THIS VOLUME

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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN AUGUST AND DECEMBER TERMS 1801,

AND

FEBRUARY TERM 1803.

By WILLIAM CRANCH,

ASSISTANT JUDGE OF THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA.

Potius ignoratio juris litigiosa est, quam scientia.
CIC. DE LEGIBUS, DIAL. 1.

VOL. I.

THIRD EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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PREFACE

TO THE FIRST EDITION.

MUCH of that uncertainty of the law, which is so frequently, and perhaps so justly, the subject of complaint in this country, may be attributed to the want of American reports.

Many of the causes, which are the subject of litigation in our courts, arise upon circumstances peculiar to our situation and laws, and little information can be derived from English authorities, to lead to a correct decision.

Uniformity, in such cases, cannot be expected, where the judicial authority is shared among such a vast number of independent tribunals, unless the decisions of the various courts are made known to each other. Even in the same court, analogy of judgment cannot be maintained, if its adjudications are suffered to be forgotten. It is, therefore, much to be regretted, that so few of the gentlemen of the bar have been willing to undertake the task of reporting.

In a government which is emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps, nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge: he cannot decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public. The avenues to corruption are thus obstructed, and the sources of litigation closed.

One of the effects expected from the establishment of a national judiciary, was the uniformity of judicial decision; an attempt, therefore, to report the cases decided by the Supreme Court of the United States, cannot need an apology; and perhaps, none can be given for the inadequate manner in which that attempt has been executed. It has been the endeavor of the reporter to give a faithful summary of the arguments of counsel. To do them complete justice, he acknowledges himself incompetent. In no instance, perhaps, has he given the words in which the ideas were conveyed,

as his attention was almost entirely occupied in collecting the point of the argument. He may have omitted ideas deemed important, and added others supposed to be impertinent; but in no case has he intentionally diminished the weight of the argument. It may possibly be alleged, that he has introduced into the reports of some of the cases more of the record than was necessary. If he has erred in this, he has been led into the error, by observing that many of the cases in the books are rendered useless, by the want of a sufficient statement of the case, as it appeared upon the record; and he imagined it would be a less fault to insert too much, than to omit anything material.

He has been relieved from much anxiety, as well as responsibility, by the practice which the court has adopted of reducing their opinion to writing, in all cases of difficulty or importance; and he tenders his tribute of acknowledgment for the readiness with which he was permitted to take copies of those opinions.

He is indebted to Mr. Caldwell, for his notes of the cases which were decided prior to February term 1803, without the assistance of which, he would have been unable to report them, as his own notes of those cases, not having been taken with that view, were very imperfect.

He also feels his obligation to those gentlemen of the bar, whose politeness has prompted a ready communication of their notes, which have enabled him more correctly to report their arguments.

Should an apology be deemed necessary for the liberty he has taken in his notes to some of the cases reported, that apology exists in a wish candidly to investigate the truth. In doing this in a respectful manner, he does not feel conscious of giving cause of offence to liberal and candid minds.

If the fate of the present volume should not prove him totally inadequate to the task he has undertaken, it is his intention to report the cases of succeeding terms.

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OF THE

SUPREME COURT OF THE UNITED STATES,

FROM THE TIME OF ITS FIRST ESTABLISHMENT, WITH THE DATES OF THEIR COMMISSIONS.

John Jay, Chief Justice,	26 Sept.	1789.
William Cushing, Associate Justice,	27 Sept.	1789.
James Wilson, "	29 Sept.	1789.
John Blair, "	30 Sept.	1789.
James Iredell, "	10 Feb.	1790.
Thomas Johnson, "	7 Nov.	1791.
William Paterson, "	4 March	1793.
John Rutledge, Chief Justice,	1 July	1795.
Samuel Chase, Associate Justice,	7 January	1796.
Oliver Ellsworth, Chief Justice,	4 March	1796.
Bushrod Washington, Associate Justice,	20 Dec.	1798.
Alfred Moore, "	10 Dec.	1799.
John Marshall, Chief Justice,	31 January	1801.
William Johnson, Associate Justice,	March	1804.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. JOHN MARSHALL,	Chief Justice.
" WILLIAM CUSHING,	Associate Justices.
" WILLIAM PATERSON,	
" SAMUEL CHASE,	
" BUSHROD WASHINGTON,	
" ALFRED MOORE,	

LEVI LINCOLN, Esquire, Attorney-General.

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RULES AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

I. 1790, February 3. Ordered, That John Tucker, Esq., of Boston, be the clerk of this court. That he reside and keep his office at the seat of the national government, and that he do not practise, either as an attorney or a counsellor in this court, while he shall continue to be clerk of the same.

II. 1790, February 5. Ordered, That (until further orders) it shall be requisite to the admission of attorneys or counsellors to practise in this court, that they shall have been such for three years past in the supreme courts of the state to which they respectively belong, and that their private and professional character shall appear to be fair.

III. 1790, February 5. Ordered, That counsellors shall not practise as attorneys, nor attorneys as counsellors, in this court.

IV. 1790, February 5. Ordered, That they shall respectively take the following oath, viz.: "I, ——— ———, do solemnly swear, that I will demean myself (as an attorney or counsellor of the court) uprightly, and according to law, and that I will support the Constitution of the United States."

V. 1790, February 5. Ordered, That (unless and until it shall otherwise be provided by law) all process of this court shall be in the name of the President of the United States.

VI. 1791, February 7. Ordered, That the counsellors and attorneys, admitted to practise in this court, shall take either an oath, or, in proper cases, an affirmation, of the tenor prescribed by the rule of this court on that subject, made February term, 1790, viz.: "I, ——— ———, do solemnly swear (or affirm, as the case may be) that I will demean myself, as an attorney, or counsellor of this court, uprightly, and according to law, and that I will support the Constitution of the United States."

VII. 1791, August 8. The chief justice, in answer to the motion of the attorney-general, made yesterday, informs him and the bar, that this court consider the practice of the courts of king's bench, and of chancery, in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein as circumstances may render necessary.

VIII. 1795, February 4. The court gave notice to the gentlemen of the bar, that hereafter they will expect to be furnished with a statement of the material points of the case from the counsel on each side of a cause.

IX. 1795, February 17. The court declared that all evidence on motions for a discharge upon bail must be by way of deposition, and not *vivâ voce.*

X. 1796, August 12. Ordered, That process of *subpœna* issuing out of this court in any suit in equity, shall be served on the defendant sixty days before the return-day of the said process; and further, that if the defendant, on such service of the *subpœna*, shall not appear at the return-day contained therein, the complainant shall be at liberty to proceed *ex parte.*

XI. 1797, February 13. It is ordered by the court, that the clerk of the court to which any writ of error shall be directed, may make return of the same, by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court.

XII. 1797, August 7. It is ordered by the court, that no record of the court be suffered by the clerk to be taken out of his office, but by the consent of the court; otherwise, to be responsible for it.

XIII. 1800, August 15. In the case of *Course* v. *Stead's Executors.* Ordered, That the plaintiff in error be at liberty to show to the satisfation of this court, that the matter in dispute exceeds the sum or value of $2000, exclusive of costs; this to be made appear by affidavit, on —— days' notice to the opposite party, or their counsel, in Georgia. Rule as to affidavits to be mutual.

XIV. 1801, August 12. Ordered, That counsellors may be admitted as attorneys in this court, on taking the usual oath.

XV. 1801, December 9. It is ordered, That in every cause where the defendant in error fails to appear, the plaintiff may proceed *ex parte.*

XVI. 1803, February Term. It is ordered, That where the writ of error issues within thirty days before the meeting of the court, the defendant in error is at liberty to enter his appearance, and proceed to trial: otherwise, the cause must be continued.

XVII. 1803, February Term. In all cases where a writ of error shall delay the proceedings on the judgment of the circuit court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of ten per centum per annum, on the amount of the judgment.

XVIII. 1803, February Term. In such cases, where there exists a real controversy, the damages shall be only at the rate of six per centum per annum. In both cases, the interest is to be computed as part of the damages.

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

AUGUST TERM, 1801.

The AMELIA.

SILAS TALBOT *v.* HANS FRED. SEEMAN.

Salvage.—Partial war.—Foreign laws.

Salvage allowed to a United States ship of war, for the recapture of a Hamburg vessel out of the hands of the French (France and Hamburg being neutral to each other), on the ground that she was in danger of condemnation under the French decree of the 18th January 1798.

The United States and France, in the year 1799, were in a state of partial war.[1]

To support a demand for salvage, the recapture must be lawful, and a meritorious service must be rendered.

Probable cause is sufficient to render the recapture lawful.

Where the amount of salvage is not regulated by statute, it must be determined by the principles of general law.[2]

Marine ordinances of foreign countries, promulgated by the executive, by order of the legislature of the United States, may be read in the courts of the United States, without further authentication or proof.

Municipal laws of foreign countries are generally to be proved as facts.

THIS was a writ of error to reverse a decree of the Circuit Court, which reversed the decree of the District Court of New York, so far as it allowed salvage to the recaptors of the ship Amelia and her cargo.

The libel in the district court was filed November 5th, 1799, by Captain Talbot, in behalf of himself and the other officers and crew of the United States ship of war the Constitution, against the ship Amelia, her tackle, furniture and cargo; and set forth—

1. That in pursuance of instructions from the president of the United States he subdued, seized, &c., on the high seas, the said ship Amelia and cargo, &c., and brought her into the port of New York.

2. That at the time of capture, she was armed with eight carriage-guns, and was under the command of citoyen Etienne Prevost, a French officer

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[1] Bas *v.* Tingy, 4 Dall. 37.

[2] Post *v.* Jones, 19 How. 150; Tyson *v.* Prior, 1 Gallis. 133; The Emulous, 1 Sumn. 207; The Cora, 2 W. C. C. 80.

of marine, and had on board, besides the commander, eleven French mariners. That the libellant had been informed, that she, being the property of some person to him unknown, sailed from Calcutta, an English port in the East Indies, bound for some port in Europe; that upon her said voyage she was met with and captured by a French national corvette, called La Diligente, commanded by L. J. Dubois, who took out of her the master and crew of the Amelia, with all the papers relating to her and her cargo, and placed the said Etienne Prevost, and the said French mariners, on board of her, and ordered her to St. Domingo for adjudication, as a good and lawful prize; *2] and that she remained in the *full and peaceable possession of the French from the time of her capture, for the space of ten days, whereby, the libellant was advised, that, as well by the law of nations as by the particular laws of France, the said ship became, and was to be considered, as a French ship.

Whereupon, he prayed usual process, &c., and condemnation; or, in case restoration should be decreed, that it might be on payment of such salvage as by law ought to be paid for the same.

The claim and answer of Hans Frederic Seeman, in behalf of Messrs. Chapeau Rouge & Co., of Hamburg, owners of the ship Amelia and her cargo, stated, that the said ship, commanded by Jacob F. Engelbrecht, as master, sailed on the 20th of February 1798, from Hamburg, on a voyage to the East Indies, where she arrived safe; that in April 1799, she left Calcutta, bound to Hamburg; that during her voyage, and at the time of her capture by the French, she and her cargo belonged to Messrs. Chapeau Rouge & Co., citizens of Hamburg, and if restored, she will be wholly their property; that on the 6th of September, on her voyage home, she was captured on the high seas by a French armed vessel, commanded by citizen Dubois, who took out the master and thirteen of her crew, and all her papers, leaving on board the claimant, who was mate of the Amelia, the doctor and five other men. That the French commander put on board twelve hands, and ordered her to St. Domingo, and parted from her on the fifth day after her capture. That on the 15th of September, the Amelia, while in possession of the French, was captured, without any resistance on her part, by the said ship of war the Constitution, and brought into New York. That the Amelia had eight carriage guns, it being usual for all vessels in the trade she was carrying on, to be armed, even in times of general peace. That there being peace between France and Hamburg, at the time of the first capture, and also between the United States and Hamburg, and between the United States and France, the possession of the Amelia by the French, in the manner, and for the time stated in the said libel, could, neither by the law of nations, nor by the laws of France, nor by those of the United States, change the property of the said ship Amelia and her *3] cargo, or make the same liable *to condemnation in a French court of admiralty; that the same could not, therefore, be considered as French property: wherefore, he prayed restoration in like plight as at the time of capture by the ship Constitution, with costs and charges.

On the 16th of December 1799, the district judge, by consent of parties made an interlocutory decree, directing the marshal to sell the ship and cargo, and bring the money into court; and that the clerk should pay half of the amount of sales to the claimant, on his giving security to refund, in case

the court should so decree; and that the clerk should retain the other half in his hands, together with all costs and charges, &c.

Afterwards, on the 25th of February 1800, the judge of the district court (HOBART) made his final decree, directing half of the gross amount of sales of the ship and cargo, without any deduction whatever, to be paid to the libellant for the use of the officers and crew of the ship Constitution, to be distributed according to the act of congress for the government of the navy of the United States. And that out of the other moiety, the clerk should pay the officers of the court, and the proctors for the libellant and claimant, their taxed costs and charges, and that the residue should be paid to the owners of the Amelia, or their agent. From this decree, the claimant appealed to the circuit court.

At the Circuit Court for the district of New York, in April 1800, before Judge WASHINGTON and the district judge, the cause was argued by *B. Livingston* and *Burr* for the appellant, and *Harrison* and *Hamilton*, for the respondent; and on the 9th of April 1800, the circuit court made the following decree, viz.:

"That the decree of the district court, so far forth as it orders a payment, by the clerk, of a moiety of the gross amount of sales, to Silas Talbot, commander, &c., and to the officers and crew of the said ship Constitution, is erroneous, and so far forth, be reversed without costs; that is to say, the court considering the admission on *the part of the respondent, that the papers brought here by Jacob Frederic Englebrecht, master of the [*4 ship Amelia, prove her and her cargo to be Hamburg property, and also considering that as the nation to which the owners of the said ship and cargo belong, is in amity with the French republic, the said ship and cargo could not, consistently with the laws of nations, be condemned by the French as a lawful prize, and that, therefore, no service was rendered by the United States ship of war the Constitution, or by the commander, officers or crew thereof, by the recapture aforesaid.

"Whereupon, it is ordered, adjudged and decreed by the court, and it is hereby ordered, adjudged and decreed by the authority of the same, that the former part of the decree of the district court, by which a moiety of the proceeds is allowed to the commander, officers and crew aforesaid, be and the same is hereby reversed. And the court further considering all the circumstances of the present case, arising from the capture and recapture stated in the libel and claim and answer, and that by the sale of the said ship Amelia and her cargo, made with the express consent of the appellant, the costs and charges in this cause have nearly all accrued, and that, therefore, the expenses should be defrayed out of the proceeds, thereupon, it is hereby further ordered, adjudged and decreed by the court, that so much of the said decree of the said district court as relates to the payment by the clerk, to the several officers of the court, and to the proctors of the libellant and claimant in this cause, of their taxed costs and charges, out of the other moiety of the said proceeds, and also of the residue of the said last-mentioned moiety, after deducting the costs and charges aforesaid, to the owner or owners of the said ship Amelia and her cargo, or to their legal representatives, be and the same is hereby affirmed."

To reverse this decree, the libellant sued out a writ of error to the

supreme court, and by consent of parties, the following statement of facts was annexed to the record which came up.

*5] *"The ship Amelia sailed from Calcutta, in Bengal, in the month of April 1799, loaded with a cargo of the product and manufacture of that country, consisting of cotton, sugars and dry goods in bales, and was bound to Hamburg. On the 6th of September, in the same year, she was captured, while in the pursuit of her said voyage, by the French national corvette La Diligente, L. J. Dubois, commander, who took out her master and part of her crew, together with most of her papers, and placed a prize-master and French sailors on board of her, ordering the prize-master to conduct her to St. Domingo, to be judged according to the laws of war. On the 15th of the same month of September, the United States ship of war the Constitution, commanded by Silas Talbot, Esq., the libellant, fell in with and recaptured the Amelia, she being then in full possession of the French, and pursuing her course for St. Domingo, according to the orders received from the captain of the French corvette.

"At the time of the recapture, the Amelia had eight iron cannon mounted, and eight wooden guns, with which she left Calcutta, as before stated. From such of the ship's papers as were found on board, and the testimony in the cause, the ship Amelia and her cargo appear to have been the property of Chapeau Rouge, a citizen of Hamburg, residing and carrying on commerce in that place. It is conceded, that the republic of France and the city of Hamburg are not in a state of hostility to each other; and that Hamburg is to be considered as neutral between the present belligerent powers.

"The Amelia and her cargo, having been sent by Captain Talbot to New York, were there libelled in the district court, and such proceedings were thereupon had in that court, and the circuit court for that district, as may appear by the writ of error and return."

*6] *The cause now came on to be argued, at August term 1801, by *Bayard* and *Ingersoll*, for the libellant, and *Dallas*, *Mason* and *Levy*, for the claimant.

For the *libellant*, three points were made. 1. That at the time, and under the circumstances, the ship Amelia was liable to capture by the law, and instructions to seize French armed vessels, for the purpose of being brought into port, and submitted to legal adjudication in the courts of the United States. 2. That Captain Talbot, by this capture, saved the ship Amelia from condemnation in a French court of admiralty. 3. That for this service, upon abstract principles of equity and justice, according to the law of nations, and the acts of congress, the recaptors are entitled to a compensation for salvage.

I. Had Captain Talbot a right to seize the Amelia, and bring her into port for adjudication?

The acts of congress on this subject ought all to be considered together and in one view. This is the general rule of construction, where several acts are made *in pari materia*. Plowd. 206; 1 Atk. 457, 458.

The first act authorizing captures of French vessels, is that of 28th May 1798. (1 U. S. Stat. 561.) The preamble recites, that "whereas, armed vessels sailing under authority, or pretence of authority, from the republic of France, have committed depredations on the commerce of the United

States," &c., therefore it is enacted, that the president be authorized to instruct and direct the commanders of the armed vessels of the United States "to seize, take and bring into any port of the United States, to be proceeded against according to the laws of nations, any such armed vessel, which shall have committed, or which shall be found hovering on the coasts of the United States, for the purpose of committing, depredations on the vessels belonging to citizens thereof; and also to retake any ship or vessel of *any citizen or citizens of the United States, which may have been captured by any such armed vessel." [*7

The Amelia was "an armed vessel, sailing under authority from the republic of France," and if she had committed, or had been found hovering on the coast, for the purpose of committing, depredations on the vessels of the citizens of the United States, she would have been clearly liable to capture under this act of congress. This act is entitled "an act more effectually to protect the commerce and coasts of the United States;" and by it, the objects of capture are limited to "armed vessels, sailing under authority, or pretence of authority, from the republic of France, which shall have committed, or which shall be found hovering on the coasts of the United States, for the purpose of committing, depredations," &c.

It was soon perceived, that a right of capture, so limited, would not afford, what the act contemplated, an effectual protection to the commerce of the United States. Congress therefore, on the 9th July 1798, at the same session, passed the "act further to protect the commerce of the United States" (1 U. S. Stat. 578), and thereby took off the restriction of the former act, which limited captures to vessels having actually committed depredation, or which were hovering on the coast for that purpose. This act authorizes the capture of any "armed French vessel, on the high seas," and if the Amelia was such an armed French vessel as is contemplated by this act, she was liable to capture, and it was the duty of Captain Talbot to take her and bring her into port.

Another act was passed at the same session, on the 25th June 1798 (1 U. S. Stat. 572), entitled "an act to authorize the defence of the merchant vessels of the United States against French depredations," which, as it constitutes a part of that system of defence and opposition which the legislature had in view, ought to be taken into consideration. It enacts, that merchant vessels of citizens of the United States may oppose and defend against any search, restraint or seizure which shall be attempted "by the commander or crew of any armed vessel, sailing under French colors, or acting, or pretending to act, by or under the authority of the French republic;" and in case of attack, may repel the same, and subdue and capture the vessel.

The court, *in construing any one of these laws, will not confine themselves to the strict letter of that particular law, but will consider the spirit of the times, and the object and intention of the legislature. It is evident, by the title of the act of the 9th July 1798, and by the general complexion of all the acts of that session upon the subject, that it was not the intention of congress, by the act of July 9th, to restrict the cases of capture contemplated by the act of 28th May, but to enlarge them. The spirit of the people was roused; they demanded a more vigorous and a more effectual opposition to the aggressions of France, and the spirit of congress rose with that of the people. It cannot be supposed, that having, in May, [*8

used the expression, "armed vessels, sailing under authority, or pretence of authority, from the republic of France," and in June the expression, "any armed vessel, sailing under French colors, or acting, or pretending to act, by or under the authority of the French republic," they meant to restrict the cases of capture, in July, when they used the words "any armed French vessel." On the contrary, the confidence in the national opinion was increased, and further measures of defence were adopted, intending not to recede from anything done before, but to amplify the opposition. The act of July was in addition to, not in derogation from, the act of May. Congress evidently meant the same description of vessels, in each of those acts. "Armed vessels, sailing under authority, or pretence of authority, of France," and "armed vessels sailing under French colors, or acting, or pretending to act, under the authority of the French republic," and "armed French vessels," must be understood to be the same.

If there is a difference, no reason can be given for it. A vessel, in the circumstances of the Amelia, was as capable of annoying our commerce, as if she had been owned by Frenchmen. Her force was at the command of France, and there can be no doubt, but she would have captured any unarmed American that might have fallen in her way. She was, therefore, one of the objects of that hostility which congress had authorized. Congress have the power of declaring war: they may declare a general war or a partial war: so, it may be a general maritime war, or a partial maritime war.

*9] *This court, in the case of *Bas* v. *Tingy* (*The Eliza*, 4 Dall. 37), have decided, that the situation of this country with regard to France, was that of a partial and limited war. The substantial question here is, whether the case of the Amelia is a *casus belli?* whether she was an object of that limited war? The kind of war which existed was a war against all French force found upon the ocean, to seize it and bring it in, that it might not injure our commerce. It is precisely as if congress had authorized the capture of all French vessels, excepting those unarmed. If such had been the expressions, there could be no doubt of the right to capture. The object of the war being to destroy French armed force, and not French property, it made no difference in whom the absolute property of the vessel was, if her force was under the command of France. Suppose, the Amelia had captured an American, by what nation would the capture be made? by Hamburg or by France? There can be no doubt, but the injury would be attributed to France. She was under French colors, armed, and to every intent an object of the partial war which existed; and if so, her case is governed by the rights of war, and by the law of nations, as they exist in a state of general war.

Perhaps, it may be said, that this proves too much, and that, if true, the Amelia must be condemned as prize. This would be true, if the rights of a third party did not interfere. Having accomplished the object of the war, as it relates to this case, in wresting from France the armed force, we must now respect the rights of a neutral nation, and restore the property to its lawful owner. But this is a subsequent consideration: it is only necessary now to show that the capture was so far a lawful act, as to be capable of supporting a claim of salvage. At first view, she certainly presented the appearance of such an armed French ship as the libellant was bound in duty to seize and bring in, at least, for further examination. He had probable

cause, at least, which is sufficient to justify the seizure and detention. But if she was liable to be condemned by France, being in the hands and possession of the French, she was within the scope of the war which existed between the United States and France; she was within the meaning of the act of congress.(*a*)

*The act of July gives no new authority to recapture American vessels; it only gives to private armed vessels the same right which the act of May gives to the public armed vessels, to make captures and recaptures. But the act of May only authorizes the recapture of American vessels, "which may have been captured by any such armed vessel," *i. e.*, by armed vessels sailing under authority from the republic of France, and which shall have committed, or be found hovering on the coasts, for the purpose of committing, depredations on our commerce." Yet, the instructions from the president were to recapture all American vessels. These instructions show the opinion of the executive upon the construction of the acts of congress—and for that purpose they were offered to be read. [*10

The counsel for the *claimant* objected to their being read, because they were not in the record. The counsel for the *libellant* contended, they had a right to read them as matter of opinion, but did not offer them as matter of fact.(*b*) The court refused to hear them.

II. The second point is, that a service was rendered to the owners of the Amelia, by the recapture, inasmuch *as she was thereby saved from condemnation in a French court of admiralty. To support this position, the counsel for the *libellant* relied on the general system of violation of neutral rights adopted by France. [*11

In general cases, when belligerents respect the law of nations, no salvage can be claimed for the recapture of a neutral vessel, because no service is rendered; but rather a disservice, because the captured would, in the courts

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(*a*) *Bayard.*—What authority is there for American armed vessels to recapture British vessels taken by the French?

Chase, J.—"Is there any case, where it has been decided in our courts, that such a recapture was lawful? It has been so decided in the English courts."

The counsel on both sides admitted that no such case had occurred in this country.

(*b*) Chase, J.—I am against reading the instructions, because I am against bringing the executive into court on any occasion. It has been decided, as I think, in this court, that instructions should not be read. I think it was in a case of instructions to the collectors. It was opposed by Judge Iredell, and the opposition acquiesced in by the court.

Paterson, J.—The instructions can only be evidence of the opinion of the executive, which is not binding upon us.

Marshall, C. J.—I have no objection to hearing them, but they will have no influence on my opinion.

Moore, J.—Mr. Bayard can state all they contain, and they may be considered as part of his argument.

Bayard.—May I be permitted to read them as a part of my speech?

The Court.—We are willing to hear them as the opinion of Mr. Bayard, but not as the opinion of the executive.

Bayard.—I acquiesce in the opinion of the court. My reasons for wishing to read them were, because the opinion of learned men, and men of science, will always have some weight with other learned men. And the court would consider well the opinien of the executive, before they would decide contrary to it.

of the captors, recover damages and costs for the illegal capture and detention.

The principle upon which the circuit court decided, is not denied; but it is contended, that a service was rendered by the recapture. To show this, the counsel for the libellant offered to read the message from the president to both houses of congress, of 4th May 1798, containing the communications from our envoys extraordinary at Paris, to the department of state, and sundry *arrêts* and decrees of the government of France, in violation of neutral rights, and of the law of nations; and particularly the decree of the council of five hundred of 29th Nivose, an 6 (Jan. 18, 1798), which declares, "that the character of vessels, relative to their quality of neuter or enemy, shall be determined by their cargo; in consequence, every vessel found at sea, loaded, in whole or in part, with merchandise, the production of England, or of her possessions, shall be declared good prize, whoever the owner of these goods or merchandise may be."

The counsel for the *claimant* objected to the reading of those dispatches, because they were matter of fact. No new fact can be shown on the writ of error. Neither the pleadings, nor the statement of facts accompanying the record, give notice of introducing this new matter. By the act of congress (1 U. S. Stat. 83, § 19), *a state of the case must come up with the record; and is conclusive on this court. *Wiscart* v. *D'Auchy*, 3 Dall. 321. On p. 327, ELLSWORTH, Chief Justice, said, a writ of error removes only matter of law. *Arrêts* and decrees of foreign governments are matters of fact, and must be proved as such, and the court cannot notice them unless
*12] shown in the *pleadings, admitted or proved. *Freemoult* v. *Dedire*, 1 P. Wms. 429, 431; *Bernardi* v. *Motteux*, Doug. 557. The same case in the 2d edition, p. 575–79. In that case, the court could not take notice of the *arrêt* of July 1778, as it had not been given in evidence at the trial.

The general conduct of France is a matter of fact, which can only be noticed by the sovereign of the state. Judgment upon a writ of error must be upon the same facts upon which the judgment below was predicated. 3 Bl. Com. 405 (Williams's edit. 407); 8 T. R. 438, 434, 566. If it is matter of law, it is not such law as is binding upon this court, and therefore, they cannot officially take notice of it. Foreign laws must be proved as facts. 3 Woodeson 306; 2 Eq. Cas. Abr. 289, 476; *Way* v. *Yally*, 2 Salk. 651; s. c. 6 Mod. 195; *Mostyn* v. *Fabrigas*, Cowp. 174–5. The law must be given in evidence. 1 Bos. & Pul. 171, 175, 138; 8 T. R. 566. Facts cannot be adduced to contradict the record. 8 T. R. 438. In *The Providentia*, 2 Rob. 126 (Am. edit.), Dr. Scott relied on the king's instructions, but that was because the king has the power of war and peace.

A state of the case is like a special verdict; nothing new can be added to it. In *The Santa Cruz*, 1 Rob. 57, Dr. Scott required the ordinances of Portugal to be proved, and evidence of the decisions of their tribunals upon them.

On the contrary, it was said by the counsel for the *libellant*, that this case differs from evidence offered to a jury. In chancery, if evidence is not legal, the chancellor will hear it, but will give it no weight. The pamphlet containing the despatches is offered to be read, not to show what are the municipal laws of France, but what is the law of nations in France; to

show how it has been modified by that government. We are before this court as a court of admiralty, and not as a court of common law. All the world are parties to a decree of a court of admiralty. *Bernardi* v. *Motteux*, Doug. 560 or 581. This court is now to decide by the law of nations, not by municipal regulations. *All the cases cited against us are cases in common-law courts. But courts of admiralty take notice of foreign ordinances which affect the law of nations, without their being shown in evidence. *The Maria*, 1 Rob. 288 (Eng. ed. 341); and s. c. 1 Rob. 304 (Eng. ed. 363). [*13

The object in reading these dispatches is to show that the law of nations was not respected in France; that the construction of their courts of admiralty was such, that their decisions could not conform to the law of nations; that the law of nations has been so modified in France, that there was no certainty of indemnity for neutrals, and that by the decrees and *arrêts* of that government, the Amelia would have been condemned. They are offered as the official communications of our authorized agents abroad to the executive, and by that department communicated to congress, and published, in conformity to an act of congress (1 U. S. Stat. 612), for the information of the citizens of the United States. This act of congress has made them proper evidence before this court; who are, therefore, bound to notice them. On the subject of admitting foreign ordinances in a court of admiralty, no difficulty ever occurred. The objections are only to private municipal regulations. Such, it is admitted, must be proved as facts, but not when they are offered as explaining the law of nations. In *The Maria*, 1 Rob. 288 (Am. ed.), this very decree is cited; and it is immaterial to us, whether we read it out of the dispatches or out of the book which the opposite counsel have already cited for other purposes. By the same rule that they read pages 57 and 126, we may surely read page 288.

On the part of the *claimant* it was replied: That this decree is not an act of congress, nor the law of nations, but simply a law of France. The record is confined to the facts which originally came up with the writ of error, or such as may afterwards be procured upon a suggestion of diminution. It is admitted, that in equity, on an appeal to the house of lords, nothing new can be received. And nothing ought now to be read which was not before the circuit court, or which that *court was bound to notice. In the cases cited by the opposite counsel, the *arrêts* were read by consent. A common-law court is as much bound as a court of admiralty, to take notice of the law of nations, on a question where that law applies; and the rules by which common-law courts are bound, as to evidence of the law of nations, are equally binding on courts of admiralty. [*14

The Court suffered the dispatches and decrees of France to be read, but reserved the question, whether they ought to be considered in their decision of this cause, until the whole argument of the case should be finished.

The counsel for the *libellant* proceeded in the argument on the second point. The decree of the 18th of January 1798, was not repealed, until the 14th of December 1799, and consequently, was in full force at the time of the capture, on the 6th of September 1799. The facts stated in the appendix

to vol. 2 of Robinson's Reports, show that the French had discarded the law of nations, and that their conduct towards neutrals had been such as to exclude every possibility of escape. So notorious was this conduct, that Sir WILLIAM SCOTT makes it the ground of his decision in various cases.

It is not necessary to show, that the Amelia would certainly have been condemned. To entitle to salvage, it is only necessary to show that she was in a better condition by the recapture. Her cargo was the production of the possessions of England, and therefore, by the decree of the 18th January 1798, was liable to condemnation. The general conduct of France and of the French courts of admiralty towards neutrals has been repeatedly adjudged by Sir WILLIAM SCOTT a good ground for salvage. (*The Two Friends*, 1 Rob. 232 ; *The War Onskan*, 2 Ibid. 246.)

III. But without resorting to the general principle of a service being a ground for salvage, we claim it under the express terms of the act of congress of the 2d of March 1799, entitled "an act for the government of the
*15] navy of the United States," § 7 (1 U. S. Stat. 716), by *which it is enacted, "that for the ships or goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, if retaken from the enemy, within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage, &c., and if after ninety-six hours, one-half ; all of which is to be paid without any deduction whatsoever."

In the case of *Bas* v. *Tingy* (3 Dall. 37), it was decided by this court, that France was to be considered as an enemy. The case of the Amelia comes within the very words of this act of congress. She is a ship belonging to citizens of a nation in amity with the United States, retaken from the enemy, after a possession of ninety-six hours.

By the act of congress of 25th June 1798 (1 U. S. Stat. 572), property of American citizens, recaptured by armed merchant vessels, is to be restored, on the payment of not less than one-eighth, and not more than one-half, for salvage. And by the act of the 3d March 1800, not less than one-sixth is allowed on recapture by a private armed vessel, and one-eighth by a public ship-of-war. If, then, the recapture of this vessel was a lawful act, and if service was rendered thereby to the owners, the recaptors are entitled to salvage, and the rate of that salvage is, by the act of congress, fixed at one-half of the value of the ship and cargo.

On the part of the *claimant*, it was said, that if France and America were at peace, the recapture was not authorized by the law of nations. The claim of salvage must rest on two grounds : 1. A right to interfere. 2. A benefit conferred on the owners.

I. It is admitted, that a belligerent has a right to detain a neutral vessel and carry her into port for the purpose of examination. The possession of a belligerent must, by third parties, be considered as lawful, whatever may
*16] be the motive or intent of such possession. (2 Woodeson 424.) *The belligerent has a lawful right to search merchant vessels, and this right cannot be considered as injurious to the fair neutral trader. Resistance to such search is unlawful, and such resistance, a rescue, or an escape, are sufficient causes to condemn the neutral vessel. (Vattel, lib. 3, c. 7, § 114, p. 507 ; *The Maria*, 1 Rob. 304.)

The act of the recaptors, then, being in aid of the unlawful resistance of the neutral, must in itself be illegal. The courts of the captors only are competent to decide the question of prize or no prize. American citizens have no right to interfere, and wrest the neutral vessel from the possession of the belligerent.

The French have been represented as pirates, *hostes humani generis.* But if France has waged so general a war on neutral property, has not England done the same? We find in their courts, that when a benefit is to accrue to British subjects, by such a decision, they decide that France must be presumed to respect the law of nations and to decree the restitution. *The Betsey*, 1 Rob. 84–5; *Geyer* v. *Aguilar*, 7 T. R. 695; but when salvage is to be given to British recaptors of neutral property, then it appears that France has lost all regard for the law of nations, and there is no chance of escape from her courts of admiralty. *The Two Friends*, 1 Rob. 232; *The War Onskan*, 2 Ibid. 246.

But it is contended, that the courts of France would have decided according to the decree of the 18th January 1798, and not according to the law of nations. This is not to be presumed; but if it was, however tyrannical the conduct of a belligerent may be, no neutral can lawfully interfere, unless she herself is injured, or her property or rights are affected; and even then individuals cannot act. The injury must be redressed by the government, in the way of negotiation or war. What was the conduct of our government in such a case? It first chose to negotiate, and then to prepare for war. At the time the negotiation was begun, all the injurious decrees were in force, full in the view of the legislature, who authorized certain measures of hostility: but no citizen could *go one step beyond what was authorized. The liability of the Amelia to condemnation in a French court of admiralty, created no right in Captain Talbot to capture her, even if that condemnation was certain. [*17

But the facts of this case do not warrant such a conclusion. The fact stated is, that "the ship Amelia sailed from Calcutta, in Bengal, in the month of April 1799, loaded with a cargo of the product and manufacture of that country." What country? Bengal. But Bengal is not stated to be one of the possessions of England. Not long since, the province of Bengal was in possession of sovereign princes; but it does not appear how far they have been subdued by the English. It is true, that the libel speaks of Calcutta as being an English port in the East Indies, but it does not follow, that the whole country of Bengal has been subjected to the British power. Besides, it is not the port from whence the vessel sails which taints the cargo, but its quality, as being the production of an English possession. Hence, it does not appear, that the Amelia was liable to condemnation under the decree of the 18th January 1798, and we cannot presume that she would have been condemned. The French captors did not pretend she was liable under that decree, but sent her in to be judged according to the laws of war; that is, according to the law of nations as applicable to a state of war; and there being no fact stated to the contrary, we are to suppose, that she would have been so judged, and not otherwise. To have interfered on our part to prevent this would have been a just cause of hostilities against us. No citizen ought to be allowed to come into our courts to claim a reward, for an act which hazards the peace of the country.

If benefit be the criterion of salvage, then the greater the service the greater ought to be the salvage. But if the construction given by the opposite counsel to the act of 2d March 1799, be correct, then the same salvage is due for the re-capture of a clear neutral, as of a belligerent. And yet, in common wars, no salvage at all is due for the re-capture of a neutral.

Every neutral nation has a right to choose her own manner of redress. We have no right to interfere, or to decide how far her vessels are liable to condemnation under French decrees. She may be willing to trust to the
*18] *chances of acquittal or indemnification. We have no right to legislate upon the property of a foreign independent nation, and to say, that we will, whether you consent or not, rescue your vessels from the French, and then make you pay us salvage. (Vatt. lib. 2, c. 1, § 7, p. 123.) If an act, intended solely for my benefit, is advantageous to another, I am not entitled to reward. (*The Vryheid*, 2 Rob. 23–4.) In order to ground a claim of salvage, the danger of the property must have been, not hypothetical, but absolute ; not distant and uncertain, but immediate and imminent : the act of saving must have been done with that sole intent, and must have been attended with labor, loss, expense or hazard to the salvor. The Amelia was taken by Captain Talbot, and libelled as a French vessel ; his object was not to save a neutral, but to capture a belligerent. Under such a mistake, he might have a right to examine her further, but the moment she proved to be neutral property, he ought to have released her. His mistake can be no ground for a claim of salvage : it is a mere justification of an act of force, and as such may save him from the payment of damages and costs. In this case, there was no danger to the property, no trouble in saving it, nor any intention to benefit the owners. In Beawes' Lex Mer., vol. 1, p. 158, it is said, that to support a claim of salvage, the vessel must be in evident hazard, and must be saved by means used with that sole view.

The owner was a citizen of an independent nation, and ought to have had his election. Where is the law or the authority that allows salvage to one belligerent taking from another the property of a neutral ? By the state of the case, this vessel was neutral as to all the belligerent powers. If the captor had applied for her, she must have been given up, upon the authority of the case of *Glass* v. *Gibbs*, 3 Dall. 6, without any compensation for recapture. Among the cases cited, the only one against us is *The War Onskan*, 2 Rob. 246. In that case, Sir William Scott says, that "lately" it has been the practice of his court to give salvage on re-capture of neutral property out of the hands of the French ; but that such is not the modern practice of the law of nations ; and upon this plain principle, that the liberation of a clear neutral from the hand of the enemy, is no essential service rendered to him ; inasmuch as that same enemy would be
*19] *compelled by the tribunals of his own country, after he had carried the neutral into port, to release him, with costs and damages for the injurious seizure and detention. But in that very case, however, we see that he might shortly change his course of decisions on that subject, so that, very probably, had that case been decided in the next term, it would have been decided differently. No judge has a right to decide upon the departure of other nations from the law of nations, whatever evidence of such departure he may possess. There will be a variance in the decisions of the

lower courts; it should, therefore, be put upon such a footing, as to make it clear and plain to all the judges of the inferior courts. This decision of Sir WILLIAM SCOTT is a creature of his own, which he himself promises to change, when the situation of affairs will allow.

Sir WILLIAM SCOTT gives salvage expressly on the ground of service rendered, on account of the kind of hostility which France exercised towards neutrals. But in this case, the statement of facts excludes the idea of hostility between France and Hamburg. The law of nations gave no right to re-capture. The authority under the acts of congress must be construed strictly, and confined to their express provisions. Neither the executive, nor individuals, nor the courts, have a right to alter them.

So far as war is not authorized by congress, there is peace. It was not contemplated by any act of congress, that our vessels should capture Hamburg vessels. The mischief to be remedied by the act of May was, that the small armed vessels of France were hovering on our coasts, and taking our vessels almost in our ports. The act of congress has completely met the evil, by authorizing the capture of such French vessels as had taken, or were found hovering, for the purpose of taking our vessels. This act, therefore, does not authorize the capture of a Hamburg vessel. There is no law which authorizes a capture for two purposes, viz., to be condemned as a French vessel, or to be subjected to salvage as a neutral. The Amelia was not navigating under the authority or pretended authority of France: she was engaged in a lawful trade. But if the French took possession of her, under suspicion of unlawful trade, that gave us no *authority to take her from the possession of France, the property, under the law of nations, not being changed. The taking, being unlawful, can support no claim of salvage. [*20

The act of July 1798, authorizes only the capture of armed French vessels, and confines the cases of recapture to the ships or goods of citizens or residents of the United States. The capture can only be justified by the doubtful character of the vessel, and as soon as that was known to be neutral, Captain Talbot ought to have dismissed her; the detention afterwards was unlawful, and will not justify a decree for salvage. This vessel, it is true, might have been used to distress our commerce, and this might possibly be an excuse for detaining her, or even dismantling her, but will not entitle him to salvage.

If this vessel was lawful prize to France, then, France has a claim for indemnity; but as she has made no claim, we must presume, the vessel would have been restored by her to the owners.

The act of congress of March 2d, 1799, upon which the counsel for the libellant rely, does not contemplate a case like the present. That is a permanent law, not made for the present war only, but intended to apply to all future wars. It could not, therefore, intend to give salvage, on the re-capture of a neutral from a belligerent, which is not given by the law of nations, and which, it is allowed on all hands, is given, this war, for the first time, only on account of the conduct of France towards neutrals, and will cease, when that conduct shall be altered. Besides, it would give the same reward for taking the property of a neutral out of the hand of his friend, as out of the hand of his enemy. The word "enemy," in the 7th section of that act, means the enemy of us and our ally, whose vessel is re-captured by our armed vessels, and not our enemy, who is the friend of our ally.

If, then, this is not a statutory case of salvage, we must recur to the question of benefit. In the court below they relied wholly on the act of congress: not a word was said respecting the service rendered. Let us then consider the claim of *quantum meruit*. To support this, there must
*21] be, *1. A lawful consideration; and 2. A contract, express or implied.

To make the consideration lawful, it must be permitted by law; *à fortiori*, it must not be contrary to law. It is not authorized by our law, to take the property of a neutral out of the possession of his friend, and it is in direct opposition to policy, as it tends to commit the peace of the country. It is not alleged, that there was any express contract; and a contract cannot be implied, because the intent with which she was taken, viz., to be condemned as a French armed vessel, excludes the idea. Nor can an implied contract be raised, on the retaining her, because that was a state of duress, which cannot be made the ground of a reward.

But if this case is to be considered upon a *quantum meruit*, then the amount of salvage must depend upon the danger and the exertion. *The San Bernardo*, 1 Rob. 151; and *The Two Friends*, Ibid. 240. It is said, that in cases of unauthorized capture or recapture, the property goes to the crown (*The Princessa*, 2 Rob. 45), and it is sometimes referred to the court to fix the reward of the captors. It follows, then, that the property goes to the government, and they alone can fix the reward; but our code gives no right to salvage in this case, nor does the state of hostilities between the two countries, as disclosed on the record, justify it. But if the decree and the notoriety of the misconduct of France, are to be admitted to prove a benefit conferred, who can say it was worth $94,000, the half of the gross amount of sales of the ship and cargo? Neither the service rendered, the danger to the property, nor the exertion in saving it, can justify so enormous a reward. The decree of France might be only *in terrorem*, and so no danger. If the Amelia was not liable to condemnation in the French courts, then no service was rendered, and consequently, no salvage ought to be allowed.

*22] *But if she was liable to condemnation, then the re-capture is a violation of the rights of France. If France violates the laws of nations, it is no justification of a violation of them on our part. An illegal power to take, given by France to her cruisers, does not authorize us to retake. In the case of *Bas* v. *Tingy* (4 Dall. 37), the reasoning of the court seems to admit that the act of 2d March 1799, will not apply, in the present state of hostilities, to re-captures of the vessels of nations in amity with the United States, unless the owners are residents of the United States; because there could be no lawful re-capture of a neutral from the hand of a belligerent. Judge Moore, in delivering his opinion in that case, says, "It is, however, more particularly urged that the word 'enemy' cannot be applied to the French; because the section in which it is used, is confined to such a state of war as would authorize a re-capture of property belonging to a nation in amity with the United States, and such a state of war does not exist between America and France. A number of books have been cited, to furnish a glossary on the word enemy; yet, our situation is so extraordinary, that I doubt whether a parallel case can be traced in the history of nations. But if words are the representatives of ideas, let me ask, by what other word the idea of the relative situation of America and France could be communi-

cated, than by that of hostility or war? And how can the characters of the parties engaged in hostility or war, be otherwise described than by the denomination of 'enemies.' It is for the honor and dignity of both nations, therefore, that they should be called enemies; for it is by that description alone, that either could justify or excuse the scene of bloodshed, depredation and confiscation, which has unhappily occurred; and surely, congress could only employ the language of the act of June 13th, 1798, towards a nation whom she considered as an enemy. Nor does it follow, that the act of March 1799, is to have no operation, because all the cases in which it *might [*23 operate, are not in existence at the time of passing it. During the present hostilities, it affects the case of recaptured property belonging to our own citizens, and in the event of a future war, it might also be applied to the case of re-captured property belonging to a nation in amity with the United States."

And in the same case, Judge WASHINGTON observed, "that hostilities may subsist between two nations, more confined in its nature and extent, being limited as to places, persons and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no further than to the extent of their commission." And again he says, "It has likewise been said, that the 7th section of the act of March 1799, embraces cases which, according to pre-existing laws, could not then take place, because no authority had been given to re-capture friendly vessels from the French, and this argument was strongly and forcibly pressed. But because every case provided for by this law was not then existing, it does not follow, that the law should not operate upon such as did exist, and upon the rest whenever they should arise. It is a permanent law, embracing a variety of subjects; not made in relation to the present war with France only, but in relation to any future war with her, or with any other nation. It might, then, very properly allow salvage for re-capturing of American vessels from France, which had previously been authorized by law, though it could not immediately apply to the vessels of friends; and whenever such a war should exist between the United States and France, or any other nation, as, according to the law of nations, or special authority, would justify the recapture of friendly vessels, it might, on that event, with similar propriety, apply to them; which furnishes, I think, the true construction of the act. The opinion which I delivered at New York, in *Talbot* v. *Seeman*, was, that although an American vessel could not justify the taking of a neutral vessel from the French, because neither the sort of war that subsisted, *nor the special [*24 commission under which the American acted, authorized the proceeding; yet that the 7th section of the act of 1799, applied to re-captures from France, as an enemy, in all cases authorized by congress. And on both points, my opinion remains unshaken; or, rather, has been confirmed by the very able discussion which the subject has lately undergone in this court, on the appeal from my decree."(*a*)

Similar sentiments were also expressed by Judge CHASE and Judge PATERSON, in the same case. From these opinions, it seems clearly to

(*a*) This case of Talbot *v.* Seeman was argued once before, in this court, at Philadelphia. See 4 Dall. 34.

result, that the act of March 2d, 1799, cannot be the rule of salvage in this case.

On the part of the *libellant*, it was stated, in reply, as to the admissibility of the dispatches from the American envoys, and the French *arrêt* of 18th January 1798, that courts of admiralty will always take notice of such laws of foreign countries as go to modify or change the law of nations, and are not bound by the same rules of evidence, as courts of common law. 1 Dall. 364; Lofft 631; Doug. 619, 622, 649, 650, 554. The opposite counsel have cited and relied on Robinson's Reports, to show what was the ancient law of France, and surely, we have as good a right to cite the same book, to show what is the present law of France. In *The Maria*, 1 Rob. 288, this *arrêt* of France is cited and argued upon by the judge.

The cases cited by the opposite counsel to show that foreign laws must be proved as facts, are all cases at common law, or relate to the mere municipal laws of a foreign country; and are not such as go to modify or explain the law of nations, as that country has adopted it. The case in P. Williams refers to a municipal law, which had no connection with the law of nations. The same observation applies to the cases from 6 Mod., and 2 Salk. No case can be produced, where a law of a foreign country, authenticated as this is by an act of the legislature of our country, has been refused to be considered by a court.

*25] *As to the objection, that the cargo does not appear to be the production of England, or her possessions, because there is no evidence that the whole of the province of Bengal has been subjected to the dominion of England; it may be sufficient to observe, that the libel and answer admit Calcutta to be an English port, and the case stated says, the vessel sailed from Calcutta, in Bengal, loaded with a cargo of the product and manufacture of that country. It being admitted, that Calcutta is an English port, and that the cargo was the production of that country, it follows, unless the contrary is clearly shown in evidence, that the cargo was the product of an English possession.

It is said, that there is no evidence that France carried her unjust decrees into execution, and that they might only be enacted *in terrorem*. But the fact is notorious to all the world: congress have expressly declared it in the preambles of their acts: the whole system of hostility is founded upon it, and can be justified on no other ground. They have further declared it, by ordering the dispatches to be published and distributed among the citizens of the United States, for their information. It would be strange, if this court, sitting here as a court of the law of nations, to try a cause in which all the world are parties, should be the only persons in the world ignorant of the fact.

The general principle is admitted, that salvage is not due for the recapture of a neutral from a belligerent, and for this reason, that by the law of nations, the neutral would be restored by the captor, with damages and costs. But *cessante ratione, cessat lex*. And it follows, by powerful inference, that if the captor would not have restored the neutral, with damages and costs, salvage ought to be allowed. To bring the Amelia within this inference, it is only necessary to show, that she would not have been restored with damages and costs. If the court should take into consideration

the *arrêt* of the 18th of January 1798, and the fact, that the cargo was the production of an English possession, there is no doubt but, instead of being restored with damages and costs, she would have been condemned and totally lost to her owners. Is no salvage due, for so certain and so signal a benefit?

*It is said, that unless salvage is expressly given by the act of congress, it can only be claimed upon a contract, either express or implied. This is not the case. The claim of salvage upon re-capture never is supposed to arise *ex contractu*. It is given as a reward for the benefit received, and where there is no express statute upon the subject, the amount is to be regulated, not by the labor or hazard of the re-captor, nor by his intention to concur a benefit, but by the supposed amount which the owner would have been willing to give for the rescue of his property. Woodeson, 423. In *The Two Friends*, 1 Rob. 234–5, the rule of salvage on rescue is said to be *quantum meruit*. And in the same case, p. 232, Sir W. Scott says, "it has been slightly questioned in the act of court (which contains the exposition of facts given by both parties), whether there was such a state of hostilities between America and France as to raise a title of salvage for American goods re-taken from the French. But this point has not been pursued in argument; and indeed, I should wonder if it had, after the determinations of this court, which have, in various instances, decreed salvage in similar cases. It is not for me to say, whether America is at war with France, or not; but the conduct of France towards America has been such *de facto*, as to induce American owners to acknowledge the services by which they have recovered their ships and cargoes out of the hands of French cruisers, by force of arms." [*26

In the case of *Bas* v. *Tingy*, the question was not argued, whether salvage could be claimed upon the re-capture of a neutral, on the ground of benefit rendered; and therefore, the opinion of the court in that case does not militate with our claim.

August 11th, 1801. Marshall, C. J., delivered the opinion of the court: This is a writ of error to a decree of the circuit court for the district of New York, by which the decree of the district court of that state, restoring the ship Amelia to her owner on the payment of one-half for salvage, was reversed, and a decree rendered, directing the restoration of the vessel without salvage.

*The facts agreed by the parties, and the pleadings in the cause, present the following case: The ship Amelia sailed from Calcutta, in Bengal, in April 1799, loaded with a cargo of the product and manufacture of that country, and was bound to Hamburg. On the 6th September, she was captured by the French national corvette La Diligente, commanded by L. J. Dubois, who took out the master, part of the crew and most of the papers of the Amelia, and putting a prize-master and French sailors on board her, ordered her to St. Domingo, to be judged according to the laws of war. On the 15th of September, she was re-captured by Captain Talbot, commander of the Constitution, who ordered her into New York for adjudication. At the time of the re-capture, the Amelia had eight iron cannon, and eight wooden guns, with which she left Calcutta. From the ship's papers, and other testimony, it appeared, that she was the property of Chapeau Rouge, [*27

a citizen and merchant of Hamburg; and it was conceded by the counsel below, that France and Hamburg were not in a state of hostility with each other, and that Hamburg was to be considered as neutral between the present belligerent powers.

The district court of New York, before whom the cause first came, decreed one-half of the gross amount of the ship and cargo as salvage to the re-captors. The circuit court of New York reversed this decree, from which reversal, the re-captors appealed to this court. The Amelia was libelled as a French vessel, and the libellant prays that she may be condemned as prize; or, if restored to any person entitled to her as the former owner, that such restoration should be made on paying salvage. The claim and answer of Hans Frederic Seeman discloses the neutral character of the vessel, and claims her on behalf of the owners.

The questions growing out of the facts, and to be decided by the court,
*28] are, *Is Captain Talbot, the plaintiff in error, entitled to any, and if to any, to what salvage, in the case which has been stated?

Salvage is a compensation for actual service rendered to the property charged with it. It is demandable of right for vessels saved from pirates, or from the enemy. In order, however, to support the demand, two circumstances must concur. 1. The taking must be lawful. 2. There must be a meritorious service rendered to the re-captured.

1. The taking must be lawful; for no claim can be maintained in a court of justice, founded on an act in itself tortious. On a re-capture, therefore, made by a neutral power, no claim for salvage can arise, because the act of re-taking is a hostile act, not justified by the situation of the nation to which the vessel making the re-capture belongs, in relation to that from the possession of which such re-captured vessel was taken. The degree of service rendered the rescued vessel is precisely the same as if it had been rendered by a belligerent; yet the rights accruing to the re-captor are not the same, because no right can accrue from an act in itself unlawful.

In order, then, to decide on the right of Captain Talbot, it becomes necessary to examine the relative situation of the United States and France at the date of the re-capture. The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry. It is not denied, nor, in the course of the argument, has it been denied, that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they
*29] actually apply to our situation, must be noticed. *To determine the real situation of America in regard to France, the acts of congress are to be inspected.

The first act on this subject passed on the 28th of May 1798, and is entitled "An act more effectually to protect the commerce and coasts of the United States." This act authorizes any armed vessel of the United States to capture any armed vessel sailing under the authority, or pretence of authority, of the republic of France, which shall have committed depredations on vessels belonging to the citizens of the United States, or which shall be found hovering on the coasts, for the purpose of committing such depredations. It also authorizes the re-capture of vessels belonging to the citizens of the United States.

The Amelia.

On the 25th of June 1798, an act was passed "to authorize the defence of the merchant vessels of the United States against French depredations." This act empowers merchant vessels, owned wholly by citizens of the United States, to defend themselves against any attack which may be made on them by the commander or crew of any armed vessel sailing under French colors, or acting, or pretending to act, by or under the authority of the French republic; and to capture any such vessel. This act also authorizes the re-capture of merchant vessels belonging to the citizens of the United States. By the 2d section, such armed vessel is to be brought in and condemned for the use of the owners and captors. By the same section, re-captured vessels belonging to the citizens of the United States, are to be restored, they paying for salvage not less than one-eighth nor more than one-half of the true value of such vessel and cargo.

On the 28th of June, an act passed "in addition to the act more effectually to protect the commerce and coasts of the United States." This authorizes the condemnation of vessels brought in under the first act, with their cargoes, excepting only from such condemnation, the goods of any citizen or person *resident within the United States, which shall have been before taken by the crew of such captured vessel. The second [*30 section provides that whenever any vessel or goods, the property of any citizen of the United States, or person resident therein, shall be re-captured, the same shall be restored, he paying for salvage one-eighth part of the value, free from all deductions.

On the 9th of July, another law was enacted, "further to protect the commerce of the United States." This act authorizes the public armed vessels of the United States to take any armed French vessel, found on the high seas. It also directs such armed vessel, with her apparel, guns, &c., and the goods and effects found on board, being French property, to be condemned as forfeited. The same power of capture is extended to private armed vessels. The 6th section provides, that the vessel or goods of any citizen of the United States, or person residing therein, shall be restored, on paying for salvage not less than one-eighth, nor more than one-half, of the value of such re-capture, without any deduction.

The 7th section of the act for the government of the navy, passed the 2d of March 1799, enacts, "That for the ships or goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, if re-taken within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage," and if they have remained above ninety-six hours in possession of the enemy, one-half is to be allowed.

On the 3d of March 1800, congress passed "an act providing for salvage in cases of recapture." This law regulates the salvage to be paid "when any vessels or goods, which shall be taken as prize as aforesaid, shall appear to have before belonged to any person or persons *permanently resident [*31 within the territory, and under the protection, of any foreign prince, government or state, in amity with the United States, and to have been taken by an enemy of the United States, or by authority, or pretence of authority, from any prince, government or state, against which the United States have authorized, or shall authorize, defence or reprisals."

These are the laws of the United States which define their situation in

regard to France, and which regulate salvage to accrue on re-captures made in consequence of that situation.

A neutral armed vessel which has been captured, and which is commanded and manned by Frenchmen, whether found cruising on the high seas, or sailing directly for a French port, does not come within the description of those which the laws authorizes an American ship of war to capture, unless she be considered *quoad hoc* as a French vessel.

Very little doubt can be entertained, but that a vessel thus circumstanced, encountering an American unarmed merchantman, or one which should be armed, but of inferior force, would as readily capture such merchantman, as if she had sailed immediately from the ports of France. One direct and declared object of the war, then, which was the protection of the American commerce, would as certainly require the capture of such a vessel, as of others more determinately specified. But the rights of a neutral vessel, which the government of the United States cannot be considered as having disregarded, here intervene ; and the vessel certainly is not, correctly speaking, a French vessel.

If the Amelia was not, on the 15th of September 1799, a French vessel, within the description of the act of congress, could her capture be lawful? It is, I believe, a universal principle, which applies to those engaged in a partial, as well as those engaged in a general war, that where there is prob-
*32] able cause to believe the vessel met with at sea, is in the condition of one *liable to capture, it is lawful to take her, and subject her to the examination and adjudication of the courts. The Amelia was an armed vessel, commanded and manned by Frenchmen. It does not appear, that there was evidence on board to ascertain her character. It is not then to be questioned, but that there was probable cause to bring her in for adjudication. The re-capture, then, was lawful.

But it has been insisted, that this re-capture was only lawful in consequence of the doubtful character of the Amelia, and that no right of salvage can accrue from an act which was founded in mistake, and which is only justified by the difficulty of avoiding error, arising from the doubtful circumstances of the case. The opinion of the court is, that had the character of the Amelia been completely ascertained by Captain Talbot, yet, as she was an armed vessel, under French authority, and in a condition to annoy the American commerce, it was his duty to render her incapable of mischief. To have taken out the arms, or the crew, was as little authorized by the construction of the act of congress contended for by the claimants, as to have taken possession of the vessel herself.

It has, I believe, been practised in the course of the present war, and if not, is certainly very practicable, to man a prize and cruise with her for a considerable time, without sending her in for condemnation. The property of such vessel would not, strictly speaking, be changed, so as to become a French vessel, and yet it would probably have been a great departure from the real intent of congress, to have permitted such vessel to cruise unmolested. An armed ship, under these circumstances, might have attacked one of the public vessels of the United States. The acts which have been recited expressly authorize the capture of such vessel, so commencing hostilities, by a private armed ship, but not by one belonging to the public. To suppose. that a capture would in one case be lawful, and in the other unlawful ; or to sup-

pose, that even in the limited state of hostilities in which we were placed two *vessels armed and manned by the enemy, and equally cruising on American commerce, might the one be lawfully captured, while the other, though an actual assailant, could not; or if captured, that the act could only be justified from the probable cause of capture furnished by appearances, would be to attribute a capriciousness to our legislation on the subject of war, which can only be proper when inevitable. [*33

There must, then, be incidents growing out of those acts of hostility specifically authorized, which a fair construction of the acts will authorize likewise. This was obviously the sense of congress. If by the laws of congress on this subject, that body shall appear to have legislated upon a perfect conviction that the state of war in which this country was placed, was such as to authorize re-captures, generally, from the enemy; if one part of the system shall be manifestly founded on this construction of the other part, it would have considerable weight in rendering certain, what might before have been doubtful.

Upon a critical investigation of the acts of congress, it will appear, that the right of re-capture is expressly given, in no single instance, but that of a vessel or goods belonging to a citizen of the United States. It will also appear, that the *quantum* of salvage is regulated, as if the right to it existed previous to the regulation.

Although no right of re-capture is given, in terms, for the vessels and goods belonging to persons residing within the United States, not being citizens, yet an act, passed so early as the 28th of June 1798, declares, that vessels and goods of this description, when re-captured, shall be restored on paying salvage; thereby plainly indicating, that such re-capture was sufficiently warranted by law, to be the foundation of a claim for salvage. If the re-capture of vessels of one description, not expressly authorized by the very terms of the act of congress, *be yet a rightful act, recognised by congress as the foundation for a claim to salvage, which claim congress proceeds to regulate, then it would seem, that other re-captures from the same enemy are equally rightful; and where the claim they afford for salvage has not been regulated by congress, such claim must be determined by the principles of general law. [*34

In this situation remained the re-captured vessels of any other power, also at war with France, until the act of the 2d of March 1799, which regulates the salvage demandable from them. Neither by that act, nor by any previous act, was a power given, in terms, to re-capture such vessels. But their re-capture was an incident which unavoidably grew out of the state of the war. On the capture of a French vessel, having with her as a prize the vessel of such a power, the prize was inevitably re-captured. On the idea, that the re-capture was lawful, and that it was a foundation on which the right to salvage could stand, the legislature, in March 1799, declared what the amount of that salvage should be. The expression of this act is by no means explicit. If it extends to neutrals, then it governs in this case; if otherwise, the law respecting them continued still longer, on the same ground with the law respecting a belligerent, prior to the passage of the act of the 2d of March 1799. Thus it continued until the 3d of March 1800, when the legislature regulated the salvage to be paid by neutrals, re-captured from a power against which the United States have authorized defence or reprisals.

This act having passed subsequently to the re-capture of the Amelia, can certainly not affect that case as to the quantity of salvage, or give a right to salvage which did not exist before. But it manifests, in like manner with the laws already commented on, the system which congress considered itself as having established. This act was passed at a time when no additional hostility against France could have been contemplated. It was only designed to keep up the defensive system which had before been formed, and which it was deemed necessary to continue, until the negotiation then pending should have a pacific termination. Accordingly, there is no expres-
*35] sion in the act extending *the power of re-capture, or giving it, in the case of neutrals. This power is supposed to exist, as an incident growing out of the state of war, and the right to salvage produced by that power is regulated in the act.

In case of a re-capture, subsequently to the act, no doubt could be entertained, but that salvage, according to its terms, would be demandable. Yet there is not a syllable in it which would warrant an idea, that the right of re-capture was extended by it, or did not exist before. It must then have existed, from the passage of the laws, which commenced a general resistance to the aggressions we had so long experienced and submitted to.

It is not unworthy of notice, that the first regulation of the right of salvage in the case of a re-capture, not expressly enumerated among the specified acts of hostility warranted by the law, is to be found in one of those acts which constitute a part of the very system of defence determined on by congress, and is the first which subjects to condemnation the prizes made by our public ships of war.

It has not escaped the consideration of the court, that a legislative act, founded on a mistaken opinion of what was law, does not change the actual state of the law as to pre-existing cases. This principle is not shaken by the opinion now given. The court goes no further than to use the provisions in one of several acts forming a general system, as explanatory of other parts of the same system; and this appears to be in obedience to the best established rules of exposition, and to be necessary to a sound construction of the law.

An objection was made to the claim of salvage, by one of the counsel for the defendant in error, unconnected with the acts of congress, and which it is proper here to notice. He states, that to give title to salvage, the means
*36] used must not only have produced the benefit, but must have *been used with that sole view. For this he cites Beawes' Lex Mer. 158. The principle is applied by Beawes to the single case of a vessel saved at sea, by throwing overboard a part of her cargo. In that case, the principle is unquestionably correct, and in the case of a re-capture, it is as unquestionably incorrect. The re-captor is seldom actuated by the sole view of saving the vessel, and in no case of the sort, has the inquiry ever been made. It is, then, the opinion of the court, on a consideration of the acts of congress, and of the circumstances of the case, that the re-capture of the Amelia was lawful; and that, if the claim to salvage be in other respects well founded, there is nothing to defeat it in the character of the original taking.

2. It becomes then necessary to inquire, whether there has been such a meritorious service rendered to the re-captured, as entitles the re-captor to salvage?

The Amelia.

The Amelia was a neutral ship, captured by a French cruiser, and re-captured while on her way to a French port, to be adjudged according to the laws of war. It is stated to be the settled doctrine of the law of nations, that a neutral vessel, captured by a belligerent, is to be discharged without paying salvage: and for this several authorities have been quoted, and many more might certainly be cited. That such has been a general rule, is not to be questioned. As little is it to be questioned, that this rule is founded exclusively on the supposed safety of the neutral. It is expressly stated in the case of *The War Onskan*, cited from Robinson's Reports, to be founded on this plain principle, "that the liberation of a clear neutral from the hand of the enemy, is no essential service rendered to him, inasmuch as that the same enemy would be compelled, by the tribunals of his own country, after he had carried the neutral into port, to release him, with costs and damages for the injurious seizure and detention." It is not unfrequent, to consider and speak of a *regular practice under a rule, as itself forming a rule. [*37
A regular course of decisions on the text of the law, constitutes a rule of construction, by which that text is to be applied to all similar cases: but alter the text, and the rule no longer governs. So, in the case of salvage. The general principle is, that salvage is only payable, where a meritorious service has been rendered. In the application of this principle, it has been decided, that neutrals carried in by a belligerent for examination, being in no danger, receive no benefit from re-capture; and ought not, therefore, to pay salvage.

The principle is, that without benefit, salvage is not payable: and it is merely a consequence from this principle, which exempts re-captured neutrals from its payment. But let a nation change its laws and its practice on this subject; let its legislation be such as to subject to condemnation all neutrals captured by its cruisers, and who will say, that no benefit is conferred by a re-capture? In such a course of things, the state of the neutral is completely changed. So far from being safe, he is in as much danger of condemnation, as if captured by his own declared enemy. A series of decisions, then, and of rules founded on his supposed safety, no longer apply: only those rules are applicable, which regulate a situation of actual danger. This is not, as it has been termed, a change of principle; but a preservation of principle, by a practical application of it, according to the original substantial good sense of the rule.

It becomes, then, necessary to inquire, whether the laws of France were such as to have rendered the condemnation of the Amelia so extremely probable, as to create a case of such real danger, that her re-capture by Captain Talbot must be considered as a meritorious service entitling him to salvage. To prove this, the counsel for the plaintiff in error has offered several decrees of the French government, and especially, one of the 18th of January 1798.

Objections have been made to the reading of these decrees, as being the laws of a foreign nation, and therefore, facts, which, like other facts, ought to have been *proved, and to have formed a part of the case stated for the consideration of the court. That the laws of a foreign [*38
nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court

below, cannot be questioned. The real and only question is, whether the public laws of a foreign nation, on a subject of common concern to all nations, promulgated by the governing powers of a country, can be noticed as law, by a court of admiralty of that country, or must be still further proved as a fact.

The negative of this proposition has not been maintained in any of the authorities which have been adduced. On the contrary, several have been quoted (and such seems to have been the general practice), in which the marine ordinances of a foreign nation are read as law, without being proved as facts. It has been said, that this is done by consent: that it is a matter of general convenience, not to put parties to the trouble and expense of proving permanent and well-known laws which it is in their power to prove; and this opinion is countenanced by the case cited from Douglas. If it be correct, yet, this decree having been promulgated in the United States as the law of France, by the joint act of that department which is entrusted with foreign intercourse, and of that which is invested with the powers of war, seems to assume a character of notoriety which renders it admissible in our courts. It is, therefore, the opinion of the court, that the decree should be read as an authenticated copy of a public law of France, interesting to all nations.[1]

The decree ordains, that "the character of vessels, relative to their quality of neuter or enemy, shall be determined by their cargo; in consequence, every vessel found at sea, loaded, in whole or in part, with merchandise, the production of England or her possessions, shall be declared good
*39] prize, whoever the owner of these goods or merchandise may be." *This decree subjects to condemnation in the courts of France, a neutral vessel, laden, in whole or in part, with articles the growth of England or any of its possessions. A neutral thus circumstanced cannot be considered as in a state of safety: his re-captor cannot be said to have rendered him no service. It cannot reasonably be contended, that he would have been discharged in the ports of the belligerent, with costs and damages.

Let us, then, inquire, whether this was the situation of the Amelia. The first fact states her to have sailed from Calcutta, in Bengal, in April 1799, laden with a cargo of the product and manufacture of that country. Here it is contended, that the whole of Bengal may possibly not be in the possession of the English, and therefore, it does not appear that the cargo was within the description of the decree. But to this, it has been answered, that in inquiring whether the Amelia was in danger or not, this court must put itself in the place of a French court of admiralty, and determine as such court would have determined. Doing this, there seems to be no reason to doubt, that the cargo, without inquiring into the precise situation of the British power in every part of Bengal, being *primâ facie* of the product and manufacture of a possession of England, would have been so considered, unless the contrary could have been plainly shown.

The next fact relied on by the defendant in error is, that the Amelia was sent to be adjudged according to the laws of war, and from thence it is inferred, that she could not have been judged according to the decree of the 18th of January. It is to be remembered, that these are the orders of the captor, and without a question, in the language of a French cruiser, a law of his

[1] See Ennis *v.* Smith, 14 How. 427.

own country furnishing a rule of conduct in time of war, will be spoken of as one of the laws of war.

But the third and fourth facts in the statement admit the Amelia, with her cargo, to have belonged to a citizen of Hamburg, which city was not in a state of hostility with the republic of France, but was to be considered as neutral between the then belligerent powers. *It has been contended, that these facts not only do not show the re-captured vessel [*40 to have been one on which the decree could operate, but positively show that the decree could not have affected her. The whole statement, taken together, amounts to nothing more than that Hamburg was a neutral city; and it is precisely against neutrals, that the decree is in terms directed. To prove, therefore, that the Amelia was a neutral vessel, is to prove her within the very words of the decree, and consequently, to establish the reality of her danger.

Among the very elaborate arguments which have been used in this case, there are some which the court deem it proper more particularly to notice. It has been contended, that this decree might have been merely *in terrorem;* that it might never have been executed; and that, being in opposition to the law of nations, the court ought to presume it never would have been executed. But the court cannot presume the laws of any country to have been enacted *in terrorem;* nor that they will be disregarded by its judicial authority. Their obligation on their own courts must be considered as complete; and without resorting either to public notoriety, or the declarations of our own laws on the subject, the decisions of the French courts must be admitted to have conformed to the rules prescribed by their government.

It has been contended, that France is an independent nation, entitled to the benefits of the law of nations; and further, that if she has violated them, we ought not to violate them also, but ought to remonstrate against such misconduct. These positions have never been controverted; but they lead to a very different result from that which they have been relied on as producing.

The respect due to France is totally unconnected with the danger in which her laws had placed the Amelia; nor *is France in any manner [*41 to be affected by the decree this court may pronounce. Her interest in the vessel was terminated by the re-capture, which was authorized by the state of hostility then subsisting between the two nations. From that time, it has been a question only between the Amelia and the re-captor, with which France has nothing to do.

It is true, that a violation of the law of nations by one power does not justify its violation by another; but that remonstrance is the proper course to be pursued, and this is the course which has been pursued. America did remonstrate, most earnestly remonstrate, to France, against the injuries committed on her; but remonstrance having failed, she appealed to a higher tribunal, and authorized limited hostilities: this was not violating the law of nations, but conforming to it. In the course of these limited hostilities, the Amelia has been re-captured, and the inquiry now is, not whether the conduct of France would justify a departure from the law of nations, but what is the real law in the case? This depends on the danger from which she has been saved.

Much has been said about the general conduct of France and England on

the seas, and it has been urged, that the course of the latter has been still more injurious than that of the former. That is a consideration not to be taken up in this cause: animadversions on either, in the present case, would be considered as extremely unbecoming the judges of this court, who have only to inquire what was the real danger in which the laws of one of the countries placed the Amelia, and from which she has been freed by her re-capture.

It has been contended, that an illegal commission to take, given by France, cannot authorize our vessels to re-take; that we have no right by legislation to grant salvage out of the property of a citizen of Hamburg, who might have objected to the condition of the service. But it is not the authority given by the French government to capture neutrals, which is legalizing the re-capture made by Captain Talbot; it is the state of hostility between the two nations which is considered as having authorized that act. The re-capture having been made lawfully, then the right to salvage,
*42] on general principles, depends *on the service rendered. We cannot presume this service to have been unacceptable to the Hamburger, because it has bettered his condition; but a re-capture must always be made without consulting the re-captured. The act is one of the incidents of war, and is, in itself, only offensive as against the enemy. The subsequent fate of the re-captured depends on the service he has received, and on other circumstances.

To give a right to salvage, it is said, there must be a contract, either express or implied. Had Hamburg been in a state of declared war with, France, the re-captured vessels of that city would be admitted to be liable to pay salvage. If a contract be necessary, from what circumstances would the law, in that state of things, imply it? Clearly, from the benefit received, and the risk incurred. If, in the actual state of things, there was also benefit and risk, then the same circumstances concur, and they warrant the same result.

It is also urged, that to maintain this right, the danger ought not to be merely speculative, but must be imminent and the loss certain. That a mere speculative danger will not be sufficient to entitle a person to salvage, is unquestionably true. But that the danger must be such, that escape from it by other means was inevitable, cannot be admitted. In all the cases stated by the counsel for the defendant in error, safety by other means was possible, though not probable. The flames of a ship on fire might be extinguished by the crew, or by a sudden tempest. A ship on the rocks might possibly be gotten off, by the aid of wind and tides, without assistance from others. A vessel captured by an enemy might be separated from her captor, and if sailors had been placed on board the prize, a thousand accidents might possibly destroy them; or they might even be blown by a storm into a port of the country to which the prize vessel originally belonged. It cannot, therefore, be necessary that the loss should be inevitably certain; but it is necessary
*43] that the danger should *be real and imminent. It is believed to have been so, in this case. The captured vessel was of such description that the law by which she was to be tried, condemned her as good prize to the captor. Her danger, then, was real and imminent. The service rendered her was an essential service, and the court is, therefore, of opinion, that the re-captor is entitled to salvage.

3. The next object of inquiry is, what salvage ought to be allowed? The captors claim, one-half the gross value of the ship and cargo. To support this claim they rely on the "act for the government of the navy of the United States," passed the 2d of March 1799. This act regulates the salvage payable on the ships and goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in amity with the United States, re-taken from the enemy. It has been contended, that the case before the court is in the very words of the act. That the owner of the Amelia is a citizen of a state in amity with the United States, re-taken from the enemy. That the description would have been more limited, had the intention of the act been to restrain its application to a re-captured vessel belonging to a nation engaged with the United States against the same enemy. The words of the act would certainly admit of this construction.

Against it, it has been urged, and we think with great force, that the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law. If the construction contended for be given to the act, it subjects to the same rate of salvage a re-captured neutral, and a re-captured belligerent vessel. Yet, according to the law of nations, a neutral is generally to be restored without salvage.

This argument, in the opinion of the court, derives great additional weight from the consideration that the act in question is not temporary, but permanent. It is not merely fitted to the then existing state of things, and *calculated to expire with them, but is a regulation applying to present and future times. Whenever the danger resulting to captured neutrals [*44
from the laws of France should cease, then, according to the principles laid down in this decree, the liability of re-captured neutrals to the payment of salvage would, in conformity with the general law and usage of nations, cease also. This event might have happened, and probably did happen, before hostilities between the United States and France were terminated by treaty. Yet, if this law applies to the case, salvage from a re-captured neutral would still be demandable. This act, then, if the words admit it, since it provides a permanent rule for the payment of salvage, ought to be construed to apply only to cases in which salvage is permanently payable.

On inspecting the clause in question, the court is struck with the description of those from whom the vessel is to be re-taken, in order to come within the provisions of the act. The expression used is, the enemy: a vessel re-taken from the enemy. The enemy of whom? The court thinks it not unreasonable to answer, of both parties. By this construction, the act of congress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.

If this act does not comprehend the case, then the court is to decide, on a just estimate of the danger from which the re-captured was saved, and of the risk attending the re-taking of the vessel, what is a reasonable salvage. Considering the circumstances, and considering also what rule has been adopted in other courts of admiralty, one-sixth appears to be a reasonable allowance.

It is, therefore, the opinion of the court, that the decree of the circuit court, held for the district of New York, was correct, in reversing the

decree of the district court, but not correct in decreeing the restoration of the Amelia, without paying salvage. This court, therefore, is of opinion, *45] that the decree, so far as the restoration of the *Amelia, without salvage, is ordered, ought to be reversed, and that the Amelia and her cargo ought to be restored to the claimant, on paying for salvage one-sixth part of the net value, after deducting therefrom the charges which have been incurred.[1]

DECEMBER TERM, 1801.

GEORGE WILSON *v.* RICHARD MASON, devisee of GEORGE MASON.

RICHARD MASON, devisee of GEORGE MASON, *v.* GEORGE WILSON.

Writ of error.—Land law of Kentucky.—Effect of notice.

A writ of error upon a *caveat*, lies from the district court of Kentucky district, to the supreme court of the United States.

Waste and unappropriated lands, in Kentucky, in the year 1780, could not be lawfully appropriated by survey alone, without a previous legal entry in the book of entries.

A survey in Kentucky, not founded on an entry, is a void act, and constitutes no title whatever; and land so surveyed remains vacant, and liable to be appropriated by any person holding a land-warrant.

Notice of an illegal act will not make it valid.

THESE were writs of error to the District Court of the United States for the district of Kentucky, upon cross *caveats* for the same tract of land.

The *caveat* of *Wilson* v. *Mason* originated in the supreme court for the district of Kentucky, in 1785, whilst Kentucky was a part of the commonwealth of Virginia, and the record stated, "that heretofore, viz., at a supreme court for the district of Kentucky, held at Danville, in the said district, in the month of March 1785, came George Wilson, and caused a certain *caveat* to be entered against George Mason, which is in the following words, viz.: Let no grant issue to George Mason, of Fairfax county, for 8300 acres of land in Jefferson county, surveyed on the south side of Panther creek, adjoining another survey of the said Mason's, of 8400 acres, on the upper side; because the said George Mason has surveyed the same, contrary to his location, for which cause, and also on account of the vagueness of the entry, George Wilson claims the same, or so much thereof as interferes with his entry made on treasury-warrants for 40,926 acres, specially made on the 9th day of April 1784. Entered, 25th March 1785."

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[1] The general rule, undoubtedly, is, that salvage is not due, on a re-capture of neutral property, from a belligerent. The Carlotta, 5 Rob. 54; The Jonge Lambert, Ibid. n; The Antelope, Bee 233; Peck *v.* Randall's Trustees, 1 Johns. 165. Cases arising under the French arrêt of the 18th January 1798 (such as that of The Amelia), formed exceptions to the general rule, but they did not alter the established doctrine of the courts of admiralty. The Huntress, 6 Rob. 104. For a review of the French proceedings in matters of prize, which occasioned the allowance of military salvage, on re-capture of neutral property from French cruisers, see appendix to 2 Robinson, p. 307 (Am. edit.). And see The Acteon, Edw. 254. In The Charming Betsey, 2 Cr. 121, the court say, that the case of The Amelia was well decided, under the particular circumstances, and is a precedent not to be departed from in like cases.

"Whereupon, at October term 1785, a summons issued, commanding the sheriff of Fairfax county to summon George Mason to appear at the next March term, to show cause why the 8300 acres should not be *granted to George Wilson, or so much as interferes with his entry for 40,926 acres, made on the 9th of April 1784." [*46

Afterwards, and after Kentucky became a separate state, at a court held for the district of Bairdstown, in September 1797, "to which court this suit had been removed, and the said George Mason having departed this life, the said suit was ordered to be revived in the name of Richard Mason, the devisee of George Mason, deceased, who was devisee of George Mason, deceased." Richard Mason then removed the cause from the state court, to the district court of the United States for the district of Kentucky, and it was agreed by the parties, "that the judgment in this *caveat* (*Wilson* v. *Mason*), if for the plaintiff, should be entered up as a judgment for the defendant in the *caveat*, *Mason* v. *Wilson*; and if for the defendant, as a judgment for the plaintiff in the said *caveat*, *Mason* v. *Wilson*, which suits are cross *caveats* between the parties, for the same land." "And thereupon, came a jury, &c., who, being elected, tried and sworn well and truly to inquire into such facts as may be material in this cause, and not agreed to by the parties," found the special verdict hereinafter stated.

The cross *caveat* of *Richard Mason* v. *Wilson* was filed on the 13th of March 1799, and seemed to be in the nature of a plea or answer to the claim of Wilson. It was in the following form, viz.: "Let no grant issue to George Wilson, or his assignees, on the said Wilson's survey of 30,000 acres of land, lying in Jefferson county (now Nelson county), on the south side of Panther creek, a branch of Green river, made by virtue of an entry, dated April the 9th, 1784, for 40,926 acres, upon the five following land-office treasury-warrants, No. 17,639; 19,143; 19,614; 19,616; and 12,795. Richard Mason, infant heir and devisee of George Mason, jun., who was heir and devisee of George Mason, Esq., late of Fairfax county, Virginia, a citizen of the commonwealth of Virginia, by Cuthbert Banks, his next friend, enters a *caveat* against the same, for the following causes: Because the said survey includes a tract of 8300 acres which had been before located and entered by the *said George Mason, in the year 1780, and which tract had been actually surveyed for him, the said George Mason, and the certificate of survey thereof, dated October 2d, 1783, returned to the county surveyor's office, long before the said George Wilson made his said entry; and because the said entry, made by the said George Wilson, on which his said survey is founded, was illegal and fraudulent, the said George Wilson having knowingly and wilfully located his said entry upon lands which had been actually before appropriated and surveyed for others, as appears by the words of the said Wilson's own entry, which begins at the upper and north-east corner of the said George Mason's 8400 acre survey, on the bank of Panther creek, upon which survey of 8400 acres, the adjacent survey made for George Mason of 8300 acres, made about the same time, binds, and runs thence, south, 10 deg. east (being the course to a single degree of the dividing line between the said Mason's two tracts of 8400 and 8300 acres), passing the said Mason's south-east corner, 2600 poles, north, 80 deg. east (which is the course to a single degree of the back line of George Mason's said survey of his tract of 8300 acres), 3200 poles, and [*47

off at right angles northwardly, to the bank of Panther creek; and down the same, according to the meanders thereof, to the beginning; whereby it includes the whole of Richard Mason's said tract of 8300 acres, as devisee as aforesaid of George Mason, as well as some other lands which have been previously located and surveyed for other people; which above-mentioned courses could not have been inserted in Wilson's entry, in the manner they are, without his having been acquainted with the said surveys made by George Mason, before mentioned; the plats and certificates of which were, at the time of Wilson's said entry, in the county-surveyor's office; and from which, it is evident, Wilson gained the information by which he made his special entry." The original *caveat* of *George Mason* v. *Wilson*, was entered May 6th 1785.

Mason's entries, in the book of entries, were as follows, viz.:

"1780, April 29th, George Mason enters 8400 acres of land, to begin on
*48] Panther creek, on the east side *thereof, opposite to a beech on the west side, about four miles above the mouth of the west fork, and to run up and down the said creek, and eastwardly for quantity."

"1780, April 29th, George Mason enters 8300 acres, to begin at the upper corner of his 8400 acre entry, and to run up the creek, on the east side, and back for quantity."

"1780, October 27th, George Mason desires to make his entry of 8400 acres more special, on Panther creek, viz., to begin four miles above the forks of Panther creek, where it mouths into Green river, on the east side, running up and back for quantity."

The tract of 8400 acres was surveyed on 27th September 1783, beginning four miles above the mouth of Panther creek, where it empties into Green river, and not four miles above the mouth of the west fork of Panther creek, as mentioned in his first entry. The mouth of Panther creek being more than twelve miles below the mouth of the west fork. The tract of 8300 acres was surveyed on the 2d of October 1783, adjoining to the survey of 8400 acres, below the mouth of the west fork, and not above, as it would have been, if surveyed according to the entry of the 29th April 1780.

George Wilson's entry is as follows, viz.: "1784, April 9th, George Wilson enters 40,926 acres upon five treasury-warrants, No. 17,639, 19,143, 19,614, 19,616, 12,795, on the south side of Panther creek, a branch of Green river, beginning at the upper and north-east corner of George Mason's 8400 acre survey, on the bank of Panther creek, which survey begins, perhaps, about three miles from the mouth of the said creek and 320 poles upon a direct line above the mouth, of the first fork of the said creek from the mouth, thence running south, 10 deg. east, passing the said Mason's south-east corner, 2600 poles; thence, north, 80 deg. east, 3200 poles; thence,
*49] off at right angles, northwardly, *to the bank of Panther creek, and down the same, with the several meanders thereof, to the place of beginning." Upon four of those warrants, 30,000 acres were surveyed for Wilson, on the 2d June 1784, and located so as to comprehend the whole of Mason's survey of 8300 acres.

The following facts were agreed to by the counsel for both parties, viz.:

"1. We admit that Panther creek has been known and called by that name, Panther creek, generally, since the begining of the year 1780, and is truly represented on the plat returned in this cause, and also the forks thereof.

"2. That at the distance of twelve and one-quarter miles and thirty-six poles, on a direct line from its mouth, the said creek divides itself into two forks, viz., the fork marked on the plat returned in this cause, as the west fork of said creek; and the other, the fork marked on the plat, Panther creek; and that from the size and natural descriptions of these forks, they would be remarked and called such by strangers who should explore the waters of that creek.

"3. That the said forks were generally known and called the forks of Panther creek, from the beginning of the year 1780; and that they were notorious as such, to all who had acquaintance with the waters in that part of the country.

"4. That in the winter before the said entries were made for said defendant, the said agent, Hancock Lee, went down on Panther creek, and explored the country thereabouts; and encamped thereabouts, four or five weeks, for that purpose; and there were several others in company with him, who all went on the business of viewing the land in that quarter.

"5. That James Hord was the surveyor who surveyed the said entries, in September and October 1783.

*"6. That Hubbard Taylor was the special attorney of the defendant Mason, for the purpose of making his surveys on Panther [*50 creek, among which was the one now in controversy, and previous to making said surveys, the said Taylor made out a plat of Panther creek, up to the forks thereof, by actual survey, for the purpose of satisfying himself how the survey of the said defendant ought to be made; which plat he delivered to the said Hord, when he went to make the surveys of the said lands, for his instruction; and by the said plat, the said Hord was instructed to make the surveys of the said defendant, as they are now surveyed. The entries alluded to in the 4th fact, are those found by the jury to have been made for the defendant, by Hancock Lee, at the same time with that of the land in controversy."

The verdict of the jury was as follows, viz.: "We of the jury do find the facts following for the plaintiff, excluding those agreed to by the attorneys:

"1. That the said Hancock Lee, at the time he made the said entry for the said Mason, did also make the several other entries for him.

"2. That the plats and certificates of survey lay three weeks in the office, before they were recorded.

"3. That at the time of making out and recording the plats of said surveys, William Mason was agent to the said George Mason, and came to this country for the express purpose of attending to his land business; and had power and instructions to re-survey any of the said Mason's entries, which he should find to have been erroneously surveyed, or interfering with better claims.

"4. That it was a general practice in the offices of surveyors, when a survey was found to have been made erroneously, to make the same over again, at the request of the parties concerned; and the said practice prevailed also in cases of surveys recorded.

"5. That when William Mason came to the surveyor's office, to take out the plats in this case, and also those in *the other cases in which [*51 George Mason was concerned, the surveyor told him that the entries

of the said George, the defendant, had been surveyed wrong ; and took a pen and paper and explained to him the calls of the entries, and by comparing them with the surveys, showed him that they were erroneous ; and offered to send a deputy with him, without further or additional expense, to make the surveys aright, with which proposal the said William seemed pleased, and proceeded no further in the business at that time ; but went away, and after some days came back to the said office, and told the surveyor, that the entries of said Mason were so made that they would clash with each other, if surveyed otherwise than they then were ; and he did not see that the surveys could, be amended : whereupon, he took out the plats and certificates of survey, to return them to the register's office, and actually did so ; which transaction happened at the office of the surveyor, about the 12th of September 1784.

" 6. That the lands, generally, over all the state of Kentucky, except the land reserved by law for entries, are involved in disputes, by different entries and surveys having been made for the same tracts.

" 7. That it was usual for the surveyors, to survey entries, agreeable to the directions of the proprietors, or their agents, when such directions were given.

" 8. That a law, passed by the assembly of Kentucky, in 1792, prohibited any further entry of land with the surveyors, and that ever since that time, no land could be appropriated by virtue of land-warrants.

" 9. That the practice of entering for land, was a general strife for the best legal entry.

" 10. That George Mason's entry of 8400 acres, made the 17th day of October 1780, is surveyed on Panther creek, and a large branch thereof ; and not on either of the main forks of said creek, as appears by the plat ; and that the survey of 8300 acres, being the land in controversy, adjoining the last-mentioned survey, above, on said creek, and described in the plat in this cause by *the letters and figure, A. E. F. 8, is claimed by the defendant Mason, as a survey made by the said Mason, on an entry of his, dated the 29th day of April 1780, for 8300 acres of land ; is on said creek and a branch thereof, and not on either of the main forks, as appears by the plat.

*52]

" 11. That the place designated in the corrected plat, by the letter A., on the south side of Panther creek, is the place called for by the plaintiff, as the beginning corner of his entry of 40,926 acres, and described agreeable to the plat.

" 12. That it was a practice in the office of William May, surveyor of Jefferson, with whom the defendant Mason's entries were made, and by whose deputy-surveyor, James Hord, the defendant's surveys were made, to alter surveys discovered to be erroneous or wrong, after they were recorded, and survey them aright, without further or additional expense to the owners of such entries, and to proceed on the plats of the amended surveys, as the proper plats of the legal survey.

" 13. That the said Hord, when on his way to make said surveys, called on said surveyor of Jefferson, for copies of the defendant's entries, and on seeing them, was struck with the variance between the calls of the entries and his instructions, in point of location, and on that account, did not return the plats of the said surveys, until he had seen Hubbard Taylor, and showed

them to him, and represented his opinion of such variance; but on their being shown to the said Taylor, he directed said surveys to be returned as they were then made.

"14. That the said Hord was fully informed of the forks of Panther creek, when he was making said defendant's surveys, and saw the same, and about the same time at which he made the defendant's said surveys, and before he returned from doing the same.

(Signed) DANIEL WEISIGER, Foreman."

"We of the jury do find the following facts for the defendant Mason:

*"1. That the entry made in the name of George Wilson, April 9th, 1784, of 40,926 acres, on the south side of Panther creek, claiming under which the said Wilson entered this *caveat*, although made in his name, was made for the benefit of Christopher Greenup and John Handley, as well as for his benefit, and that the said Greenup and Handley were, at the time of making the entry, and long since, partners with him in the same. [*53

"2. That John Handley, then a deputy-surveyor of the county, made the said entry of 40,926 acres, for himself and the other partners; and before he made the same, had obtained information of the surveys made for George Mason, on his entries of 8300, and 8400 acres, on the south side of Panther creek, from the surveys then in the office of the surveyor.

"3. That the said George Wilson, Christopher Greenup and John Handley, had, before and at the time the said entry of 40,926 acres was made, notice of the place where, and the manner in which, the surveys had been made for George Mason, on his entries of 8300 acres, and 8400 acres, on the south side of Panther creek.

"4. That John Handley, before the said entry of 40,926 acres was made, had notice that the land now in dispute in this *caveat*, had been included in Mason's survey, on his entry of 8300 acres.

"5. That the surveys, made for the said Mason, on his entries of 8400, and 8300 acres, on the south side of Panther creek, were returned to the office of the surveyor of the county, in the course of the fall, 1783.

(Signed) DANIEL WEISIGER, Foreman."

The judgment of the district court of the United States for the district of Kentucky, at June term 1800, in the *caveat* of *Wilson* v. *Mason*, was, "That the defendant hath the better right to the land in controversy; it is, therefore, ordered, that the *caveat* be dismissed, and that the defendant recover against the plaintiff his costs in this behalf expended."

*In the *caveat* of *Mason* v. *Wilson*, the judgment was, "That the plaintiff recover against the defendant so much of the land in controversy as is included within the survey of 8300 acres, made by George Mason, on his entry of 8300 acres, entered March (*quære?* April) the 29th 1780, and designated in the corrected plat returned in the said other *caveat*, by the letters, D. E. F. 8, and also his costs by him about his suit in this behalf expended." [*54

After these judgments were entered, Wilson, by his counsel, moved the court for a citation on a writ of error to the supreme court of the United States, to which Mason, by his counsel, objected, alleging that by the acts of assembly of Virginia, under which the plaintiff Wilson claimed, it is provided, that no appeal or writ of error shall be allowed on a judgment en-

tered on a *caveat*, and that, therefore, in this case, the plaintiff was precluded from claiming the benefit of a writ of error. But the court overruled this objection, and granted the citation; to which opinion, the defendant excepted.(*a*)

(*a*) The following is the opinion of Judge INNES, who tried the cause in the district court; and which is alluded to in the subsequent arguments of counsel. After stating the facts of the case, he proceeds: The novelty of this case, the number of facts submitted and found by the jury, as well as the ingenious manner in which it was argued by the counsel of both plaintiff and defendant, have attracted my particular attention, and induced me to weigh the subject deliberately; the result of my deliberations will appear from the following opinion.

The first question which presents itself in this cause is, whether Mason has surveyed 8300 acres of land, contrary to his entry made the 29th of April 1780. The alteration of Mason, on the 27th day of October 1780, to the entry of 8400 acres, dated the 29th day of April preceding, is considered as a withdrawing of, and a total abandonment of the first entry. The first entry calling to lie about four miles above the mouth of the west fork, the second, four miles from the mouth of the main creek. The survey, therefore, of the 8300 acres is made contrary to the entry, as it adjoins the track of 8400, which is made in conformity to the new entry.

This decision, that the land in question is surveyed contrary to entry, brings me to the principal question in this cause; will Mason's survey for 8300 acres of land, made contrary to his entry, secure the land to him, against the claim of Wilson, founded on a special entry, subsequent to the recording of Mason's survey—Wilson having, before he made his entry, notice of the place where, and manner in which Mason had surveyed, and of the survey being recorded?

The parties to this suit are both considered as purchasers of the commonwealth (Chancery Revision of the Laws, p. 95, 96, § 3); the surveyor of the county, as her ministerial agent; who is authorized to receive warrants for land, make entries, survey the same, receive the surveys, when made, record the plat and certificate, within three months after it is returned to his office, provided, upon examination, he finds it truly made, and legally proportioned as to length and breadth.

I will here take notice of two arguments urged by the plaintiff's counsel, viz., that the word "truly," used in the law, when speaking of the duties of the surveyor, referred to a power over the entry; that it was his duty to see that the entry and survey agreed. This would be a dangerous construction of the law, as it would authorize the surveyor to determine the rights of claimants, and to judge in his own cause, where a survey should be made that interfered with a claim of his, I conceive him ministerial, except in two cases; he is to examine the plat, that it is truly made: *i. e.*, to see that the courses of the survey are truly laid down, and that it contains its complement of acres. It is to this part of his duty that the word truly refers. Again, he is to examine the legal proportion of the plat. In these two cases, he acts judicially; and it is right he should be vested with such a power; because, as he acts generally by deputy, it enables him to correct the work of his deputy, and also to prevent improper combinations between the employer and deputy.

The second argument alluded to is this: that neither the entry-book, nor book for entering surveys, are record-books; and that legislative interference was necessary to constitute them such. (Ch. Rev. 96, 220.) They are books directed to be procured by law. The surveyor is a sworn officer, commissioned agreeable to law. Copies of entries and copies of surveys, attested by him, are good evidence in a court of justice. I, therefore, consider every entry, and every survey, entered in these books, as being of record, and equally valid with those which are usually styled records.

Mason, a purchaser of the commonwealth, having surveyed contrary to his entry, returns the survey to the surveyor's office, where it is examined and recorded, before the claim of any other person appears to the land. Can the commonwealth destroy

Wilson v. Mason.

*This cause was argued at last term, by *Daveiss* and *C. Lee*, for the plaintiff in error, and *Jones* and *Mason*, for defendant.

Daveiss, for plaintiff in error.—As the counsel for the defendant in error have objected to our right of appeal in this cause, I shall, at [*56

Mason's survey and refuse her grant to the land? The law has pointed out no mode by which the commonwealth can set aside Mason's survey, for her own benefit; neither was such a provision necessary; because he had paid the purchase-money, for so many acres of unappropriated land. It was vacant; and so soon as his survey was recorded, his warrant was carried into full execution, and the entry of 8300 acres became vacant, and reverted to the commonwealth, there being no warrant in the surveyor's office to cover it, the warrant being returned to the owner with the plat and certificate of survey. Or, being recorded, is the same thing in effect, as it can never be again acted upon, being executed by actual survey. (Ch. Rev. § 3, p. 95, 96.) Any practice to the contrary, I deem illegal, and contrary to law. From this statement of facts, I determine Mason's right to be good against the commonwealth.

As the commonwealth can take no advantage of Mason's surveying, contrary to entry, shall Wilson, by his subsequent special entry, when he had full and perfect knowledge of the place where Mason's survey was made, and of its being recorded? There are only two ways of destroying a man's right to a tract of land. By *caveat*, after survey and before the title is complete; or, by a suit in chancery after the grant has issued. In the present case, Wilson has chosen to enter a *caveat* to prevent the emanation of a grant to Mason; alleging that Mason has surveyed contrary to entry, and that it is vague, for which reasons he claims the land by virtue of a special entry.

There are four causes stated in the land-law which authorize the entering of a *caveat* 1. Failing to register the plat and certificate of survey, within twelve months after making the survey: 2. If the breadth of the plat be not one-third of its length: 3. If any person shall obtain a survey of land to which another hath by law a better right, the person having such better right may in like manner enter a *caveat*, &c.: 4. If the plaintiff in a *caveat* recover judgment and fails to deliver the same, &c., into the land-office, within six months after judgment, it shall be lawful for any person to enter a *caveat*, &c. The first two and fourth causes are penalties which any person may take advantage of, and do not apply to the present case. The third requires an existing right in the caveator, at or before the time the survey caveated is recorded.

From an attentive consideration of this passage in the law, it conveys to me this idea: "Shall obtain a survey of lands," means, subsequent to the passing of the law, and after the survey is recorded; and not from the making, because the survey is not complete until it is recorded; neither could he "obtain" it, until the surveyor has performed that part of his duty, after which it is to be delivered to the proprietor with the warrant. Previous to the recording, I consider the survey to be under the direction of the owner, and that he may make any alteration he pleases in it, but not after; although a different practice has prevailed, and which, upon inquiry, will be found to be contrary to law.

It is important to this cause, to consider another passage in the same sentence of the law; "to which another hath by law a better right." The word hath is in the present tense, and refers to the time of obtaining the survey. If my construction relative to the word *obtain* be right, the claim of the caveator must exist, before or at the time of recording the survey. I am confirmed in the propriety of this interpretation of the law, for the following reasons. If a deputy-surveyor makes a survey, the principal ought not to sign it, until it is recorded; then the signature makes it ready to be delivered. If made by the principal, he will not deliver it, before it is recorded. The survey cannot be considered as complete, until all the requisites of the law be performed; the party is then entitled to it. Neither will the register of the land-office receive it, without that formality. Without these requisites, it is of no more value

first, confine myself to that point; because, if the court should agree *57] *with them in opinion on that question, much time will be saved and much useless discussion prevented. It is contended, that by the laws of Virginia, upon which the title to the land in dispute depends, and which *58] give the remedy *by *caveat*, no appeal or writ of error will lie. The land-law of Virginia, as it is called, viz., the act of May 1779 (Chancery Revision of the Laws of Virginia, p. 94), entitled "an act for establishing a land-office, and ascertaining the terms and manner of granting waste and unappropriated lands," which directs the manner of proceeding upon *caveats*, enacts, that "the court" (that is, the general court) "shall proceed to determine the right of the cause in a summary way, without pleadings in writing; impannelling and swearing a jury for the finding of such facts as are material to the cause, and are not agreed by the parties; and shall thereupon give judgment, on which no appeal or writ of error shall be allowed."

This law, it is said, was in force at the time of the separation of Kentucky from Virginia; and that by the act of assembly of Virginia, of December 1789 (Rev. Code, p. 56, § 7), which prescribes the terms upon which Kentucky might become an independent state, after the 1st of November 1791, it is provided, that all private rights and interests of lands, within the said district, derived from the laws of Virginia, prior to such separation,

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than waste paper; it cannot, therefore, be said to be "obtained," without their being performed.

The first two and fourth causes, which justify the entering a *caveat*, I have already said, do not apply to the present case.

It remains to be considered, whether Wilson has pursued the statute, so as to bring his case within the third cause: Had he "a better right" to the land surveyed for Mason, and for which he has instituted this suit, than Mason had, at the time the survey was recorded?

A *caveat* is a new and summary mode of proceeding, in derogation of the proceedings at common law, instituted by statute; it is necessary, therefore, to pursue the statute strictly, and show to the court that the caveator has a clear right to pursue that mode of proceeding. 1 T. R. 141.

Wilson's entry was made on the 9th day of April 1784. To the date of his entry, I fix the commencement of his claim to the land in controversy, it being the first certain and evident act of ownership manifested by him; which is upwards of four months after Mason's survey had been recorded. As Wilson's right did not exist at the time Mason's survey was recorded, he has failed to prove the better right required by law; neither has he pursued the statute, by assigning proper causes for caveating. Surveying contrary to entry, or making a vague entry, are not stated in the law, as exceptions to a survey, or causes for entering a *caveat*.

True it is, that there are instances in which surveying contrary to entry would be a good cause of caveating. But this is where there is an existing right, before the survey is made or obtained; and the question would then rest on having the better right to the land. The favorable light in which surveys have been viewed by the legislature is apparent in all the laws which have been enacted respecting the titles to land. They are all to be considered as one law, forming one general system on the same subject.[1]

The surveys here alluded to were injurious to the interest of the commonwealth, but being made by the proper officer, were confirmed. In this case, the commonwealth is not injured, and Wilson, through his partner, Handley, had every information necessary to guard him against an interference with Mason's survey.

[1] Many acts passed the Virginia legislature, giving further time to return plats, &c.

shall remain valid and secure, under the laws of the proposed state, "and shall be determined by the laws now existing in this state."

*But we shall contend: 1st. That the jurisdiction and powers of this court do not depend upon the laws of Virginia, but upon the constitution of the United States, and the acts of congress. 2d. That the laws of particular states lose their force, when they contravene the acts of congress. 3d. That by the law of Virginia a right of appeal is allowed upon a *caveat*. [*59

1. By the constitution of the United States, Art. III. § 2, "the judicial power shall extend" "to controversies between citizens of different states," and in all cases, except where a public minister, or a state, shall be a party, "the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make." Congress have not excepted the present case; it, therefore, follows, that by the constitution of the United States, this court has appellate jurisdiction of the cause.

2. By the constitution of the United States, Art. VI., "this constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land; and the judges, in every state, shall be bound thereby, "anything in the constitution or laws of any state to the contrary notwithstanding." By the 10th section of the judiciary act of

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Considering the parties both as purchasers of the commonwealth, deriving their claims from the same source; Mason as the first, and Wilson as the second, the following principles will apply in this case respecting notice. Lord Hardwicke said, in the case of Le Neve *v.* Le Neve (Amb. 446; 3 Atk. 634); "that the taking of a legal estate after notice of a prior right, makes a person a *malâ fide* purchaser, and is a species of fraud." If a person does not stop his hand, but gets the legal estate, when he knew the right in equity was in another, he will be rebutted by this maxim, "*fraus et dolus nemini patrocinari debent.*" In the case of Abney *v.* Kendall (1 Eq. Cas. Abr. 330, pl. 1; 1 Chan. Ca. 38),[1] it was determined, that if A., having notice that lands were contracted to be sold to B., purchases those lands, and takes a conveyance, it shall destroy the purchase, and the land shall be reconveyed to B.

Mason being considered the first purchaser of the commonwealth, having obtained his survey through the means of her agent (though contrary to entry, yet of which she can take no advantage, and which worked no iniquity to any person, the land being vacant), by recording the survey, the entry above the forks of the creek was abandoned. Wilson having notice, before he made his entry, that Mason had appropriated the land by the recording of the survey, cannot support his claim under the statute; judgment, therefore, must be entered for the defendant.

The preceding pages contain my opinion delivered in the *caveat*, George Wilson against Richard Mason, devisee, &c., at the June term 1800, of the district court of the United States for the Kentucky district.

As the principles on which the decision was founded will be brought before the supreme court of the United States, where I can have no opportunity of assigning my reasons in support of the judgment, with due deference, I solicit the court to permit the opinion to be read; by which the principles which governed me in the decision will appear fully before the court which is to reverse or affirm the judgment I have given between the parties. This request is grounded upon this single consideration, that what I have been officially obliged to do, may be examined, before a final inquiry is had respecting my judicial acts. (Signed) HARRY INNES.

May 18th, 1801.

[1] 1 Chan. Cas. 38, Merry *v.* Abney, the father, Abney, the son, and Kendall.

1789, the district court of Kentucky has jurisdiction of all cases by that act made originally cognisable by the circuit courts, and it is enacted, that "writs of error and appeals shall lie from decisions therein, to the supreme court, in the same causes, as from a circuit court to the supreme court, and under the same regulations." This cause having been removed by the defendant Mason, from the state court into the district court of the United States for the district of Kentucky, under the 12th section of the judiciary act of 1789, is to "proceed in the same manner as if it had been brought there by original process." And by the 22d section, "final judgments and decrees in civil actions in a circuit court, brought there by original process, or removed there from courts of the several states," *where the matter in dispute exceeds $2000, may be re-examined, and reversed or affirmed, in the supreme court.

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A cause may be removed into a circuit court, from a supreme court of a state, from which, by the laws of the state, no appeal or writ of error would lie; and if the principle contended for by the opposite counsel is correct, it would equally prevent this court from taking cognisance of a writ of error in that case, as in this. Besides, the question, whether a writ of error or appeal will or will not lie upon a *caveat*, does not affect the title to the land; and the act of assembly of Virginia, of December 1789, was only intended to protect the rights to land in Kentucky acquired under the laws of Virginia. It says, "the rights and interests of lands shall be determined by the laws now existing," and does not say that Kentucky may not give a further remedy.

3. A right of appeal upon a *caveat* did exist in Virginia, at the time of passing the act of assembly of December 1789, c. 53, respecting Kentucky. By the act of the Virginia assembly, October 1788, c. 67, § 11, 12, the cognisance of *caveats* was given to the district courts, and by the 16th section of the same act, an appeal is allowed as of right in all cases. The act of December 12th, 1792, § 6, 9 (Rev. Code, p. 80, 81), re-enacts those clauses of the act of 1788.

Mason, for defendant in error.—It is not denied, that the acts of congress are, in many cases, paramount to the laws of the individual states; but even a general position of that kind will not decide the present question. This action was brought in a state court, under a state law, before congress legislated upon the subject, and even before congress, or the constitution of the United States, had an existence. Can such an action be affected by subsequent acts of congress?

The law by which Kentucky was erected into a separate state passed the Virginia legislature, in December 1789. This is an unalterable law, embracing the citizens *of both states. It is a compact by which they mutually agreed that the rules of property should not be altered. If we admit, that by the act of 1792, appeals were allowed in the case of *caveats*, the admission proves nothing in the present question, because the law of 1789 is an unalterable law, and confined to the then existing state of things. It was not in the power of one of the contracting parties to change the terms of the compact.

*61]

But it is said, that there was a right of appeal at the time of that compact. Let us examine the laws relative to this subject. The first act is

that of 1779, mentioned by the opposite counsel, which declares that *caveats* shall be tried in the general court, and that there shall be no appeal or writ of error. The next is the act of 1788, which transfers the jurisdiction of the general court to district courts, and declares that "they shall have the same jurisdiction concerning" "*caveats*" "as the general court heretofore had by law." But the jurisdiction which the general court heretofore had by law was an exclusive and final jurisdiction, from which there could be no appeal. If, then, the district courts were to possess the same jurisdiction, it must be an exclusive and a final jurisdiction. But it is said, that by the same act of 1788, an appeal in all cases from the district court, was a matter of right. This must evidently mean in all cases where a right of appeal before existed from the general court to the court of appeals; but cannot be understood to give an appeal, in a case where it had been expressly excluded by an existing law. The intention of the legislature was, to put the district court, as to all cases arising within the district, exactly in the place of the general court, and to give them the same jurisdiction, to be exercised in the same manner, with the same limitations, and liable to appeals only in the same cases. But the act of 1788, erecting district courts on the eastern waters, did not affect Kentucky. The legislature had, before, by an act passed in 1782, erected a court on the western waters, called the supreme court for the district of Kentucky, to which it had transferred all the powers and jurisdiction theretofore exercised by the general court of Virginia; and with the rest, the power to try *caveats* and to give judgment thereon, without any appeal or writ of error to their judgment. The act of 1788 did not take away the *exclusive cognisance which the supreme court for the district of Kentucky had respecting *caveats*, but they [*62 retained it, until the final separation of Kentucky from Virginia; after which, the legislature of Kentucky passed no law authorizing an appeal; so that under the state laws, it is clear, that no appeal or writ of error would lie. There being then no appeal under the state laws, the question will be, simply, whether a writ of error will lie to the district court of the United States for the Kentucky district, upon an action carried there from the state court, which, under the laws of the state, had a final and exclusive jurisdiction of the cause.

The 22d section of the judiciary act of 1789 (1 U. S. Stat. 84), which allows appeals and writs of error, generally, did not contemplate a case like the present. This court is bound to take notice of the laws of the several states. By the 34th section of the same judiciary act (p. 92), the laws of the several states are to be the rules of decision, in cases where they apply. The remedy by *caveat* is given by the state law, and the party who chooses to take that remedy, must take it with its condition annexed, that no appeal or writ of error shall be allowed. A purchaser under the commonwealth of Virginia acquires his right under this condition. It is a part of the contract, from which this court cannot absolve him. The parties to this suit are not the only parties interested in this question; for while the right is hung *in dubio*, whilst it is uncertain to whom the grant ought to issue, the state taxes cannot be collected, the commonwealth having no tenant to whom to resort. Wilson has sought the summary process by *caveat*, and ought to be bound by the restrictions of that law under which he claims his remedy. He was not compelled to use the summary remedy; he might have resorted to

chancery, and then the commonwealth would have had a tenant to pay the taxes. He ought not to have the benefits of this kind of process, without submitting to the inconveniences which may be supposed to attend it. If this opinion is correct, although the laws of the United States provide generally that writs of error may be had, they can only give them as a remedy, where a right exists; and if Wilson's right is gone, by the judgment of the court below, he is precluded from suing it out, by the statute under which he claims.

*63] *Lee*, in reply.—This *caveat* is brought from the district court of the United States, and not from a state court. It is true, that it originated in the state court, but it was the defendant, Mason, and not Wilson, the plaintiff, who brought it into the court of the United States; and if the judgment of that court becomes thereby liable to be reversed upon a writ of error, it is a consequence attributable to the act of Mason alone.

There is nothing peculiar in the nature of the proceeding by *caveat*, to exclude it from the general appellate jurisdiction which is given to this court by the constitution and laws of the United States. It is not true, that this court are to look into the laws of Virginia for their right to correct the errors of the inferior courts of the United States. When a cause is brought from a state court into a court of the United States, it is to be proceeded upon, as if it had originated in the latter court, and the act of congress has expressly provided for an appeal or writ of error, in the very case of an action removed from a state court into an inferior court of the United States. Unless this case can be shown to be within some express exception to the general rule, none ought to be presumed by implication. With regard to the compact between Virginia and the inhabitants of Kentucky, it is true, that in all matters of substance, where the right of property depends upon it, it is binding upon this court; but in matters of form only, it could never receive the strict construction contended for, even between the parties themselves. The reasoning of the opposite counsel would go to prove that every *caveat*, depending upon the laws of Virginia, must be tried in the courts of Virginia only, because they had the sole right of trying a *caveat*, at the time of the compact. It would prevent the states of Virginia and Kentucky for ever from modifying and regulating their system of courts, and neither state could ever afterwards authorize an appeal upon *caveat*.

But an appellate jurisdiction on *caveats* did exist in Virginia, at the time of the compact. It appears by the act of congress (1 U. S. Stat. 189), that Kentucky did not become an independent state until June 1792. The

*64] county *courts of Virginia had, before that time, cognisance of *caveats* as to lands within their respective counties (Laws of Virginia, Rev. Code, p. 92, § 11), and in p. 88, § 53, an appeal is given from the county courts to the district courts, in all cases of a certain value, or where the title of land is drawn in question; and in p. 69, § 14, an appeal or writ of error is allowed from the district courts to the court of appeals, in the same manner as from the county to the district courts.

As to taxes, the state may tax the land, before any patent has issued, if they think proper. It is not necessary that there should be a tenant.

The Court directed the counsel to proceed in the further argument of the cause, observing, that they would consider this point with the others.

Lee, for the plaintiff in error.—The question is, who has the better right to the grant for 8300 acres of land, surveyed for George Mason on the 2d of October 1783?

1. The decision of this controversy depends on the laws of Virginia, prescribing the terms and manner of acquiring title to waste and unappropriated lands; with which there must be a legal and exact compliance.(*a*) Ac-

(*a*) The following is the substance of those parts of an act of assembly, which are material to this cause, contained in the Chancery Revision of the Laws of Virginia, published in 1785, by order of the general assembly (p. 94), entitled "An act for establishing a land-office, and ascertaining the terms and manner of granting waste and unappropriated lands," May session 1779.

The preamble recites, "Whereas, there are large quantities of waste and unappropriated lands within the territory of this commonwealth, the granting of which will encourage the migration of foreigners hither, promote population, increase the annual revenue, and create a fund for discharging the public debt, be it enacted," &c.

§ 1. That an office be constituted for the purpose of granting lands, and a register of the said land-office be appointed, &c.

§ 2. That any person may acquire title to so much waste and unappropriated lands as he or she shall desire to purchase, on paying the consideration of 40*l.* for every 100 acres, and so in proportion, &c.

§ 3. Register to grant printed warrants, under his hand and seal of office, specifying the quantity of land, and the rights upon which it is due, authorizing any surveyor, duly qualified, according to law, to lay off and survey the same, "which warrants shall be always good and valid, until executed by actual survey:" no warrant to be issued other than pre-emption warrants, before the 15th of October 1779. No surveyor to admit the entry or location of any warrant, before the 1st of May 1780. A surveyor to be appointed in every county.

"Every person having a land-warrant founded on any of the before-mentioned rights, and being desirous of locating the same on any particular waste and unappropriated lands, shall lodge such warrant with the chief surveyor of the county wherein the said lands or the greater part of them lie, who shall give a receipt for the same, if required. The party shall direct the location thereof, so specially and precisely, as that others may be enabled with certainty to locate other warrants on the adjacent residuum: which location shall bear date on the day on which it shall be made, and shall be entered by the surveyor in a book to be kept for that purpose, in which there shall be left no blank leaves or spaces between the different entries.

"The surveyor, at the time of making the survey, shall see the same bounded plainly by marked trees, except where a water-course, or ancient marked line, shall be the boundary, and shall make the breadth of each survey at least one-third of its length, in every part, unless where such breadth shall be restrained on both sides by mountains unfit for cultivation, by water-courses, or the bounds of lands before appropriated. He shall, as soon as it can conveniently be done, and within three months at farthest, after making the survey, deliver to his employer, or his order, a fair and true plat and certificate of such survey, the quantity contained, the hundred (where hundreds are established in the county wherein it lies), the courses and descriptions of the several boundaries, natural and artificial, ancient and new, expressing the proper names of such natural boundaries, where they have any, and the name of every person whose former line is made a boundary; and also the nature of the warrant and rights on which such survey is made. The said plats and certificates shall be examined and tried by the said principal surveyor, whether truly made and legally proportioned as to length and breadth, and shall be entered, within three months at farthest after the survey is made, in a book, well bound, to be provided by the court of his county, at the county charge.

"Every person for whom any waste or unappropriated lands shall be so located

cording *to these laws, there must be a warrant, an entry and a survey; the warrant being the foundation of the entry, and the entry directing
*66] and controlling the survey. If the *entry be made without a warrant, or if the survey be made of other land than that described in the entry, in either case there is a defect of title.

*67] *In this *caveat*, one of the causes assigned is, that the survey of Mason was made, contrary to his entry, and this we conceive to be a fatal defect in his title.

2. The entries made on the 29th of April 1780, by G. Mason (from whom the defendant derives his title), of his two warrants, No. 1, for 8400 acres, and No. 2, for 8300 acres, were valid and sufficient entries of land on the east side of Panther creek, and above the mouth of the west fork thereof, at the time those entries were made. The entry of warrant No. 1, is "on 8400 acres

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and laid off, shall, within twelve months at farthest after the survey made, return the plat and certificate of the said survey into the land-office, together with the warrant on which the lands were surveyed, and may demand of the register a receipt for the same, and on failing to make such return within twelve months, as aforesaid, or if the breadth of his plat be not one-third of its length, as before directed, it shall be lawful for any other person to enter a *caveat* in the said land-office against the issuing of any grant to him, expressing therein for what cause the grant should not issue; or if any person shall obtain a survey of lands, to which another hath by law a better right, the person having such better right may in like manner enter a *caveat* to prevent his obtaining a grant, until the title can be determined; such *caveat* also expressing the nature of the right on which the plaintiff therein claims the said land. The person entering any *caveat* shall take from the register a certified copy thereof, which, within three days thereafter, he shall deliver to the clerk of the general court, or such *caveat* shall become void; the said clerk, on receiving the same, shall enter it in a book, and thereupon issue a summons, reciting the cause for which such *caveat* is entered, and requiring the defendant to appear on the seventh day of thesucceeding court, and defend his right; and on such process being returned executed, the court shall proceed to determine the right of the cause, in a summary way, without pleadings in writing; empannelling and swearing a jury for the finding of such facts as are material to the cause, and are not agreed by the parties; and shall thereupon give judgment, on which no appeal or writ of error shall be allowed; a copy of such judgment, if in favor of the defendant, being delivered into the land-office, shall vacate the said *caveat;* and if not delivered within three months, a new *caveat* may for that cause be entered against the grant; and if the said judgment be in favor of the plaintiff, upon delivering the same into the land-office, together with a plat and certificate of the survey, and also producing a legal certificate of new rights on his own account, he shall be entitled to a grant thereof; but on failing to make such return and produce such certificates, within six months after judgment so rendered, it shall be lawful for any other person to enter a *caveat*, for that cause, against issuing the grant; upon which subsequent *caveats*, such proceedings shall be had, as are before directed in the case of an original *caveat;* and in any *caveat* where judgment shall be given for the defendant, the court shall award him his costs:" "and in case the plaintiff in any such *caveat* shall recover, the court may, if they think it reasonable, award costs against the defendant.

"And for preventing hasty and surreptitious grants, and avoiding controversies and expensive law-suits, be it enacted, that no surveyor shall, at any time within twelve months after the survey made, issue or deliver any certificate, copy or plat of land, by him surveyed, except only to the person or persons for whom the same was surveyed; or to his, her or their order; unless a *caveat* shall have been entered against a grant to the person claiming under such survey, to be proved by an authentic certificate of such *caveat* from the clerk of the general court, produced to the surveyor."

of land, to begin on Panther creek, on the east side thereof, opposite to a beech on the west side, about four miles above the mouth of the west fork, and to run up and down the said creek, and eastwardly for quantity." The entry of warrant No. 2, is "on 8300 acres to begin at the upper corner of his 8400 acre entry, and run up the creek on the east side, and back for quantity."

3. If the explanation made on the 27th October 1780, of the entry of warrant No. 1, on the 29th of April preceding, for 8400 acres, was a subtraction thereof from the land to which it had been applied, a matter not clear of doubt, and therefore not admitted; yet the entry of warrant No. 2, upon 8300 acres, was not thereby affected, *but remained unaltered, unimpaired and unsubtracted from the land which it describes [*68 with sufficient legal precision and certainty. The re-location of one warrant is not necessarily the re-location of another. If the warrant No. 1, was transferred by a new entry, on the 27th of October 1780, to land some miles below the west fork of Panther creek, yet the warrant No. 2, having been legally located, on the 29th of April antecedent, upon a tract of land some miles above the west fork, remained appropriated to that tract of land.

4. The entry of 8300 acres, under warrant No. 2, being such a special and precise entry as the law requires, is an appropriation of the land described in it; and fixes that warrant upon that tract of land, situate upwards of four miles above the west fork of Panther creek: and the survey made by Mason of 8300 acres on the south side of Panther creek, and below the west fork thereof, and several miles below it, is not a survey of the same land contained in his entry.

A survey, of itself, without a previous legal entry of a land-warrant, is not a legal appropriation of waste and vacant land; and therefore, this survey, unsupported by a legal warrant and a legal entry, was no legal appropriation, by Mason, of the land in controversy; but an unlawful intrusion thereupon; and the same land remained open to the appropriation of others, who, having notice of the legal survey of Mason, were not precluded by law, or equity, from proceeding in due course of law, to obtain title to the same land which is described in that illegal survey which had been knowingly made by the agents of Mason, contrary to his legal entry. No grant of the land, therefore, ought to be made to the defendant Mason.

5. If the claim of the defendant be deemed invalid, then there is no impediment in the way of the plaintiff, whose warrants, whose entry, and whose survey, are perfectly conformed to law.

The two causes assigned by Mason in his *caveat* against Wilson, are resolvable into one, viz., that having notice of the survey of Mason, it was not equitable, but fraudulent, *to acquire a title to the same land which [*69 was contained in that survey. But if the law be in favor of the plaintiff, equity is also: for notice of illegal proceedings in one man to acquire property, is no equitable bar to another who shall in all respects proceed according to law.

On the part of the defendant Mason, there was full and complete knowledge of Green river, Panther creek, and the west fork; and with this knowledge, a survey was made of a different tract than the one described and authorized by the entry No. 2, for the purpose of obtaining a grant, in evasion and fraud of the law. Such illegal proceeding ought not to be sus-

tained in a court of justice, against another who shall respect and obey the law in all particulars.

The entry of Mason for 8300 acres, on the 29th April 1780, begins at the upper corner of his entry for 8400 acres, as made on the same day. The entry for 8400 acres, well and accurately described a tract of land, lying on the east side of Panther creek, opposite a beech on the west side, and four miles above the west fork. This entry being sufficiently certain, the entry for 8300 acres must be certain also, and describes a particular tract of land, lying more than four miles above the west fork.

The west fork was known by that name, to the agent of Mason, at the time he made the entries on the 29th April, having encamped thereabouts four or five weeks in the winter and spring, before he made the entries for Mason. It has always been known by that name, since the first exploring of that part of the country. He was informed, while the surveys were still in his power, that they did not conform to his entries, and shown the manner in which they differed, and yet he obstinately persisted in having them recorded. The warrant No. 2, then, was well and sufficiently located on the land above the west fork, and a removal of the location of warrant No. 1, even if such removal could be made according to law, could not be considered as a removal also of the location of No. 2, without an express declaration to that effect. The location of warrant No. 1 was changed, but the location of No. 2 was not. Mason has surveyed it, as if it was; and hence
*70] results, the fatal difference between *his entry and his survey; by which his survey is a mere void act, and cannot be the foundation of a claim to a patent.

But it may be said, perhaps, that Mason's survey of 8300 acres, although not authorized by a previous entry, yet, being made before Wilson's entry, and Wilson having notice of it, was good against Wilson as well as against the commonwealth. This is denied. As to the commonwealth, it was an intrusion; and as to Wilson, the land was still vacant; it not having been appropriated in the manner authorized by law. Before a grant for land has actually issued, the only record of appropriations is the surveyor's book of entries of locations. The book of surveys was not intended by the legislature as the book to resort to, for information as to appropriations; it furnished no evidence of that kind. And as to notice, the principle is well established, that notice of an illegal act is no equitable bar to him who proceeds according to law; *Chapman* v. *Emery*, Cowp. 280; and *Doe* v. *Routledge*, Ibid. 708, 711, 712, where Lord MANSFIELD states the reason for the principle to be, "because if he knew the transaction, he knew it was void by law." *Gooch's Case*, 5 Co. 60 *b*; *Tonkins* v. *Ennis*, 1 Eq. Cas. Abr. 334; *Powell* v. *Pleydell*, 2 Ibid. 682.

Notice could not make that act valid, which was void at law. A survey is not the act of appropriation which the law requires. The land, not being appropriated according to law, was such waste and unappropriated land as the act of assembly says any person may acquire a title to, on complying with the terms and by taking the steps prescribed by the act; and Wilson, or any other person, might lawfully appropriate the land, by proceeding regularly according to law.

Mason, then, not having taken the steps required by the act of assembly, had no title at law; and having illegally made his survey, with a full knowl-

edge of all the circumstances, and after having been warned of his error, has certainly no right in equity. Before he obtained a grant, Wilson, by pursuing the steps of the law, acquired a better right, and was thereby entitled to bring his *caveat* and obtain a judgment in his favor.

**Daveiss*, on the same side.—Notice cannot alter the law, except where the law requires notice. Where a statute requires notice, and prescribes the mode, notice in another mode is not sufficient. *King* v. *Newcomb*, 4 T. R. 368 ; Amb. 444, 445. [*71

This is a case in which Wilson and Mason are both contending *de damno evitando*. The jury have found that, by a law passed by the assembly of Kentucky, in 1792, all further entries of land with the surveyors are prohibited, and that ever since, no land could be appropriated by virtue of land-warrants. Consequently, the principle applies which is laid down by Lord Kaims, in his Principles of Equity, p. 26, 27, 162, 163, 199, "that it is a universal law of nature, that it is lawful for one, *certans de damno evitando*, to take advantage of another's error." A warrant is a transitory chattel, until it has been located according to law. The entry is the appropriation of a particular tract of land, and the fixing of the warrant to that tract. The survey is of no effect, unless it be a survey of the tract so appropriated. In support of these positions he cited *Swearingen* v. *Higgins*, Hughes 4; *Dougherty* v. *Crow*, Ibid. 21; *Isaacs* v. *Willis*, Ibid. 12; *Owen* v. *Wilson*, Ibid. 64; *Hite* v. *Stevenson*, Ibid. 16; *Consilla* v. *Briscoe*, Ibid. 43; *Swearingen* v. *Same*, Ibid. 47; *Miller's Heirs* v. *Fox*, Ibid. 51; *Smith* v. *Bradford*, Ibid. 55; *Fry* v. *Essery*, Ibid. 53, and other cases in the same book.(*a*)

It will probably be contended by the defendant, that the intention of the assembly in requiring an entry, was to give notice to subsequent purchasers; and that notice given or gained in any way is sufficient. But it has been shown, that here was no appropriation by Mason ; and that the land, until appropriated, is waste. The land-law shows this, because nothing but a regular title is protected by that law. In a statute introducing a new law, or prescribing the mode of acquiring new rights, affirmative words imply a negative of all other modes of acquiring that right, or fulfilling the terms of that law. The land-law, by giving one way of acquiring titles, negatives all other modes. In 4 Bac. Abr. 641, it is said, "If an affirmative *statute, which is introductive of any new law, limits a thing to be done in one manner, it shall not, even where there are no negative words, be done in any other ;" and the following cases are there cited : *Standing* v. *Morgan*, Plowd. 206 *b* ; *Slade* v. *Drake*, Hob. 298; *Wethen* v. *Baldwin*, Sid. 56. He cited also *Thornby* v. *Fleetwood*, 1 Str. 329, and *The King* v. *Burrage*, 3 P. Wms. 458–61. Where a certain mode is pointed out by a statute, in which a title may be obtained, a conformity to that mode is a condition precedent, without complying with which, no title can be obtained. In the present case, a warrant, an entry, and a survey are conditions precedent, and a want of either is fatal. [*72

Lee.—In the 10th fact found by the jury for the plaintiff, it is stated, the survey of 8400 acres was made on the entry of the 17th of October, and

(*a*) On the argument, these cases were cited from a manuscript volume. Hughes' Reports not having been published until 1803.

that the survey of 8300 acres was made on the entry of 29th of April. This must prevent the defendant from arguing that the latter survey was made on the entry of October, as well as from pretending that the entry of October applies to the entry of 8300 acres made in April.

In order to prove that all lands, not entered for in a regular manner, were to be considered as waste and unappropriated, he cited the case of *Jones* v. *Williams*, 1 Wash. 231 ; in which the court call lands waste and unappropriated, although they had been settled and occupied for years.

Mason, for defendant in error.—1st. The entry of Mason, upon which his survey of 8300 acres was made, is sufficiently certain, and the survey is in conformity to the entry.

2d. Admitting that the entry was vague, and not corresponding with the survey, yet, Mason having paid for the land, and surveyed it, *quoad* the commonwealth, he was a *bonâ fide* purchaser, for a valuable consideration,
*73] and entitled to the land, provided no step had been taken *by any other person to acquire title to this land, previous to Mason's survey.

3d. Mason having appropriated this land, by a survey actually made, returned to the surveyor's office, and recorded, the land ceased to be waste and unappropriated land : and Wilson having a perfect knowledge of these facts, before and at the time he made his entry, was and is (if he could acquire title at all) in the character of a second purchaser, with notice of a prior sale of the same land, and therefore, was a fraudulent purchaser.

4th. The plaintiff in error is not, under the provisions of the law, entitled to a *caveat* in this case, because the better right, which the law meant to protect, was a right existing before or at the time the survey to be caveated was made.

I. The entry of 8300 acres is sufficiently certain, by its reference to the entry of 8400 acres. The surveys of both entries are upon the identical tracts originally intended to be located. The first description of them, in April 1780, was inaccurate, on account of the mistake in the names of places. The particular forks and branches had, at that time, scarcely acquired any names at all. The facts stated in this case do not admit that the names of the places were known before the beginning of the year 1780, which is the very time when the entries were made. It does not appear, that the place now called the mouth of west fork, was known by that name, before Mason made his entries. It may be a name since acquired, or given by the surveyor or his deputies, who are the persons that generally give names to places in new countries. So soon as the fall of the same year, Mason found that the description was not sufficiently accurate, and made an explanatory entry, declaring what place he meant by the mouth of the west fork, and stating it to be the forks of Panther creek where it mouths into Green river. A mistake of that kind was by no means improbable, in the then wild and uninhabited state of the country on and about Green river, when it was dangerous, on account of the Indians, to attempt to set a compass. That such mistakes were general, is evident, from the names of places which were given. Thus, the west fork is, in fact, a north-east fork ;
*74] *what is called the east side of Panther creek, is truly the south-west side. The entry of April was, in substance, the location of the tract surveyed ; and the memorandum of Mason, in October, was only fixing with

more accuracy, what was before in some degree vague. If this was the fact, then the entry of October was not a re-location of the warrant; it was never removed, but was always fixed to one and the same spot of earth. If, then, the entry of October is nothing more than it purports to be, viz., an explanation of the name of a place which was before uncertain, this same act of explanation, which rendered certain the location of warrant No. 1, must, of necessity, also render certain the location of No. 2, which depends, for its beginning, upon the location of No. 1. *Id certum est, quod certum reddi potest.* The two locations are dependent upon, and connected with, each other; and the explanation of the first must also explain the second. It is evident, that it was Mason's intention that the two tracts should lie alongside of each other, and the rendering certain the first, upon which the second was dependent, could never be considered as withdrawing the one from the other, and placing them many miles asunder. If it was Mason's intention, in October, to make a new location, why did he not avow it? No person had applied to appropriate the land he wanted. No one had interfered, or was about interfering, to take up that tract. There was nothing to prevent him from expressly withdrawing the entry of April, and making an entire new location. But his object was, not to remove the location which he had actually made, but only more fully to explain the ideas which he had at first intended to express, but which, on account of the inaccurate knowledge of the names of places, and of the real geography of the country, he had failed to do. Taking, then, the entry of October as an explanation only, it applies as well to fix the true location of warrant No. 2, as of No. 1; and the survey of No. 2, is as correspondent to its entry as that of No. 1, is to its entry.

Nothing can more clearly prove Mason's intention to be, to explain, and not to remove his entries of April 1780, than his omitting to say anything respecting his former entry of 8300 acres, at the time he was explaining the entry of 8400. Because, having no idea that his act *would be construed to be anything more than an explanation, it must apply as well to the former as to the latter. But if his intention had been to remove the location of warrant No. 1, he would either have expressly removed No. 2, at the same time, or else would not have ordered the survey of No. 2, to be made contiguous to that of No. 1. He might as easily have explained No. 2, as No. 1. [*75

Words are but the representatives, and not always the true representatives, of ideas. They do not always express, nor are they the uncontrollable evidence of the ideas of the person using them. They may be explained by the tone of the voice, by the emphasis, by the gestures, or by the actions, of the person speaking. To determine, at a subsequent period of time, the nature of the act from the words used, and not to suffer the words to be explained, by other proof of the nature of the act, is not a fair mode of seeking for truth.

The question is, what particular spot did Mason mean to locate, by his entry of April? He has himself answered the question, by his explanation in October. The only doubt can be, whether he spoke the truth. He certainly had no motive for deception: there were, then, no contending claims: no other person had attempted to locate the land which he wished to appropriate. He had no reason to wish to preserve the priority of his

entries, because the book of entries was open before him, and he could see that no person had entered for the same land; a new entry, therefore, in October, would have been as good as his old entry in April.

The act of assembly says, that the warrant "shall be good and valid, until executed by actual survey." The survey, then, and not the entry, is the execution of the warrant: the warrant merges in the survey. This shows that the legislature attached greater importance to the survey than to the entry. If, then, the land surveyed is the same land which Mason fixed his eye upon, but inaccurately described, in April, then the survey was correctly made, and pursuant to the actual location.

*76] *II. But admitting, for the sake of argument, that the survey did not correspond with the entry, yet Mason having paid the money for the land, and surveyed it, he was, as to the commonwealth, a *bonâ fide* purchaser for a valuable consideration, and entitled to a grant of the land. The commonwealth could not refuse, because the want of an entry was no injury to her. Mason had his choice among all the waste and unappropriated land in the state. It was of no importance to the commonwealth, whether he took this tract or another: the commonwealth sold all her land at the same price: the land was waste and unappropriated, and the warrant being executed by actual survey, was spent and gone, *functus officio*. The commonwealth had no means to prevent the emanation of a grant. As between the commonwealth, therefore, and Mason, this was a contract for that specific tract of land: it was as if the warrant had been special for that particular land. The warrant having been originally general, became special, as against the commonwealth, by the survey: the land ceased to be waste and unappropriated, as to the commonwealth, who was bound by the survey, and could not sell it to another.

III. This being the case, and Wilson having a full knowledge of all these facts, before he made his entry, became a *malâ fide* purchaser. This is one of the grounds upon which Judge Innes decided the case. (Here the opinion of Judge Innes was read, with the authorities there cited.) As a second purchaser with notice, he could take only the right which the commonwealth had, subject to the contract with Mason.

The preamble of a statute is said to be a key to unlock its meaning. It appears by the preamble of the act of 1779, to have been the object of the legislature: 1st. To encourage migration, and to promote population: 2d. To increase the revenue.

To induce persons to become purchasers, it became necessary to secure their titles, and for this purpose, as the situation of the country would not permit them, in all cases, to make actual surveys, an entry or location of the land entered in the surveyor's books, was to be considered as equivalent

*77] to a survey, for the purpose of appropriating *the land and securing a title. A survey, returned and recorded, is, in itself, a more unequivocal act of appropriation than an entry, and the law has made it the only means of executing the warrant. No time is fixed by law for the making the survey, because, in many parts of the state, it was, at that time, impossible to make it, on account of Indians, and no time could be ascertained, with any degree of precision, when it would become possible. For the security of subsequent purchasers, it also became necessary that some means of notice should be prescribed, that they might avoid an inter-

ference with prior rights. Hence, it was enacted, that the locations of warrants should be entered in a book, and should be so special, that others might be enabled, with certainty, to locate other warrants on the adjacent *residuum*. The object of the commonwealth, in requiring entries, was not to secure her own immediate interest, but that of purchasers, by giving them notice: and if the subsequent purchaser acquires such notice, it is of no importance, whether it be by an entry, which was liable to be changed, or by an actual survey recorded, which was a complete execution of the warrant, and could not be altered. Indeed, the latter seems to be the more complete and effectual notice, and to answer the intention of the legislature better than notice by an entry only.

The other object of the legislature was to raise money. If, then, complete notice of the location was given to the subsequent purchaser, and the money paid to the commonwealth, the two objects of the legislature were fully answered, and neither the commonwealth, nor that subsequent purchaser, had any right to complain: no injury was done to either. The person who, with full notice of these facts, insists upon becoming a second purchaser, becomes such in his own wrong, and if a loss must fall upon either, it must light upon him who thus voluntarily put himself in danger. Where the object of a statutory provision is only to give notice, if notice is had by other means, it has the same effect, as if given in the mode required by the statute. Such have been the uniform decisions in England, on the statutes of enrollment, and so well established is the doctrine, that it cannot be necessary to cite authorities to support it. Although, where a new right is given by statute, a strict compliance with the *provisions of the statute is necessary, yet it is not necessary for every purpose. *Blackwell* v. *Harper*, 2 Atk. 94–5. Mrs. Blackwell having designed and engraved certain drawings of plants, but omitted to engrave on the plate the day of their first publication, as required by the statute, Lord Chancellor HARDWICKE decreed a perpetual injunction against Harper, notwithstanding that omission; but did not decree an account of the profits. [*78

It will not be forgotten, that Handley, a deputy-surveyor of the county, was the partner of Wilson in this business, and was the person who actually made the entry, and that he fraudulently took advantage of the knowledge of Mason's surveys, which he acquired by means of his official situation, contrary to the express provisions and spirit of the act of assembly of 1779, which enacts, that "for preventing hasty and surreptitious grants, and avoiding controversies and expensive law-suits, no surveyor shall, at any time within twelve months after the survey made, issue or deliver any certificate, copy or plat of land by him surveyed, except only to the person for whom the same was surveyed." This clause of the act was made for the very purpose of preventing others from taking that advantage of surveys, which the deputy-surveyor himself has here taken; the law not contemplating the case of a surveyor, so regardless of his duty and of his oath, as to be guilty of an act like this. A title thus founded in fraud can never be supported. Upon a *caveat*, the court is to exercise a chancery jurisdiction. The act says, "the court shall proceed to determine the right of the cause, in a summary way." This they cannot do, without chancery powers. The court in Kentucky has so construed the act. *Isaacs* v. *Willis*, Hughes 12. If Wilson, by pursuing the strict letter of the law, has acquired

anything like a legal right, the court, as a court of chancery, will consider those circumstances of fraud which go to invalidate his right, in equity.

IV. Wilson is not, under the provisions of the law, entitled to a *caveat* in this case. The proceeding by *caveat* is in derogation of the common law, and therefore, the act which authorizes it is to *be construed strictly. *79] The act mentions only four cases in which a *caveat* may be entered. 1st. If the plat and certificate of survey be not returned into the land-office, within twelve months after the survey made, it shall be lawful for any other person to enter a *caveat:* 2d. If the breadth of the plat be not one-third of its length : 3d. If any person shall obtain a survey of lands to which another hath, by law, a better right : 4th. When, upon a *caveat*, judgment shall be given for the defendant, and he shall not lodge a copy of that judgment in the land-office, within three months thereafter. In the 1st, 2d and 4th cases, the *caveat* is allowed, for the purpose of protecting the rights of the commonwealth ; they do not apply to the present question. In the 3d case, the *caveat* is given as a remedy to him who hath by law a better right, and it is upon this ground, that Wilson claims the process.

If we examine the words of the law, according to their grammatical construction, or compare them with the spirit and object of the law, we shall find, that the better right which can support a *caveat*, must be a right existing at the time of the survey obtained, and not a right arising afterwards. The words of the act are, "if any person shall obtain a survey of lands to which another *hath* by law a better right." The word *hath* is in the present tense, and must apply either to the time of passing the law, or to the time of committing the injury which is the cause of the *caveat.* It could not apply to the time of passing the act, because, at that time, there existed no rights to those waste and unappropriated lands which were the subject of that act. The better right, then, was a right to be derived under that law. The injury to be remedied by the *caveat* was the injury done by a survey of lands to which another should have a better right. But a survey of lands, to which no other person had a right, cannot be an injury to any one, and can be no ground for a *caveat.* As to Wilson's being in the situation of one *certans de damno evitando*, the assertion cannot possibly be deemed correct. If he is in danger of loss, he has knowingly put himself in danger ; he has sought the position he is in, with a full fore-knowledge of all its evils. He was under no necessity of interfering with Mason's claims. His warrant was general : the wilderness was before him, and he knew where Mason had surveyed his land. *The same Lord Kaim, who says, "no man is *80] conscious of wrong, when he takes advantage of an error committed by another, to save himself from loss," says also in the same breath, "but *in lucro captando*, the moral sense teaches a different lesson. Every one is conscious of wrong, when an error is laid hold of, to make gain by it. The consciousness of injustice, when such advantage is taken, is, indeed, inferior in degree, but the same in kind, with the injustice of robbing an innocent person of his goods or his reputation." Here Wilson evidently had an intention of making gain by the error of Mason : and if, by that means, he has put his purchase-money at risk, it is not for a court of law or of equity to be anxious to assist him. Wilson, finding that Mason had an advantage by the priority of his location, contrived (by the assistance of Handley, his fraudulent coadjutor) a plan by which he hoped to reap the fruits of

Mason's industry; and now, he would fain make the court believe he was an innocent purchaser, striving to avoid a loss, the danger of which he had incurred by pure misadventure.

Upon the whole, then, Mason having obtained a right to this tract of land against the commonwealth, and Wilson having notice of that right, before he purchased, has no claim at all; but if he had, his remedy is not by *caveat.*

Jones, on the same side.—This cause naturally divides itself into two questions. 1st. Whether Mason has acquired a right to the patent. 2d. If Mason has not, whether Wilson has; for if neither has a right, Wilson can recover nothing.

I. The entry of Mason, in April 1780, is supposed to be so absolutely binding upon him, that he could not alter it, without withdrawing it entirely, notwithstanding that he subsequently said he was mistaken in supposing the land to lie above the west fork, when in fact it was below. A man may go upon the land, and fix in his mind a certain tract, but when he goes to the surveyor's office, he may mistake its situation, and say it is on the east, when it lies on the west, or the north, when it lies on the south; but *when [*81
he discovers his mistake, an explanation is no evidence that his choice has been altered. Here is no proof of an intention to withdraw his first entry; or to appropriate a different tract of land from that which he first intended. The only inference which can be drawn from the entry of October is, that he had been mistaken as to the point of compass, and as to the name of a particular fork of Panther creek. The land which he had chosen lies above a branch of Panther creek, which he supposed to be called the west fork, but which is not now known by that name. Mason was one of the first, if not the very first, adventurer in the lands on Panther creek. There is no evidence, that particular branches of that creek had names given them, before he made his entries in April. He had as good a right to give names to places, as any one else.

But a survey itself is as good a location as an entry. Indeed, it is better, because it is an actual location and occupation of the land. The lines are not merely described by words, which are uncertain, but are marked out upon the land itself. It is a *pedis possessio*, an actual seisin. A survey differs from an entry, as a diagram differs from a problem; or a proposition from its demonstration. If notice is the object of the statute, a survey recorded is better than an entry, as it is more definite and certain. If the object is to give evidence of an appropriation, it is better than an entry in the surveyor's book, because it is an act *en pais*, an actual possession. The one is but the command to locate, the other is the location itself. In this case, entry does not conflict with entry, and survey with survey; but a prior survey and occupation, with a subsequent entry.

A strong difference is made by the act of assembly, between a survey and an entry. The first is a satisfaction of the warrant; and various clauses of different acts speak of a survey, as the execution of the warrant. But the entry does not affect the warrant, which is declared to be "always good and valid, until executed by actual survey." The entry, therefore, is but an intermediate process, by which the party gains a priority of right; it is intended merely as a substitute for a survey, untilan "actual survey" can be *made. If, therefore, there had been no entry at all, yet [*82

Mason's right is equally good, as if his entry had been free from question. He has done the principal act itself, for which an entry is only a temporary substitute. Perhaps, he ran some risk before his survey was obtained; but when a survey is completed, the warrant and the entry are no longer of any effect or validity; they merge in the survey as the survey, does in the patent.

II. With respect to the plaintiff's right, it seems clear, that it must be a right existing at the time of the survey. If we were disseisors, as it is contended, then we gained a defeasible inheritance. We had possession, and whether legal or not, is of no consequence; it was a better right than Wilson's, and good against all the world but the lawful owner.

The acquisition of a legal title takes away the remedy by *caveat*. The warrant, entry and survey, constitute only an incipient equitable title, to be completed by the patent, which a *caveat* is the proper process to arrest. This being, then, entirely a contest about equitable rights, the process by *caveat* must be an equitable remedy, and gives the court an equity jurisdiction. If this *caveat* had not prevented, there is no doubt that Mason, having obtained and returned his survey in due time, would have had a patent, as a matter of course.

Suppose, the commonwealth had attempted, like any other vendor, to defeat the claim of Mason, would not a court of chancery have compelled a conveyance? Everything had been done by Mason, which the commonwealth had a right to require; as against her, therefore, there must have been a decree. If so, then, this court, exercising the same chancery powers with the court below, will give the same judgment which that court has rightfully given, in deciding that a contract existed between Mason and the commonwealth, which a court of chancery would have carried into effect; and that Wilson, having a full knowledge of that existing contract, became a subsequent purchaser; and therefore, as to Mason, he was a purchaser *malâ fide*, and can never defeat the right of Mason.

*83] *Daveiss*, in reply.—Can lands be appropriated in more ways than one? If it is decided, that the mode of appropriation is *unique*, then there can be no tantamount act: the one mode pointed out by the statute must be pursued. In attempting to come at the true construction of the land-law of 1779, it is highly important, to take into consideration the act which immediately proceeds it, for the settling of certain then existing claims and rights. They may indeed be called twin acts, being passed on the same day, and referring to each other. The preamble of the first act recognises the great variety of claims, and the evils resulting from various modes of gaining a title to lands; to remedy which, it declares it to be necessary "that some certain rule should be established," &c. The legislature, after settling existing claims, go on to provide a mode of acquiring titles in future, and to fix certain rules which should be observed by all future purchasers of public lands. The great evil intended to be remedied, was the existence of multifarious modes of acquiring titles. To give the act its proper remedial effect, it must be construed strictly; otherwise, the evil would continue to be as great as ever. For if you once decide that titles may be acquired in any other mode than that pointed out by the statute, you open again that door to perplexity and ambiguity, which the legislature intended to close for ever.

It may not be improper here to remark, that no objection has been

raised to the intrinsic merits of Wilson's claim: all the objections arise from its relation to Mason's. Wilson, therefore, has an intrinsic legal claim, which nothing can defeat but a prior appropriation of the land. This brings us again to the great questions, what is a legal act of appropriation? and what lands can be called waste and unappropriated?

To ascertain the meaning of these expressions, it is not necessary to consult a glossary. The manner in which the legislature has used them, on various occasions, will leave no doubt upon the subject. Sometimes, they call land, waste and unappropriated, after it has been settled, and sometimes, even after it has been cleared and cultivated; and lands once legally appropriated by legal entry, may *again become waste and [*84
unappropriated, by the purchaser's not following exactly the provisions of the law. Hence, it is apparent, that when the legislature use the terms waste and unappropriated land, they mean lands not appropriated in the manner prescribed by law.

We are then to inquire, whether, at the time of Wilson's entry, the land was such waste and unappropriated land, as, by the act of assembly, Wilson had a right to appropriate. We contend, that an entry is essential, and that Mason never entered for the land in dispute. The entry called for by the survey, is the entry of April 1780. That is clearly an entry for other land. It is a certain and a special entry: its beginning is certain, and is above the west fork: the survey is some miles below the west fork. But we are told, the name of west fork is uncertain; that the fork so called is not a west fork, but a north-east fork. But a name is different from a description: the name is arbitrary, and as long as a thing is known by a particular name, it is of no importance what that name is.

But ignorance of the country, and the danger of acquiring accurate knowledge of it, are alleged both as a proof of, and an apology for, the vagueness of the entry. If evidence and excuses of this kind are to be allowed, they will totally defeat the provisions of the law: it will let in those loose and vague claims which it was the object of the legislature to prevent. It is begging the question, to argue, that Mason was under a mistake, because he chose to alter his entry; and that what was originally in itself certain, was uncertain, because Mason, by a subsequent act, chose so to consider it. But there was a reason why Mason should wish to give it the appearance of a mistake, rather than of a removal of his entry. If he had expressly withdrawn his former entry, he would have lost his priority; and to save himself the trouble of examining all the intermediate entries, as well as the risk of omitting any of them, he chose to hold up the idea of correcting a mistake.

The entry of April, then, being sufficiently certain, the warrant attached itself to it, and the warrant and *entry taken together had the same [*85
effect as a special warrant, describing that identical tract of land. If Mason had bought, or could buy, a special warrant, stating descriptively the land, he could have no other land than that described in his warrant. When he bought his general warrant, he had the power of fixing its location at his election; having made his election, the power is expended, and the location fixed. (*a*)

(*a*) Washington, J.—Do you deny the right of removing an entry?

Daveiss.—If it were *res integra*, I should. But the whole landed property of Ken-

But it is contended, that if the entry for 8400 acres was removed, the entry for 8300 was removed also; that the one is dependent on the other. This we deny. How is it dependent? Cannot one exist without the other? Or is it because both were made by one person? Suppose, the entry of warrant No. 2, had begun at a mile distance due north from the upper corner of entry No. 1. Would the removal of No. 1, be a removal of No. 2?

The description of the beginning of No. 2, was only a description of a certain place, as was that also of No. 1, and his removal of the location of warrant No. 1, did not alter that place. Suppose, you make an entry, the beginning of which is a certain natural boundary: I make an entry beginning at the north corner of yours: you afterwards remove your entry. Does mine follow yours, whether I will or not? Again, it is said, that No. 2 could not be surveyed, without surveying No. 1. But this can make no difference; it might make some additional trouble, but creates no impossibility. The lines of No. 1 may be run, so as to ascertain the beginning of No. 2.

It is said, that a survey is as good an act of appropriation as an entry, and equally answers all the objects of the statute. This might be a good argument, if the court could make laws; but the law does not so consider it. It limits no time in which the survey shall be made. The survey, therefore, cannot be considered as the act of appropriation. By the old land-law, indeed, a survey *was the substantial appropriating act; but the last clause of the land-law (p. 98) has altered it in this respect.

*86]

It is contended also, that a survey is better notice than an entry. When a law only modifies certain existing rights, it is to be considered according to the rules of equity; but when a man claims under a law giving a right which did not exist before, he must bring his case strictly within the law. 4 Bac. Abr. 656; *Birch* v. *Bellamy*, 12 Mod. 540; Viner, tit. Statute, 506, 507.

Notice was not the only object of the law in prescribing an entry. The greater object was to avoid confusion in the sale of lands, and perplexity in the titles, which would have a bad effect upon the sale, and to establish a uniform mode of appropriating lands and locating warrants. The argument that a survey is better notice than an entry, goes to prove that an entry is unnecessary. The surveyor is the agent of the commonwealth, with limited powers, which must be strictly pursued, or his acts are void. He is by law directed to proceed in a particular manner, and must not deviate. A special power given by statute must be strictly pursued. *Rex* v. *Loxdale*, 1 Burr. 450. The surveyor must pursue the entry, and a survey not corresponding with the entry is void: the statute has made an entry necessary. In a statute creating a new law, affirmative words imply a negative. Appropriation means a legal appropriation. The book of surveys could not be intended to give notice, because it is by law shut up for twelve months from every eye but that of the surveyor and his employer. The survey itself could not be notice, because, at any time within three months, it is alterable by the party, or by the surveyor, and until the end of the three months, it does not bind even the party himself, or the surveyor, and for twelve months afterwards, it is by law kept secret.

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tucky would be shaken by such a judgment. I admit, therefore, that an entry may be removed; but Mason, as we contend, has not removed his entry of 8300 acres.

The law being affirmative, that you shall give one kind of notice, implies the negative that no other notice shall be sufficient. The survey, in itself, was wrong, illegal and void. An act in itself wrong can never be the foundation of right. Land Law, p. 90; and *Talbot* v. *Seeman* (*ante*, p. 1).

*But in the whole course of decisions in Kentucky, a survey has never been considered as giving a right. The adjudications for [*87 eighteen years do not show the date of a survey to be material as to notice, nor has it ever been so considered. There has never been a title supported upon a survey, without an entry, since the year 1779. To overthrow this course of decisions, would shake the titles of half the land in Kentucky. Arguments drawn from the inconvenience of unsettling titles to real estate, have always been respected. If it is an error, yet where "it is established, and has taken root, upon which any rule of property depends, it ought to be adhered to by the judges, until the legislature think proper to alter it, lest the new determination should have a retrospect, and shake many questions already settled." 1 Bl. Rep. 264; *Robertson* v. *Bland*, 1 W. Bl. 264; *Rice* v. *Shute*, 2 Ibid. 696; *Regina* v. *Ballivos and Burgenses de Bewdley*, 1 P. Wms. 223. In *Goodright* v. *Wright*, Ibid. 399, the court said, "that the altering settled rules concerning property is the most dangerous way of removing land-marks." The same doctrine is held in *Dawes* v. *Ferres*, 2 Ibid. 2; and in *Wagstaff* v. *Wagstaff*, Ibid. 259.

The survey could be no notice to Wilson, because it was alterable; he knew it ought to be altered, and he might well suppose it would be altered. The book of surveys is no record, and is not of more authority than the book of entries, which is the only book to be resorted to, to know what lands have been appropriated. But if the survey was notice, it was notice only of an illegal act. Notice cannot make that lawful which was unlawful in itself, nor that unlawful, which was in itself lawful. *Farr* v. *Newman*, 4 T. R. 639.

The Court took time until this term to consider, and now the Chief Justice delivered the following opinion:

Opinion of the Court.—This is a writ of error to a judgment of the Court of the United States for the district of Kentucky, rendered on a *caveat*, and is governed by the land-laws of Virginia.

*In the year 1779, the legislature of that commonwealth opened a land-office, and offered for sale, with some reservations, so much of [*88 that tract of country lying within its boundaries south-east of the river Ohio, as was then unappropriated: a part of which now constitutes the state of Kentucky.

Every person who would pay at the rate of forty pounds for one hundred acres, into the treasury of the state, became entitled to such quantity of waste and unappropriated land as was, at that rate, equivalent to the money paid, for which a certificate was given to the register of the land-office, whose duty it was, on receipt thereof, to issue a warrant for the quantity of land purchased, authorizing any surveyor, qualified according to law, to lay off and survey the same. A warrant might also be issued on certain other rights.

A chief surveyor was appointed for each county, whose duty it was, to nominate a sufficient number of deputies for the business of his county, and

the law proceeded to direct, that "every person having a land-warrant, founded on any of the before-mentioned rights, and being desirous of locating the same on any particular waste and unappropriated lands, shall lodge such warrant with the chief surveyor of the county wherein the said lands, or the greater part of them, lie, who shall give a receipt for the same, if required. The party shall direct the location thereof so specially and precisely as that others may be enabled, with certainty, to locate other warrants on the adjacent residuum; which location shall bear date on the day on which it shall be made, and shall be entered by the surveyor, in a book to be kept for that purpose, in which there shall be left no blank leaves or spaces between the different entries."

George Mason was one of the earliest purchasers under this law. On the 29th of April 1780, he made the following entries:

"1780, 29th April, George Mason enters 8400 acres of land, to begin on
*89] Panther creek, on the east side *thereof, opposite to a beech on the west side, about four miles above the mouth of the west fork, and to run up and down the said creek, and eastwardly for quantity."

"1780, April 29th, George Mason enters 8300 acres, to begin at the upper corner of his 8400 acre entry, and to run up the creek on the east side and back for quantity."

Panther creek pursues a general westwardly course from its source until it empties into Green river. The creek forks something more than twelve miles and one-quarter of a mile in a straight line above its mouth; and one of those forks, the direction of which, towards its source, is northwardly, has, from the beginning of the year 1780, been generally termed the west fork, and the other has been termed Panther creek.

On the 27th of October 1780, Mr. Mason made the following entry with the same surveyor: "1780, October the 27th, George Mason desires to make his entry of 8400 acres, more special, on Panther creek, viz., to begin four miles above the forks of Panther creek, where it mouths into Green river on the east side, running up and back for quantity."

In the months of September and October 1783, these two entries of 8400 and 8300 acres were surveyed by James Hord, one of the deputy-surveyors of the county of Jefferson, which surveys, as was the custom, were made conformable to the instructions given by Mr. Mason's agent. The survey of the entry of 8400 acres is supposed to conform to the explanation or amendment of that entry made in October 1780. It begins four miles above the mouth of Panther creek, and something more than eight miles below its forks. The survey of the 8300 acre entry adjoins the survey of 8400 acres on the upper side; and the plat was shown by the surveyor, before he would
*90] return it to the then agent *of Mr. Mason, who, after its supposed variance from the entry was suggested to him, approved it, and directed it to be returned to the office. These surveys were returned in the course of the Fall, 1783. The supposed variance between the survey and location of the 8300 acres was, afterwards, about the 12th of September 1784, pointed out by the surveyor to a subsequent agent of Mr. Mason, who also approved of the manner in which the surveys were made, and returned them to the land-office.

On the 9th of April 1783, George Wilson enters with the surveyor of Jefferson county, 40,926 acres of land on Panther creek, so as entirely to in-

clude George Mason's survey of 8300 acres. This entry, though in the name of George Wilson, was made by John Handley, a deputy-surveyor for Jefferson county, for his own benefit and that of Christopher Greenup, as well as for the benefit of George Wilson, and at the time of making the entry, full knowledge of the previous survey, made of the same land for George Mason, had been obtained by the said Handley, who had seen the surveys in the office, and had communicated this information to his two partners in the entry. In the month of March 1784, George Wilson entered, in the supreme court of the district of Kentucky, a *caveat*, to prevent a grant from issuing on George Mason's survey of 8300 acres, because the survey was made contrary to location, and because the entry was vague, he claiming the same, or so much thereof as interferes with his entry made on treasury-warrants for 40,926 acres on the 9th of April 1784. Pending the *caveat*, George Mason departed this life, and the suit was revived against Richard Mason, devisee of the said George, at whose petition it was removed into the court of the United States, held for the district of Kentucky.

*A cross *caveat* was entered in the same court, on the part of Richard Mason, to prevent the issuing a patent to George Wilson, [*91 and these causes coming on to be heard, it was agreed, that the judgment rendered in the *caveat*, *Wilson* v. *Mason*, should be also entered in the case of *Mason* v. *Wilson*. In June term 1800, the opinion of the court for the district of Kentucky was given, that the defendant Mason had the better right, and it was ordered, that the *caveat* entered by Wilson should be dismissed. To this judgment the plaintiff Wilson has obtained a writ of error, and the principal question now to be decided by this court is, which of the parties has the better right.

But before entering on the question, it may be necessary to notice a preliminary point made by the counsel for the defendant in error. He contends, that in a *caveat*, the decision of the district court is final, and that the cause cannot be carried before a superior tribunal. To maintain this proposition, he relies on an act of the legislature of Virginia, making the judgments of the district courts of the state final, in cases of *caveat*; and on the compact between Virginia and Kentucky, which stipulates that rights acquired under the commonwealth of Virginia shall be decided according to the then existing laws.

This argument would not appear to be well founded, had Virginia and Kentucky even been, for every purpose, independent nations; because the compact must be considered as providing for the preservation of titles, not of the tribunals which should decide on those titles. But when their situation in regard to the United States is contemplated, the court cannot perceive how a doubt could have existed respecting this point. The constitution of the United States, to which the parties to this compact had assented, gave jurisdiction to the federal courts in controversies between citizens of different states. The same constitution vested in this court an appellate jurisdiction, in all cases where original jurisdiction was given to the *inferior courts, with only "such exceptions, and under such [*92 regulations, as the congress shall make." Congress, in pursuance to the constitution, has passed a law on the subject, in which the appellate jurisdiction of this court is described in general terms, so as to comprehend this case, nor is there in that law any exception or regulation

which would exclude the case of a *caveat* from its general provisions. If, then, the compact between Virginia and Kentucky was even susceptible of the construction contended for, that construction could only be maintained, on the principle, that the legislatures of any two states might, by agreement between themselves, annul the constitution of the United States.

The jurisdiction of the court being perfectly clear, it remains to inquire, which of the parties has the better right? The title of Mason being eldest, is, of course, the best, if it be not, in itself, defective.

In the *caveat* of the plaintiff in error two defects in the title of the defendant are assigned. 1st. That his entry is vague. 2d. That he has surveyed contrary to his location. The first was abandoned in argument, and does not appear to the court to have been maintainable. The second shall now be considered.

To support the allegation, that the survey has been made contrary to the location, the entry and the survey are produced. The entry calls for a beginning on the upper corner of George Mason's entry of 8400 acres. To ascertain this spot, reference must be had to the entry called for. That is to begin on Panther creek, on the east side thereof, opposite to a beech on the west side, about four miles above the mouth of the west fork, and to
*93] run up and down the said creek and eastwardly for quantity. *The branch of Panther creek which was, at the date of the entry, generally denominated the west fork, is something more than twelve miles and one quarter of a mile above its mouth. The entry of 8400 acres is to begin four miles above the west fork, and the land in controversy ought to be placed above that entry: yet it is surveyed below the west fork.

To obviate this difficulty, the counsel for the defendant in error produces and relies upon the entry of October 27th, 1780. That entry is in these words: "George Mason desires to make his entry of 8400 acres more special on Panther creek, viz., to begin four miles above the forks of Panther creek, where it mouths into Green river, on the east side, running up and back for quantity."

This entry is contended to be not a removal, but an explanation, of that which had been made on the 29th of April 1780, and being merely an explanation, the survey of the land in controversy, beginning at the upper corner of the survey of the 8400 acre tract, conforms to its original location, and is, consequently, free from the exception made to it. If this position be true, the entry of the 27th of October 1780, must describe the same land with that which is described, though with less certainty, by the entry of the 29th of April, in the same year.

But the entry of the 29th of April calls for a beginning, four miles above the mouth of the west fork of Panther creek, which fork is more than twelve miles in a straight line, above the mouth of the creek, and the subsequent entry begins four miles above the forks of Panther creek, where it mouths into Green river. The west fork of Panther creek, and the mouth of the same creek, where it empties into the river, are perfectly distinct and separate places, and were so understood at the time this location was made.
*94] *It is, however, contended, that in the extensive wilderness offered for sale, accuracy of description was not to be expected, and the point of union betwen a creek and river might well be mistaken for the forks of a creek. This would not be very probable, in any case, but is

totally inadmissible in this, because names of places which they were generally understood to possess, have been used by the person locating for Mr. Mason, and as there are no other controlling boundaries referred to, they must be understood as designating the water-courses which were commonly described by those names, and which any person inclined to locate the adjacent *residuum* would necessarily suppose to have been referred to by them.

But if the location of October explains, without removing, that of April, then the original entry might, without such explanation, have been there surveyed, and could not have been properly surveyed four miles above the west fork. This would scarcely have been attempted. Indeed, the counsel for the appellee, in admitting that an entry made on the land in controversy, subsequent to Mason's entry, but before his survey, would have been good, seems to have disclosed an opinion, that the original entry did not comprehend the land in question, and that not the entry, but the survey, is to be relied on, as the foundation of his title.

To the court, it appears perfectly clear, that the entry of the 27th of October was a removal, and not an explanation, of that of the 29th of April. It has not been contended, that the removal of the 8400 acre entry has also removed that of 8300 acres.

The title of Mason, then, if good, must be shown to be so, by establishing that a survey, without an entry, is a sufficient foundation for a title. With a view to discover whether this question has been settled in Kentucky, all the adjudications contained in the *book of reports furnished by the counsel for the plaintiff in error have been examined. It is not [*95 perceived, either that the question has been directly determined, or that any principles have been settled which govern it. This case, then, is of the first impression.

The act of the Virginia legislature must be expounded according to the opinion this court may entertain of its import, without deriving any aid from the decisions of the state tribunals.

In 1779, Virginia opened a land office for the sale of an extensive, unsettled, and almost unexplored country, the motives for which are stated in the preamble of the statute to have been, "to encourage the migration of foreigners, promote population, increase the annual revenue, and create a fund for discharging the public debt." Any person whatever might become a purchaser of any portion of these lands, by paying into the treasury of the commonwealth the purchase-money required by law. By doing so, he became entitled to a warrant, authorizing any surveyor to lay off for him, in one or more surveys, the quantity of land purchased. It was apparently contemplated by the law, that the number of purchasers would immediately become very considerable. The condition of these purchasers in this stage of the contract ought to be distinctly understood. They had acquired a right each to appropriate to himself so much of the vacant land belonging to the commonwealth as he had purchased, but no right, either in common or severalty, to the whole or any particular part of the country, until such right should be acquired by further measures.

This was, at the same time, the situation of a great number of persons, and a prior was in no respect more eligibly circumstanced than a subsequent purchaser, except in the single case of both applying precisely at the same

time, for the purpose of appropriating each to himself the same land. Had the purchaser of the first warrant been negligent enough to hold it up, until the whole land was appropriated, the title of every subsequent purchaser
*96] would have been good against him, and he would have *been without remedy. The original purchase of a warrant, then, creating only a general claim which gave, of itself, only in a single case, priority of right to the prior purchaser, it became indispensably necessary to prescribe a mode by which this general title should be satisfied, by the appropriation of a particular tract of land.

This mode seems to have been prescribed by that part of the act which says, that "every person having a land-warrant, and being desirous of locating the same on any particular waste and unappropriated lands, shall lodge such warrant with the surveyor of the county wherein the lands or the greater part of them lie." "The party shall direct the location thereof so specially and precisely that others may be enabled, with certainty, to locate other warrants on the adjacent *residuum;* which location shall bear date the day on which it shall be made, and shall be entered by the surveyor in a book to be kept for that purpose."

This mode of appropriation, pointed out by the law as that which must be used by any person desirous of locating a warrant on any particular waste and unappropriated land, requires that the location shall be given to the surveyor, with the warrant, in order to be entered in a book kept for that purpose, which is denominated the book of entries.

It is apparent throughout the whole act, that the legislature never contemplated a survey as being in itself an appropriation of land, or supposed, that one would be ever made, if not founded on a previous entry. Some few of the many passages which are found in various parts of the law will be selected to evince this position.

The surveyor is forbidden to admit the entry of any warrant on treasury rights, except pre-exemption warrants, in his books, before the first day of May next succeeding the passage of the act. But the prohibition does not extend to a survey, and yet this would have been equally necessary, if land could have been appropriated by a survey, without a previous location.
*97] *It is declared, that no entry or location shall be admitted for certain lands which are described in the act, and intended to be reserved; but there is no declaration that they shall not be surveyed. This omission manifests an opinion, that they could not be appropriated by survey alone.

In prescribing the duty of a surveyor, the law enjoins him to proceed, with all practicable dispatch, to survey all lands entered in his office; and many rules are given to regulate the surveying of entries; but there is not a syllable in the act, which contemplates or makes a single provision for surveys not founded on a prior entry made in the book of entries.

The mode of appropriation, then, which the law designates, has not been pursued; but it is contended, that another course has been adopted, which equally produces all the objects designed to be effected by the location in the book of entries, and which, therefore, ought to be received as a sufficient substitute for an entry. The legislature of Virginia, when bringing her lands into the market, had undoubtedly a right to prescribe the terms on which she would sell, and the mode to be pursued by purchasers, for the

purpose of particularizing the general title acquired by obtaining a land-warrant. The court is by no means satisfied of its power to substitute any equivalent act for that required by the law.

The case of *Blackwell* v. *Harper*, reported in 2 Atk. 93, has been cited, to show the authority of a court to dispense with part of a statute directing the mode of proceeding to be observed by a person who claims title under such statute. That case arose under an act of parliament which directs that "any person who shall invent, or design, engrave, &c., any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same, for the term of fourteen years, to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints." *The plaintiff had engraved certain medicinal plants, a work deemed within the act, and had brought a bill to establish her right to the sole property in them, and to restrain the defendant from copying and engraving them, upon the penalties within the act of parliament. It was objected, that the day of publication from which the term was to commence, had not been engraved, and so the act had not been complied with, and consequently, the property had not vested. Lord HARDWICKE was of opinion, that the property vested, although the day of publication was not engraved, and that the words directing the day of publication to be engraved on each print, were only necessary to make the penalties incur, not to give the title. "Here," said his Lordship, "the clause which vests the property is distinct." This opinion, however, was given with great doubt, and only an injunction was granted, without costs, and without an order for an account. [*98

The case of *Blackwell* v. *Harper* has, at the bar, been denied to be law. However this may be, it is certainly essentially variant from that before the court. The opinion of Lord HARDWICKE was not, that where any circumstance was required by a statute, in order to vest a title, other equivalent acts might be received as a substitute; but that the particular statute on which the case depended, did not require the omitted circumstance, since the property was vested by a distinct clause. By a reference to the words themselves, it will be perceived, that the expression of the act of parliament is such as might perhaps warrant this opinion. The property is completely vested, before the direction concerning the date of the publication is given, and Lord HARDWICKE supposes it to be a question on which judges would differ, whether the subsequent words were merely directory or descriptive. A perfect property in the specific thing was supposed by that judge to have been given by other words, and on that idea, his decree is declared to have been formed.

*But in the case under consideration, no property in the specific thing is supposed to have been given by other words: no title to it is created by any other part of the act. The purchase of the land-warrant gave a power to appropriate, but was no appropriation, and the mode pointed out by the legislature would seem to the court to be that which can alone give title to the particular lands. [*99

But if this opinion should even be too strict, if an act entirely equivalent to an entry could be received as a substitute for one, a survey does not appear to be such an act, nor does it seem to have been so considered by the

legislature. From the circumstances under which the act for establishing the land-office was passed, as well as from the expressions of that act, it is apparent, that the entry was intended to give complete notice to other purchasers, that the land located was already appropriated. The mode of giving this notice, it was certainly proper to prescribe. By doing so, the numerous doubts and questions concerning the sufficiency of notice, which would inevitably arise from leaving that important fact to the discretion of individuals, in the first instance, and then to the discretion of courts, to be exercised many years after all the lands should be located, would be in a considerable degree obviated. It was, doubtless, an important object to obviate them.

The regulations, therefore, respecting entries are all calculated to make them as notorious as possible : not so, of surveys. The entries and surveys are to be kept in separate books. Why so, if a survey amounted to an entry? The entry must be dated, when made by the locator ; but the time of recording a survey may appear or not, at the discretion of the surveyor, and a subsequent survey may be recorded before one of prior date. There are to be no blanks in the book of entries, and this regulation is well calcu-
*100] lated for the prevention of *frauds in the origin of titles : it does not apply to the book of surveys. The book of entries is open to the inspection of every person : the book of surveys cannot be looked into but at the discretion of the surveyor. If a prior entry be alleged, the person affected thereby has a right to demand a copy thereof ; but no copy of a survey can be given to any other than the proprietor, until twelve months after it shall have been made.

From the whole act, a legislative intention to make an entry, and an entry only, the foundation of title to any particular tract of land, is strongly to be inferred ; and if even an equivalent act could be received, a survey does not appear to be such an act. In this particular case, it is true, that complete notice was obtained by it, but titles must rest on general principles, and in the general, a survey would not, without something more than the law requires, be notice. The law, therefore, cannot contemplate a survey as of equal operation with an entry.

A question has been made at the bar, whether a *caveat* is in the nature of an equitable action, and on the supposition that it is of that nature, the counsel for the defendant in error has insisted that Wilson, having express notice of Mason's survey, was unable to acquire title to the land appropriated by that survey. This would be true, if the survey gave to Mason any title, either in law or equity. But if a survey without an entry, was no appropriation ; if it gave no title, then notice of the survey could not create a title.

The doctrine of notice is well established. He who acquires a legal title, having notice of the prior equity of another, becomes a trustee for that other, to the extent of his equity : but if he has no equity, then there is nothing for which the purchaser of the legal estate can be a trustee.[1]

A point in the case still remains, which appears more doubtful, and con-

[1] It is on this ground, that a purchaser for value, though with notice of a prior voluntary conveyance, is protected, if his vendor had no notice. Ridgeway *v.* Underwood, 4 W. C. C. 129 ; Otley *v.* Manning, 9 East 59. And see Hildreth *v.* Sands, 2 Johns. Ch. 35.

cerning which very considerable difficulties have been felt. *Although Mason's survey may give him no title, it is questioned, whether Wilson can maintain a *caveat* against it.

The *caveat* is a remedy given to prevent a patent from issuing in certain cases, where the directions of the law have been violated, to the injury of the commonwealth, or where some other person hath a better right: the case before the court is that of a better right. The terms in which this remedy is accorded to the person who would avail himself of it, for the purpose of asserting his own title are, "or if any person shall obtain a survey of lands to which another hath by law a better right, the person having such better right may in like manner enter a *caveat*," &c.

Considerable doubts were entertained, whether the word "hath," in the description of the character by whom a *caveat* might be maintained, did not absolutely require that the better right should exist at the time the survey should be obtained. This construction, to which some of the court were at first greatly inclined, would have involved considerable inconvenience, and would have defeated what is deemed the essential object for which the remedy was given.

It has been already stated to be the opinion of the court, that a survey, not founded on an entry, is a void act, and constitutes no title whatever: consequently, the land so surveyed remains vacant and liable to be appropriated by any person holding a land-warrant. It is difficult to conceive, that a remedy designed to enable an individual who has made his entry in conformity with the law, to prevent another from obtaining a grant for the land he has entered, should be withheld from any person whose entry entitles him to the land he has located. It is not less difficult to impute to the legislature, an intention to protect a survey, to which the law denies all power of appropriating the land it comprehends, or an intention of carrying such survey into grant, while another has legally appropriated to himself the land thus to be granted. It would be difficult to state a case to which the principle, that a remedy should be so extended as to meet the mischief, would apply more forcibly than to this. If, however, the *terms of [*102
the law had been explicit, those terms must have controlled the subject. But the expression of the act is not, if any person shall obtain a survey to which another at the time such survey may be obtained shall have by law a better right, the person having such better right may enter a *caveat*, &c. The words of the law are not thus express: they are, if any person shall obtain a survey of land to which another *hath* by law a better right. The word *hath*, in its most strict and rigid sense, would refer neither to the time of making the survey, nor of entering the *caveat*, but to the present moment when the word is used, and would require that the better right should exist at the time of the passage of the act. This construction would be universally rejected as absurd, and all would expect the court to understand the words more liberally, and to expound them so as to give some effect to the legislative will. Some latitude of construction, then, must be used; some words additional to those used by the legislature must be understood, and this being apparent, the court perceive no sufficient motive for extending the remedy to rights existing when the survey shall be made, and denying it to those which are equally valid, and which exist when the *caveat* may be entered.

The *caveat* entered by Wilson is, therefore, maintainable under the land-law of Virginia, since his title had accrued when it was entered. The court is of opinion, that the district court of Kentucky has erred, in deciding that the defendant in error hath the better right, and that their judgment ought to be reversed and annulled. In pursuance of this opinion, I am directed to deliver the following judgment.

Judgment of the Court.—"Whereupon, it is considered by the court, that the plaintiff, Wilson, hath by law the better right to the land in controversy, and that the judgment of the Court of the United States for the district of Kentucky be reversed and annulled; and that the register of the land-office in Kentucky do issue a grant to the said Wilson, upon his survey of 30,000 acres of land, registered in the said office, according to the metes and bounds thereof, and *that the said plaintiff do also recover his costs expended in this court, and in the said district court, all which *103]
is ordered to be certified to the said district court, and the said register of the land-office accordingly."

In the case of *Mason* v. *Wilson*, the judgment of the court was, "that the defendant Wilson hath by law the better right to the land in controversy, and that the judgment of the Court of the United States for the district of Kentucky be reversed and annulled; and that the said *caveat* be dismissed, and that the defendant Wilson recover his costs," &c.(*a*)

The Peggy.

United States *v.* The Schooner Peggy.

Definitive decree.—Judicial notice.—High seas.

A final condemnation in an inferior court of admiralty, where a right of appeal exists, and has been claimed, is not a definitive condemnation, within the meaning of the 4th article of the convention with France, signed September 30th, 1800.

The court is as much bound, as the executive, to take notice of a treaty, and will reverse the original decree of condemnation (although it was correct when made), and decree restoration of the property, under the treaty made since the original condemnation.

Quære? as to the extent of the term high seas?

Error to the Circuit Court for the district of Connecticut, on a question of prize. The facts found and stated by Judge Law, the district judge, were as follows:

"That the ship Trumbull, duly commissioned by the President of the United States, with instructions to take any armed French vessel or vessels, sailing under authority, or pretence of authority, from the French republic, which shall be found within the jurisdictional limits of the United States, or elsewhere on the high seas, &c., as set forth in said instructions; and said ship did, on the 24th day of April last (April 1800), capture the schooner Peggy, after running her ashore, a few miles to the westward of Port au Prince, within the dominions and territory of General Toussaint, and has brought her into port, as set forth in the libel; and it further appears, that

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(*a*) As to the necessity of giving notice in the form prescribed by law, see Evans's Essay on Bills, 67, 68, 69, 70, 71, and Nicholson *v.* Gouthit, 2 H. Black. 609.

all the facts contained in the claim are true;(a) whereupon, this court *are of opinion, that as it appears, that the said schooner was solely upon a trading voyage, and sailed under the permission of Toussaint, [*104 with dispatches for the French government, under a convoy furnished by Toussaint, with directions to touch at Leogane for supplies, and that the arms she had on board must be presumed to be only for self-defence; neither does it appear she had ever made, or attempted to make, any depredations, and that she was not such an armed vessel as was meant and intended by the laws of the United States should be subject to capture and condemnation; and that the situation she was in, at the time of capture, being aground within the territory and jurisdiction of Toussaint, she was not on the high seas, so as to be intended to be within the instructions given to the commanders of American ships of war: therefore, adjudge said schooner is not a lawful prize, and decree that said schooner with her cargo be restored to the claimant."

From this decree, the attorney for the United States, in behalf of the United States and the commander, officers and crew of the Trumbull, appealed to the circuit court, in which Judge CUSHING sat alone, as the district judge declined sitting in the cause, on account of the interest of his son, who was one of the officers on board the Trumbull, at the time of capture, and who, if the schooner should be condemned, would be entitled to a share of the prize-money. The circuit court, on the appeal, found the following facts, and gave the following opinion and decree:

* "That David Jewitt, commander of the said public armed vessel, called the Trumbull, being duly commissioned, and instructed by [*105 the President of the United States, as set forth in the said libel, did, on or about the 23d of April last, capture the said schooner Peggy, after running her aground, about pistol-shot from the shore, a few miles to the westward of Port au Prince, called also Port Republican, on the coast of the island of St. Domingo, and afterwards bring her into port, as set forth in the libel. That at the time of the capture of the said schooner, there were ten persons aboard her. That she was then armed with four carriage-guns, being four-pounders, with four swivel-guns, six muskets, four pistols, four cutlasses, two axes, some boarding-hatchets, tomahawks and handcuffs. That she was a trading French vessel of about a hundred tons, then laden with coffee,

(a) The material facts stated in the claim are, that the schooner was the property of citizens of the French republic; that she was permitted by Toussaint to receive on board the cargo, which was on board at the time of capture; that she had dispatches from Toussaint to France; that she sailed by his authority, on the 23d of April, for France, navigated by ten men, including Buisson, the claimant, and Gillibert, the commander, and having on board four small three-pound carriage-guns, solely for defence against piratical assaults, and being under convoy of a tender, furnished by Toussaint. That on the 23d of April, she was run ashore, a few miles to the westward of Port au Prince, within the dominion, jurisdiction and territory of General Toussaint, so that she was fast and tight aground; at which time, and in which situation, the boats and crew of the Trumbull attacked and took possession of her, and got her off. That Toussaint then was, and still is, on terms of amity, commerce and friendship with the United States, duly entered into and ratified by treaty. That the schooner was on a lawful voyage, for the sole purpose of trade; and not commissioned, or in a condition to annoy or injure the trade or commerce of the United States.

sugar and other merchandise. That she had come from Bordeaux to Port au Prince, where the claimant had taken in said cargo, and from whence he sailed, on or about the said 23d day of April, with said schooner and cargo, having dispatches from General Toussaint for the French government. That the said Buisson sailed from Port au Prince as aforesaid, with the permission and direction of General Toussaint, to proceed to Bordeaux; that said schooner so sailed from Port au Prince, under convoy of an armed vessel, by order of said Toussaint, without a passport from Mr. Stevens, consul-general of the United States at St. Domingo, but that Buisson had been promised by Toussaint's brother, that one should be obtained and sent him, which, however, was not done; that said schooner had sailed from Bordeaux for Port au Prince, with fifteen men, besides eight passengers (according to the roll of equipage), armed with some guns, swivels and muskets; that said Captain Buisson was without any commission as for a vessel of war, and alleges that he was armed only for self-defence. That at the time of said capture, the guns of said schooner were loaded with canister-shot, one of which being fired, the shot fell near the bow of the Trumbull; but the said Buisson declares that said gun was fired only as a signal to his convoy. That the said Captain Buisson appeared to be in a disposition, and was prepared with
*106] force, to resist the boats which were sent from the Trumbull, to board him, a little *previous to the capture, in case of their atempting it; and that the said schooner and cargo are French property.

"Upon these facts, the court is of opinion, as follows, viz.: However compassion may be moved in favor of the claimant by some circumstances; such as that he was charged with dispatches from General Toussaint, between whom and the United States there were some friendly arrangements respecting commerce; that he was not in a capacity of greatly annoying trade, from the fewness of his men; and his allegation that he was armed only in defence; yet as the court is bound by law, which makes no such distinctions; as armed French vessels are not protected by any treaty or convention; particularly, not by the regulations between General Toussaint and the American consul; and as the said schooner Peggy was in a condition capable of annoying, and even of capturing single unarmed trading vessels, unattended with convoy; the court cannot avoid being of opinion, that she falls within the description and general design of the expression of the law, an armed French vessel.

"2d. That she was captured on the high seas: the argument taken by the claimant's counsel, from the extent of national jurisdiction on sea-coasts bordering on the country, not applying to this case, so as to acquit the said schooner; the sea-coast of St. Domingo not being neutral; not made so by any treaty or convention; but to be considered as hostile, upon our present plan of laws of defence with respect to France; as much so as any part of the coast of France, as far as regards French armed vessels; the court is, therefore, of opinion, that the said schooner Peggy and cargo are lawful prize:

"It is, therefore, considered, decreed and adjudged by this court, that the decree of the district court respecting the same, so far as regards their acquittal, be and the same is hereby reversed; and that the said schooner,
*107] *with her apparel, guns and appurtenances, and the goods and effects which were found on board of her at the time of capture, and brought

into port as aforesaid, be and the same are hereby condemned as forfeited to the use of the United States, and of the officers and men of the said armed vessel called the Trumbull, one-half thereof to the United States, the other half to the officers and men, to be divided according to law; the said schooner Peggy being of inferior force to the said armed vessel called the Trumbull." This sentence and decree were pronounced on the 23d day of September 1800.

During the present term, and before the court gave judgment upon this writ of error, viz., on the 21st of December 1801, the convention with France was finally ratified by the president; the fourth article of which convention has these words: "Property captured, and not yet *definitively* condemned, or which may be captured before the exchange of ratifications (contraband goods destined to an enemy's port excepted), shall be mutually restored." "This article shall take effect from the date of the signature of the present convention. And if, from the date of the said signature, any property shall be condemned, contrary to the intent of the said convention, before the knowledge of this stipulation shall be obtained, the property so condemned shall, without delay, be restored or paid for."

On the 30th of September 1800, this convention was signed by the respective plenipotentaries of the two nations, at Paris. On the 18th of February 1801, it was ratified by the President of the United States, with the advice and consent of the senate, excepting the 2d article, and with a limitation of the duration of the convention to the term of eight years. On the 31st of July 1801, the ratifications were exchanged at Paris, with a proviso that the expunging of the 2d article should be considered as a renunciation of the respective pretensions which were the object of that article.

*This proviso being considered by the president as requiring a renewal of the assent of the senate, he sent it to them for their advice. [*108
They returned it, with a resolve that they considered the convention as fully ratified. Whereupon, on the 21st of December 1801, it was promulged by a proclamation of the president.

The controversy turned principally upon two points: 1st. Whether the capture could be considered as made on the high seas, according to the import of that term, as used in the act of congress of July 9th, 1798 (1 U. S. Stat. 578). 2d. Whether, by the sentence of condemnation, by the circuit court, on the 23d of September 1800, the schooner Peggy could be considered as *definitively* condemned, within the meaning of the 4th article of the convention with France, signed at Paris, on the 30th of September 1800. The writ of error was dated on the 2d of October 1800.

Griswold and *Bayard*, for the captors.

Mason, for the claimant.(*a*)

The Chief Justice delivered the opinion of the court.—In this case, the court is of opinion, that the schooner Peggy is within the provisions of the treaty entered into with France, and ought to be restored. This vessel is not considered as being *definitively* condemned. The argument at the bar which

(*a*) I regret that not having the notes of this case, I am unable to report the very ingenious arguments of the learned counsel.

contends that because the sentence of the circuit court is denominated a final sentence, therefore, its condemnation is definitive, in the sense in which that term is used in the treaty, is not deemed a correct argument. A decree or sentence may be interlocutory or final, in the court which pronounces it, and
*109] receives its *appellation from its determining the power of that particular court over the subject to which it applies, or being only an intermediate order, subject to the future control of the same court. The last decree of an inferior court is final, in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced under. The terms used in the treaty seem to apply to the actual condition of the property, and to direct a restoration of that which is still in controversy between the parties. On any other construction, the word *definitive* would be rendered useless and inoperative. Vessels are seldom, if ever, condemned, but by a final sentence: an interlocutory order for a sale is not a condemnation. A stipulation, then, for the restoration of vessels, not yet condemned, would, on this construction, comprehend as many cases as a stipulation for the restoration of such as are not yet definitively condemned. Every condemnation is final as to the court which pronounces it, and no other difference is perceived between a condemnation and a final condemnation, than that the one terminates definitively the controversy between the parties, and the other leaves that controversy still depending. In this case, the sentence of condemnation was appealed from; it might have been reversed, and therefore, was not such a sentence as, in the contemplation of the contracting parties, on a fair and honest construction of the contract, was designated as a definitive condemnation.

It has been urged, that the court can take no notice of the stipulation for the restoration of property not yet definitely condemned; that the judges can only inquire whether the sentence was erroneous, when delivered, and that if the judgment was correct, it cannot be made otherwise, by anything subsequent to its rendition. The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted. It is certainly true, that the execution of a contract between nations is to be demanded from, and in the general, superintended by, the executive of each nation; and therefore, whatever the decision of this court may be, relative to the rights of parties litigating before it, the claim upon the nation, if unsatisfied,
*110] may still be asserted. *But yet, where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of congress; and although restoration may be an executive, when viewed as a substantive act, independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and of consequence, improper.

It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt, in the present case, has been expressed, I know of no

court which can contest its obligation. It is true, that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.[1]

Jacob Resler *v.* James Shehee.

Practice.—Opening of default.

After the first term next following an office-judgment, in Virginia, it is a matter of mere discretion in the court, whether they will admit a special plea to be filed, to set aside that judgment. Sheehee *v.* Resler, 1 Cr. C. C. 42, affirmed.

This was a writ of error upon a judgment of the Circuit Court of the district of Columbia, sitting at Alexandria, in an action for a malicious prosecution, brought by *Shehee* v. *Resler*, originally in the court of hustings for the town of Alexandria, and transferred by act of *congress of the 27th of February 1801, concerning the district of Columbia to the circuit court of that district. (Reported below, 1 Cr. C. C. 42.) [*111

The declaration stated, that on the 26th of December 1799, Resler, without reasonable cause, procured a certain false, scandalous and malicious warrant to be issued against Shehee, by F. Peyton, Esq., then mayor of the town of Alexandria, charging Shehee with having received from a certain negro slave, called ——, the property of Baldwin Dade, certain stolen goods, viz., one box of tallow, knowing the same to be stolen; which warrant was executed upon the said Shehee, who, by means of the false and malicious representations of Resler, was recognised to appear before the court of hustings of Alexandria, at April term 1800, to answer to the charges contained in the warrant, at which court, Shehee was acquitted.

At the rules, held at the clerk's office, on the 2d February 1801, an office-judgment was entered against Resler, for want of a plea, and a writ of inquiry awarded, returnable to the court of hustings, which by law would have been held on the first Monday of April 1801. But the act of congress of 27th February 1801, which provides for the government of the district of Columbia, erected a circuit court for the district, to which it transferred all the causes then pending in the court of hustings; and enacted, that the circuit court should hold four sessions a year, in Alexandria, viz., on the 2d Mondays of January, April and July, and the 1st Monday of October.

Two terms of the circuit court, viz., April and July, having elapsed, without the writ of inquiry being set aside, the defendant Resler, by his counsel, at October term 1801, on the 9th day of the month, appeared and

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[1] See Hartung *v.* People, 22 N. Y. 95.

moved the court to set aside the writ of inquiry, on filing the following special plea in justification, viz. : "And the said defendant, by his attorney, George Youngs, comes and defends the force and injury, &c., and for plea saith, that on the 26th day of December, in the year 1799, at the town of Alexandria aforesaid, and within the jurisdiction of the court of hustings of said town, a box of tallow belonging to the defendant, as his own proper goods and chattels, of the value of two dollars, *was stolen out of the house of the defendant, by some person unknown to the defendant, and the said defendant being informed by a certain John McGill, his journeyman, that the said box of tallow was in the house of the plaintiff, complained to Francis Peyton, mayor of the said town, of and concerning the said box of tallow, who, by his warrant, dated the 27th day of December, in the year 1799, called the plaintiff before him and examined him ; and upon his examination, and the testimony of sundry persons, bound the plaintiff to appear at the next grand jury court of hustings of said town, to answer the charge contained in said warrant, of and concerning the receiving the said box of tallow, so stolen as aforesaid, and which was found in his possession, whereupon, the plaintiff appearing, was acquitted and discharged by the said court, which is the same procurement of the said warrant and acquittal whereof the aforesaid action is brought, and this the defendant is ready to verify," &c.

*112]

The plaintiff objected to the filing of that plea, in this stage of the cause, and upon argument, the court, on the 13th day of October, refused to receive it ; whereupon, the defendant took a bill of exceptions, and pleaded the general issue, upon which, on the 14th day of October, there was a verdict for the plaintiff, and judgment for $1000 damages. On that judgment the defendant brought his writ of error to this court, and the error assigned was the refusal of the court below to suffer the defendant to file the special plea above recited.

The cause was, at this term, argued by *C. Lee*, for plaintiff in error, and *Simms* and *Mason*, for defendant.

Lee.—This case depends upon the law and practice of Virginia. By the act of congress of 3d March 1801, supplementary to the act concerning the district of Columbia, § 3, it is enacted, "that the circuit court for the county of Alexandria shall possess and exercise the same powers and jurisdiction, civil and criminal, as is now possessed and exercised by the district courts of Virginia." *The act of assembly of Virginia, respecting the district courts of that state, § 28 (Rev. Code, p. 85), provides, that "every judgment entered in the office against a defendant and bail, or against a defendant and sheriff, shall be set aside, if the defendant, at the succeeding court, shall be allowed to appear without bail, put in good bail, being ruled so to do, or surrender himself in custody, and shall plead to issue immediately." And in § 42 of the same act (p. 87), it is further provided, "that all judgments by default, for want of an appearance or special bail, or pleas as aforesaid, and nonsuits or dismissions obtained in the office, and not set aside on some day of the next succeeding district court, shall be entered by the clerk, as of the last day of the term ; which judgment shall be final in actions of debt founded on any specialty, bill, or note in writing, ascertaining the demand, unless the plaintiff shall choose, in any such case, to have a writ of inquiry of damages ; and in all other cases, the damages shall be

*113]

ascertained by a jury, to be impannelled and sworn to inquire thereof, as is hereinafter directed."

Upon an equitable construction of these sections of the act, the practice in Virginia has been, to permit the defendant to come in at a subsequent term, and avail himself of any such defence as he has, in the same manner as if he had pleaded it, at the particular term mentioned. This question has been discussed in Virginia, and received the construction for which I contend. The case of *Downman* v. *Downman's Executors*, 1 Wash. 26, was a plea of tender, after office-judgment confirmed. In p. 27, the court say, "these words, 'plead to issue immediately,' are the same as were used in the old act of 1753, for establishing the general court; under which, the practice of that court was very liberal, in allowing a defendant to plead that which did not make an issue, but required subsequent pleadings, provided the real justice of the case, and not intended delay, was thereby promoted. This is unavoidable in cases of bonds with collateral conditions, where the defendant cannot plead to issue." This is also agreeable to the principle laid down by Lord Holt, in 2 Salk. 622: "That though a judgment be ever so regularly entered, it shall be set aside at any time, on payment of costs, so as the plaintiff does not *lose a trial." And again, in p. 28, "Considering [*114 the circumstances of this country, and the dispersed situation of attorneys and their clients, who can seldom communicate with each other but at court, justice seems to require a relaxation in these rules (English rules) of practice. It would seem to me proper to allow a discretion in the judges to admit any plea which appears necessary for the defendant's defence, and only to resort to the rigor of the rule, where delay appears to be intended." This plea, then, if necessary for the defendant's defence, ought to have been admitted. It contains nothing exceptionable, and the facts stated in it, if true, are a justification. There is no case more proper for special pleading than one in which the prejudices of the people are enlisted on one side or the other. The law only directs what is to be done, the first term, but afterwards, it is left open to the discretion of the court. In this case, there can be no pretence, that the plea was intended for delay, as it was offered on the 9th, and the cause was not tried until the 14th of October, so that there was full time to answer the plea and make up the issue.

To show that this plea is a good justification, I refer to the case of *Coxe* v. *Wirrall*, Cro. Jac. 193, where a similar plea was adjudged good, upon demurrer.

It is a common practice, even in the English courts, to permit the general issue to be withdrawn, and a special plea filed, where it is not done, with an intent of delay. *Jefferys* v. *Walton*, 1 Wils. 177; and *Taylor* v. *Joddrell*, Ibid. 254. But the case of *Downman* v. *Downman's Executors*, before cited, seems conclusive upon this question.

Chase, J.—Have the rules of the Virginia courts been adopted in the circuit court?

Lee.—I conceive the circuit court of Alexandria to be in the same situation as the district court at Richmond. And as I understand the act of congress, they are obliged to adopt the practice of the courts of Virginia, except where the circuit court has actually made a different rule.

Simms, for defendant in error.—I will not deny that the courts of Virginia have gone the length stated in Washington's Reports. They have used their discretion, and have considered whether the plea offered tends to the justice of the cause, or whether it is intended only for delay. In this case, the time having passed, when the defendant could file his plea as a matter of right, it was entirely in the discretion of the court to admit or reject it.

It is certainly not a sufficient justification, for the defendant to say that the magistrate committed the plaintiff; for that neither destroys the evidence of express malice, nor shows probable cause for the prosecution. The magistrate might have committed upon the evidence of the defendant Resler himself; so that this plea would most probably have been overruled, upon demurrer, and at any rate, would have created delay; for in a matter of so much consequence, it cannot be presumed, that the counsel for the plaintiff could at once determine whether to demur or to join issue.

The defendant was not precluded from making a proper defence. He might have shown probable cause, on the general issue, for the gist of the action is the want of probable cause; and the court had the power of instructing the jury whether such cause was shown or not. Bull. N. P. 14.

It is said, that the plea was offered in a reasonable time. It cannot surely be said, that three days, in the hurry of the court, is a reasonable time to answer such a plea—so say the courts of Virginia.

This plea amounts to the general issue, and therefore, ought not to have been received. The justice of the case did not require it, and it is only to promote justice that the courts have ever deviated from the precise terms of the law.

Mason, on the same side.—Admitting for a moment, that the practice of the Virginia courts was binding upon the circuit court, yet the *court have only exercised the same discretion which a Virginia court might have exercised. There is a particular time allowed for special pleading; after that time, the admission of a plea is discretionary with the court. The case in Washington's Reports is clear, to show that it is altogether a matter of discretion. The court might have refused to receive any plea at all; for the right of the defendant to set aside the office-judgment, by pleading to issue, is confined to the court next succeeding the office-judgment.

*116]

But the defendant had every advantage under the general issue, which he could have had under his plea. It is extremely clear, that the plaintiff must show malice, and the defendant matter of justification. The rules of practice in the courts of Virginia, are confined to Virginia; the courts of the United States are not bound by them; they have power to make their own rules.

Lee, in reply.—Our complaint is, that the inferior court has not exercised its discretion in the manner it ought to do. I use the word *discretion* differently from Mr. Mason. The exercise of such discretion is subject to the control of this court. If we look to the decisions of the courts in Virginia, we find, that they have soundly exercised their discretionary power. The practice has constantly been, to let in the parties, notwithstanding any *laches*. Was it proper in the court to say, that although we have a right to suffer you to bring the question of probable cause before the court, and to take it from the jury, and although you wish so to do, yet we will not permit you,

but will compel you to go before the jury; where facts disclosed, not pertinent to the issue, might make an improper impression?

CUSHING, J.—Do you admit, that the defendant might have given in evidence, under the general issue, the facts stated in the plea offered?

Lee.—It is sufficient for us, if it was a matter of doubt. In such a case, a cautious practitioner will always take the safest method, and plead the facts specially.

*There is no doubt, but the court had a right to make rules of practice for itself. But not having made such a rule in this case, its [*117 discretion ought to have been guided by the practice of the Virginia courts. We, therefore, hope, that this court will correct the indiscreet exercise of the power of the court below in this case.

THE COURT.—It is true, that the courts in Virginia have been very liberal in admitting any plea, at the next term after an office-judgment, which was necessary to bring forward the substantial merits of the case, whether it was strictly an issuable plea, or not.[1] But at a subsequent term, it is a matter of mere discretion with the court, whether they will admit any special plea at all.

In the present case, the facts stated in the plea offered, might have been given in evidence on the general issue; the court exercised their discretion soundly in rejecting the plea.

Judgment affirmed.

TURNER *v.* FENDALL.

Execution.—Proceedings against sheriff.—Evidence.

A sheriff makes the money upon a *fi. fa.* at the suit of A. *v.* B., and afterwards a *fi. fa.* against A. is put into his hands, he cannot levy it upon the money of A., made by the *fi. fa.* of A. *v.* B., for it does not become the goods and chattels of A., until it is paid over to him; and by the command of the writ, the sheriff is, in strictness, bound to bring the money into court, there to be paid to the plaintiff.

Money may be taken in execution, if in the possession of the defendant.

On a motion, in Virginia, against a sheriff, for not paying over moneys by him collected on execution, it is not necessary that the judgment against the sheriff should be rendered at the term next succeeding that to which the execution has been returned.

Proceedings before magistrates, in cases of insolvent debtors, are matters *en pais*, and may be proved by parol testimony.

It is not error in the court below, to reject, as incompetent, admissible testimony, tending to prove a fact not relevant to the case before the court.

Fendall *v.* Turner, 1 Cr. C. C. 35, affirmed.

THIS was a writ of error to reverse a judgment of the Circuit Court of the district of Columbia, sitting at Alexandria, rendered on a motion by Fendall against Turner, late serjeant of the corporate town of Alexandria, for the amount of money received by him on a *fieri facias* issued on a judgment in favor of Fendall against one Towers. (Reported below, 1 Cr. C. C. 35.)

This motion was grounded on an act of assembly of Virginia (Rev. Code, p. 317, § 51), by which it is enacted, that "if any sheriff, under-sheriff or

[1] See Mechanics' Bank of Alexandria *v.* Withers, 6 Wheat. 106.

other officer shall make return upon any writ of *fieri facias* or *venditioni exponas*, that he hath levied the debt, damages or costs, as in such writ is required, or any part thereof, and shall not immediately pay the same to the party, to whom the same is payable, or his attorney," "it shall and may be *118] lawful for the creditor at *whose suit such writ of *fieri facias*, &c., shall issue, upon a motion made in the next succeeding general court, or other court from whence such writ shall issue, to demand judgment against such sheriff, officer or under-sheriff, or securities of such under-sheriff, for the money or tobacco mentioned in such writ, or so much thereof as shall be returned levied on such writ of *fieri facias*, &c., with interest thereon at the rate of fifteen per centum per annum, from the return-day of the execution, until the judgment shall be discharged; and such court is hereby authorized and required to give judgment accordingly, and to award execution thereon; provided, such sheriff or officer have ten days' previous notice of such motion."

Fendall had recovered judgment against Towers, in the court of hustings, in the town of Alexandria, for $627.52 damages, and $4.91 costs, on which judgment, a *fieri facias* issued, directed to the serjeant of the court of hustings, dated the 13th of December 1800, returnable to the said court of hustings, on the first Monday of February then next. Upon this writ, was the following return, viz.:

"Serjeant returns, executed on one large copper boiler and sundry casks, and sold for the sum of $703.98, including serjeant's commissions, on which money, I have levied a writ of *fieri facias*, issued from the clerk's office of the court of Fairfax county, on a judgment obtained by William Deneale against Robert Young and Philip R. Fendall, merchants, trading under the firm of Robert Young & Co.

CHARLES TURNER, T. S."

Before the next succeeding term of the court of hustings, after the return of the execution, the act of congress of 27th of February 1801, concerning the district of Columbia, intervened, by which, the laws of Virginia, as they then existed, were declared to be and continue in force in that part of the district of Columbia which was ceded by that state to the United States, and by them accepted for the permanent seat of government; and all suits, process, &c., depending in the court of hustings for the town of Alexandria, were transferred to the circuit court of the district of Columbia estab- *119] lished by that *act; and the first session of the circuit court, in Alexandria, was by law held on the second Monday of April 1801.

To that term (April 1801), Fendall gave Turner notice, in the usual form, that on the first day of the court, he should move for judgment against him for the amount of the execution, with interest thereon, according to law; which notice was signed "Philip Richard Fendall, for the trustees of Philip Richard Fendall," and was duly served. Turner not having appeared, the motion was continued to the next term (July 1801), when he appeared and admitted the regularity of the delivery and continuance of the notice; and the court, upon argument, gave judgment for the plaintiff, Fendall; to reverse which judgment, Turner sued out the present writ of error.

The record which came up contained three bills of exceptions. The first stated that the defendant, Turner, to prove that Fendall had taken the oath

of an insolvent debtor, and was thereupon discharged out of custody, produced the following writing, viz.:

"*Fairfax*, ss. Whereas, Philip Richard Fendall, a prisoner confined in the jail of Fairfax county, under execution at the suit of Samuel Love, issued from the district court of Dumfries, and it appearing that legal notice had been given, and a warrant issued, for bringing before us, for the purpose of taking the oath of an insolvent debtor, and the said Philip Richard Fendall having this day, in the court-house of the said county, delivered in a schedule of his estate and effects, and taken the oath prescribed by law; these are, therefore, in the name of the commonwealth, to command you to discharge the said Philip Richard Fendall out of your jail and custody, and for so doing, this shall be your sufficient warrant. Given under our hands and seals, this 21st day of March, eighteen hundred.

WILLIAM HERBERT, [Seal.]
R. WEST. [Seal.]

"To the sheriff or keeper of the jail of Fairfax county."

And offered to prove the handwriting of the said William Herbert and Roger West; and also to prove by oral testimony, that the said Philip Richard Fendall did take the *oath of an insolvent debtor, before the William Herbert and Roger West, whose names are subscribed to the said writing, and also to prove by oral testimony, that the said William Herbert and Roger West were magistrates of the county of Fairfax, on the 21st of March 1800, and had acted as such for many years before; but the court gave it as their opinion, that the said writing and oral testimony were not legal evidence to be admitted to prove the above-mentioned facts. [*120

The 2d bill of exceptions stated, that the defendant Turner offered to show to the court, that the trustees of Fendall were not entitled to the money levied on the execution of *Fendall* v. *Towers*, but the court refused to suffer him to go into that inquiry.

The 3d bill of exceptions stated, that the defendant Turner produced a copy of an execution issued on a judgment obtained by William Deneale against Robert Young and Philip Richard Fendall (the plaintiff in motion below), and a copy of the return, which return was in these words:

"Executed on the sum of $682.43, money in my hands, being the amount of the sum received by me for the sale of certain property taken by virtue of a *fieri facias*, issued from the clerk's office of the court of hustings of Alexandria, on a judgment obtained by the within named Philip R. Fendall against John Towers. CHARLES TURNER, T. S."

And alleged, that he had a right, and was bound, to levy that execution on the money of the said Fendall, which he had levied by virtue of the execution of *Fendall* v. *Towers*, and which was in his hands, separate and distinct from any other money, at the time the execution of *Deneale* v. *Young and Fendall* was delivered to him, but the court gave it as their opinion that he had not a right, and was not bound so to do.

The case was now argued by *Simms*, for the plaintiff in error, and by *C. Lee* and *Swann*, for the defendant.

For the *plaintiff* in error, it was contended: *1st. That the court below was not authorized to render judgment at any other term than [*121

that next succeeding the return of the execution. 2d. That the testimony offered to prove the insolvency of Fendall, was competent for that purpose, and ought not to have been rejected. 3d. That the defendant below ought to have been permitted to prove the trustees of Fendall not entitled to receive the money on the execution of *Fendall* v. *Towers*. 4th. That Turner had a right to levy the execution of *Deneale* v. *Young and Fendall*, on the money of Fendall in his hands.

I. The act of assembly giving this remedy against sheriffs ought to be construed strictly, because it is a penal law, inasmuch as it subjects the officer to a penalty of fifteen per cent. per annum, for not paying over the money levied upon an execution; and because this summary process by motion is in derogation of the common-law proceedings. The words of the act are, that "upon a motion made to the next succeeding general court, or other court from whence such writ shall issue," "such court is hereby authorized and required to give judgment accordingly;" that is, "such next succeeding court." The court in April was the next succeeding court; but the court in July, at which this judgment was rendered, had no jurisdiction of the cause. And although consent will take away error, yet it will not give jurisdiction.

II. The testimony offered to prove the insolvency of Fendall, ought to have been admitted. By the act of assembly respecting insolvent debtors (Rev. Code, p. 314, 315, §§ 40, 41), upon the debtor's delivering his schedule, and taking the oath, all his estate becomes vested, by act of law, in the sheriff of the county, and debts due to him are to be recovered in the name of the sheriff. This money was either the money of Fendall, and so vested in the sheriff as part of the estate in possession, or else it was a *chose in action*, and then the *sheriff is the only person entitled to recover it. *122]
In either case, by showing the insolvency of Fendall, we show that the title is out of him, so that he cannot support this motion. The act of assembly does not make the act of the magistrates, in administering the oath, and granting the warrant of discharge of an insolvent debtor, a matter of record. Third persons have no means of proving the fact of insolvency, but by parol testimony: it must be proved like any other matter *en pais*. We offered the best evidence which the nature of the case will admit: we offered the original warrant of discharge, under the hands and seals of the magistrates, and parol proof that they were magistrates at the time, and had acted as such for many years before, together with evidence of their handwriting. General reputation has always been considered as sufficient proof of the official character of a magistrate.

III. The defendant below ought to have been permitted to show that the trustees of Fendall were not entitled to the money. The notice in this case was given by Fendall for his trustees. Turner could not know whose claims he had to oppose, whether those of Fendall alone, or those of his trustees. It was necessary for him, therefore, to show that neither the one nor the others were entitled to recover upon this motion; and he came prepared to do this, but the court would not suffer him to do it. Fendall, by reason of his insolvency, and the consequent operation of law in transferring all his rights to the sheriff, could not recover in his own name, for his own use and benefit; but still, as courts of law will protect trusts and equitable rights, where they are made to appear, and as the transfer of the estate and

effects of an insolvent debtor, which takes place by the operation of law, does not transfer those things which the insolvent has merely as trustee, and as the name of Fendall might, therefore, still be used for the benefit of the trustees, it was competent and proper for the defendant below, to show that the trustees had not that equitable right which the law will protect.

IV. The fourth point seems to divide itself into two parts. 1st. Can money be taken upon a *fieri facias* in any case? *2d. Can the officer levy a *fieri facias* on money in his own hands which he has collected for the use of the debtor? [*123

1. It is a general principle, that all goods and chattels, the property of the debtor, may be taken in execution, and when an officer has it in his power to satisfy an execution to him directed, it is his duty to do it, and he is liable to the creditor, if he fails so to do. The money of a debtor is a part of his goods and chattels; it follows, that it is liable to an execution: there is no possible reason why it should not be so. It is said, there are some old authorities to the contrary, and that the reason given is, that money cannot be sold. (*Armistead* v. *Philpot*, Doug. 219.) But the reason of selling the goods taken on execution is, that money may be raised, and surely, the execution may as well be satisfied, by taking money itself, as by taking goods which must be sold to raise the money. In *Rex* v. *Webb*, 2 Show. 166, it is said, that by a *levari facias* "the sheriff may take ready money." And in this respect, there is no difference between a *levari facias* and a *fieri facias*. The law is expressly laid down in Dalt. Sheriff, 145, 543, that money may be taken on a *fieri facias*.

2. If money in the possession of the debtor may be taken, does the money being in the hands of the sheriff make any difference? In the case of *Rex* v. *Bird*, 2 Show. 87, "it was resolved by the court, on motion, that on a *fieri facias*, the sheriff may sell the goods, and if he pay the money to the party, it is good, and the court will allow of such return, because the plaintiff is thereby satisfied; although the writ run, "*ita quod habeat coram nobis*," &c. The same doctrine is held in *Hoe's Case*, 5 Co. 70 *a*.

If, then, the sheriff might have paid this money to Fendall, and had so paid it, he would have been bound to seize it again, instantly, to satisfy the execution of Deneale. If he might have done this, and if it was his duty to satisfy the execution of Deneale, where was the necessity of his *going through the ceremony of a payment of the money to Fendall. [*124 Here, it is stated by the officer, that he kept the money of Fendall distinct and separate from all other money, and that he levied the execution of Deneale on that identical money. This is, in substance, the same thing as if the money had been paid over to Fendall, and afterwards seized by the officer.

On the part of the *defendant* in error, it was said, in reply—1. As to the power of the court to give judgment at a term subsequent to the term next after the return of the execution, that although the act of assembly may be penal, and although the remedy may be in derogation of the common-law proceedings, yet, like all other statutes, it must have a reasonable construction. It could never be supposed to intend, that if the court did not give the judgment at the first term, the jurisdiction which they once had should cease.

2. The fact of Fendall's insolvency was not material to the question

before the court, because any person who was equitably entitled to the money, would not be precluded from his claim by this judgment; and by the act of assembly, no one but the creditor in whose name the judgment was rendered, is entitled to this summary process against the officer who refuses to pay the money levied upon the execution; and if any other person was in equity entitled to the money, he must still use the name of Fendall. The name of the nominal creditor must be used, or the remedy given by the statute would be wholly lost. He is the only person who could acknowledge a satisfaction upon record, and it ought not to be in the power of the officer, to allege an equitable claim in another person, to support his own improper act. (*Benson* v. *Flower*, Cro. Car. 166, 176.) In that case, the creditor had become bankrupt, after the money was made upon the execution, and before the return; and upon the return, the assignees contended, that they had the right to receive the money, but the court ordered it to be paid to the bankrupt, because the assignees were no parties to the suit, and the bankrupt was the only person who could acknowledge satisfaction upon the record; and the money being levied by the sheriff, before the
*125] assignment, was to be considered *as *in custodia legis*, and so not assignable. It was not the money of the bankrupt, at the time of the bankruptcy, because it did not become his money until he received it.

But if the insolvency of Fendall were material, still, the evidence adduced was not conclusive of the fact, nor even competent to prove it. It was not the best evidence which the nature of the case admitted. If the act of the magistrates was a simple act *en pais*, yet they themselves were the most competent witnesses to prove the fact, and their testimony would be better evidence than a paper purporting to be signed by W. Herbert and R. West, who do not style themselves magistrates, even if their handwriting should be proved. It does not appear, that they were dead, or that their testimony could not be obtained. And as to common report being evidence of their being magistrates, it certainly was not the best evidence, because their commissions, and the certificate of their taking the requisite oaths of office, were matters of record. Esp. N. P. 741. When the acts of magistrates are questioned, in the county in which they are said to be justices, common report may be sufficient, because all persons are supposed to be obliged to take notice of the officers of their county.[1] But in this case, they were alleged to be justices of a foreign county. The county of Fairfax is no part of the district of Columbia. But this was not a trial by jury, and it is very questionable, whether, in such a case, a rejection of admissible evidence can be assigned for error, with any more propriety than an admission of incompetent testimony.

3. It is contended, that Turner ought to have been permitted to show, that the trustees of Fendall had no right to receive the money. The answer to that is, that the court were not trying the right of the trustees, and could not look into their equitable claims. The court were sitting as a court of law, and not as a court of chancery. If the trustees had an equitable right, they were not precluded from asserting it, in a proper manner; if they had not, it did not affect the present question. If they had a legal right, they would not be barred by the judgment in this case. In whatever light the

[1] See Hibbs *v.* Blair, 14 Penn. St. 413; Kilpatrick *v.* Commonwealth, 31 Id. 198.

subject is viewed, it appears to be perfectly immaterial to the present question.

*4. But the fourth point includes the real merits of this controversy. Had the officer a right to satisfy the execution of *Deneale* v. *Young and Fendall*, out of the money in his hands levied by virtue of the execution of *Fendall* v. *Towers?* [*126

1st. Money cannot, in any case, be taken by the officer, upon an execution. It is a general principle, that on a *fieri facias*, the goods taken cannot be delivered to the creditor, in satisfaction of the debt, but must be sold; and the books give this as a reason why money cannot be taken: another reason may be, that money cannot be identified. But the law is different in Virginia from the English law, in respect to the proceedings on executions.

By the act of assembly respecting executions (Rev. Code, p. 309, § 12, 13), the officer, on all executions, having published notice of the time and place of sale, ten days before such sale, "shall proceed to sell, by auction, the goods and chattels so taken, or so much thereof as shall be sufficient to satisfy the judgment or decree, for the best price that can be got for the same." Here, it is evident, that the legislature did not contemplate the case of money itself being liable to be taken on execution; for they have made it the duty of the officer, in all cases of execution, to advertise and sell the goods taken. But the next section is still stronger, for it provides, "that if the owner of such goods and chattels shall give sufficient security to such sheriff or officer, to have the same goods and chattels forthcoming at the day of sale, it shall be lawful for the sheriff or officer to take a bond from such debtor and securities, payable to the creditor, reciting the service of such execution, and the amount of money or tobacco due thereon, and with condition to have the goods or chattels forthcoming at the day of sale appointed by such sheriff or officer, and shall, thereupon, suffer the said goods and chattels to remain in the possession, and at the risk of the debtor, until that time." It would be absurd, to suppose an officer obliged to appoint a day of sale for selling money; yet the giving of a forthcoming bond is a right which the debtor has by law; he is entitled to the delay on giving the security required. But the bond cannot be taken, unless a day of sale is appointed, because there can be no other day on which the *bond can become forfeited. Hence, then, it is clear, that the legislature went upon the ground that money could not be taken on an execution, or they would have excepted such a case from the general words of the law. But if money was liable to be taken on a *fieri facias*, it was a case which must have often happened, and could not have escaped the recollection of every member of the legislature. A strong argument arises from the want of adjudged cases on this point, and the total deficiency of precedent in practice, within our own knowledge. [*127

In the case of *Armistead* v. *Philpot*, cited from Doug. 219, Lord Mansfield confesses that there are old cases which say that money cannot be taken in execution, even though found in the defendant's scrutoire, and does not cite any cases to the contrary. It is true, he says the reason given is a quaint one, but he does not say it was not good. In that case, the money levied for the debtor was ordered to be paid by the sheriff to the creditor who had an execution, but there was no opposition, except as to the attor-

ney's fees on the first execution, which were compromised, and the court and bar agreed that the motion was of the first impression.

2d. But secondly, this was not the money of Fendall, until it was paid to him; and therefore, if the law be, as is contended, that money of the debtor may be taken in execution, yet the principle does not apply to this case. By the receipt of the money by the sheriff, Fendall did not become entitled to the individual pieces of coin. The remedy against the officer was not detinue or trover, but an action of debt, or on the case. The officer became the debtor of Fendall for so much money, and there is no reason why it should be more liable to an execution, in the hands of the serjeant, than in those of any other individual; it was neither the goods nor chattels of Fendall, but a mere *chose in action.* Fendall could not compel the officer to pay it before the return-day of the execution. If, in the meantime, the money had been lost or destroyed by robbery, fire, enemies, lightning or tempest, it must have been the loss of the officer, and not of Fendall. The
*128] command of the writ of *fieri facias*, according to its form as *prescribed by the act of assembly (Rev. Code, p. 306), is, "that you have the said sum of money before the judges of our said court, the ——— day of ———, to render to the said (creditor) of the debt and damages aforesaid." And the form of the return contained in the same act (p. 307), is, "by virtue of this writ to me directed, I have caused to be made the within-mentioned sum of ——— of the goods and chattels of the within-named A. B., which said sum of ———, before the judges within mentioned, at the day and place within contained, I have ready, as that writ requires."

The form of the writ and return is the best possible evidence of the duty of the officer. He is obliged to have the money in court, to be there paid to the creditors; and nothing will excuse him from an exact compliance with the command of the writ, but payment to the person named as creditor in the execution; and even this, not as a matter of right, but of favor. In the case of *Rex* v. *Bird*, cited from 2 Shower, 87, it is only said, that a payment to the party will be allowed by the court, and the reason given, is, because the plaintiff is thereby satisfied. "But this is only by permission of the court, and not by force of the law." 2 Bac. Abr. 352. Now, if the plaintiff is not satisfied, the reason fails, and consequently, the rule does not hold good. In 2 Bac. Abr. 352, it is said, "in strictness, the money is to be brought into court."

In the case of *Canon* v. *Smallwood*, 3 Lev. 203–4, it is said, that the payment of the money to the plaintiff was by permission of the court, not *ex rigore juris;* and the court often orders the sheriff to bring the money into court, and does not permit the plaintiff to have it; of which power the court would by this means be deprived.

In the case of *Benson* v. *Flower*, before cited from Cro. Car. 166, 176, it is expressly stated, that the money, at the time of the bankruptcy, being *in custodia legis*, that is, in the hands of the sheriff, was not the property of the bankrupt, and did not become so, until he received it. And in the case of *Armistead* v. *Philpot*, the money was first brought into court, and there ordered by the court to be paid to the second creditor, on affidavit that other goods and chattels could not be found. This case shows, as strongly as pos-
*129] sible, *the necessity of the sheriff's obeying the command of the writ, in bringing the money into court, instead of paying it over to the

creditor, out of court, because otherwise the act of the sheriff would deprive the court of the power of making such an order, and might, in many cases, deprive the debtor of the opportunity of obtaining speedy justice, on a motion to quash the execution for irregularity, or any other cause. Besides, the sheriff might go on and levy for one creditor after another, until the whole sum should be swallowed up in his commissions.

No case can be found, in which it has been permitted to be done, at the discretion of the sheriff, and yet it is a case which must happen in every day's practice if it could be done.

The CHIEF JUSTICE delivered the opinion of the court.—This was a motion made by the defendant in error against the now plaintiff, in the circuit court at Alexandria, under an act of the Virginia assembly, which declares that "if any sheriff, under-sheriff or other officer, shall make return on any writ of *fieri facias* or *venditioni exponas*, that he hath levied the debt, damages or costs, as in such writ is required, or any part thereof, and shall not immediately pay the same to the party to whom the same is payable, or his attorney," "it shall and may be lawful for the creditor at whose suit such writ of *fieri facias* or *venditioni exponas* shall issue, upon a motion made at the next succeeding general court, or other court from whence such writ shall issue, to demand judgment against such sheriff, officer or under-sheriff, or securities of such under-sheriff, for the money or tobacco mentioned in such writ, or so much as shall be returned levied on such writs," "with interest thereon at the rate of fifteen per centum per annum from the return-day of the execution, until the judgment shall be discharged; and such court is hereby authorized and required to give judgment accordingly, and to award execution thereon; provided, such sheriff or officer have ten days' previous notice of such motion." That Turner had been serjeant of the town of Alexandria, and had returned on a writ of *fieri facias*, issued on a judgment rendered by the court of hustings for that corporation, [*130
*in favor of Philip Richard Fendall, that he had made the debt, and had levied thereon a writ of *fieri facias* issued on a judgment obtained by William Deneale against Robert Young and Philip R. Fendall, merchants, trading under the firm of Robert Young & Co.

Before the next succeeding term of the court of hustings would have arrived, that court was abolished, and all its powers and duties transferred to the circuit court of the district of Columbia for the county of Alexandria. To the first term of the circuit court, notice was given, that a judgment would be moved for, and the notice was signed "Philip Richard Fendall, for the trustees of the said Philip Richard Fendall."

The defendant did not appear to the notice, and it was continued to the succeeding term, when the parties appeared, and the defendant, to prove that P. R. Fendall had taken the oath of an insolvent debtor, and was thereupon discharged, offered in evidence a warrant, signed William Herbert and R. West, discharging the said Philip R. Fendall out of custody, as an insolvent debtor, and further offered to prove the handwriting of the said Herbert and West, and also to prove, by oral testimony, that the said Philip Richard Fendall did take the oath of an insolvent debtor, before the said William Herbert and Roger West, and that they were, on the 21st of March 1800, the time of administering the said oath and granting the said certificate,

magistrates for the county of Fairfax. This testimony was rejected by the court, as not being legal evidence to establish the fact, and to this opinion an exception was taken.

The defendant also offered to show, that the trustees of Philip R. Fendall were not entitled to the money levied by virtue of the execution mentioned in the notice, which testimony was likewise rejected by the court; and to this opinion also, a bill of exceptions was taken.

The defendant then produced the execution issued in favor of *Deneale* v. *Robert Young and Philip R. Fendall*, merchants, trading under the firm of Robert Young & Co., with the return thereon, showing that it had
*131] *been levied on the money of Philip R. Fendall, then in his hands, and alleged, that the officer had a right and was bound to levy the said execution on the said money, but the court was of opinion, that he had not a right so to do, and to this opinion also, an exception was taken. The court then proceeded to render judgment, on the notice, for the plaintiff; to which judgment a writ of error has been sued out of this court: and the errors assigned and relied on are:

1st. That the court for the county of Alexandria was not empowered to render judgment in this case, at any term subsequent to that next succeeding the return of the execution.

2d. That the testimony offered to the court to prove the insolvency of Philip R. Fendall, and rejected, was legal testimony to prove the fact for which it was adduced, and ought, therefore, to have been admitted.

3d. That the defendant in the court below ought to have been permitted to prove the trustees of Philip R. Fendall not entitled to receive the money, to recover which the notice was given: and—

4th. That the officer had a right to levy the execution of Deneale on the money of Philip R. Fendall in his hands.

To support the first error assigned, the words of the act of assembly giving the motion have been relied on, as only empowering the court to render judgment in this summary mode, at the term next succeeding that to which the execution has been returned. That is, that although the plaintiff has brought his case rightly into court, yet if, from any cause whatever, the court shall be unable to render judgment at the first term, the suit must be dismissed, and the plaintiff must lose his remedy. The words must be very plain indeed, which will force a court to put upon them so irrational a construction as this. On recurrence to the act relied on, it does not appear, that a restriction so unusual and so unjust in itself, has been imposed. The words "such court," on fair construction, refer to the court in which
*132] *the motion has been made, and not to the term to which notice was given. The difficulty, therefore, which would have presented itself, if the notice had been given to a term subsequent to that next succeeding the return of the execution, has no existence in this case.[1]

In considering the second error assigned, the court was satisfied that the proceedings before magistrates, in cases of insolvent debtors, are entirely matters *en pais*, and are, therefore, to be proved by parol and other testimony. The evidence offered was certainly legal evidence to establish the fact for which it was adduced. The court, however, is not satisfied of its

[1] See Sheppard's Case, 65 Penn. St. 20; Stevenson *v.* Lawrence, 1 Brewst. 126.

sufficiency; but without determining that question, and without determining whether, in a case where there is no jury, a judgment ought, for the rejection of testimony which was admissible in law, to be reversed in any state of things, or the cause should be considered as if the testimony had been received, it is the opinion of all the judges, that the party is bound to show the relevancy of the fact intended to be established, to the case before the court.

In the present cause, the fact to be established was the insolvency of Fendall, which insolvency is not shown to have been material in the case, since nothing appears in the record, to induce an opinion that the proceeding could have been in any other name than his. Although, then, the testimony rejected was proper and legal evidence towards establishing the fact, yet the court committed no error in rejecting that testimony, for which their judgment ought to be reversed, because the fact does not appear to have been relevant to the cause under their consideration.[1]

On the third error assigned, the opinion of the court is, that whoever might in equity be entitled to the money, or to the use of Fendall's name, the notice, as given, could only be sustained, by showing the legal right of Fendall to recover. A legal right in the trustees would have defeated the action, for it is instituted in the name of Philip R. Fendall, although it may be for the benefit of his trustees, and neither the reversal or affirmance of this judgment, would affect the right of the trustees to proceed in their own names.

*The fourth point is one of considerable importance and difficulty. In discussing it, two questions have been made at the bar. 1st. Can an execution be levied on money? 2d. Can it be levied on money in the hands of the officer? [*133

The principle that an execution cannot be levied on money has been argued to be maintainable, under the authority of adjudged cases, and under the letter and meaning of the act of the Virginia legislature on the subject of executions. Yet no such adjudged case has been adduced. Lord MANSFIELD, in the case cited from Doug. 219, said, "he believed there were old cases, where it had been held that the sheriff could not take money in execution, even though found in the defendant's scrutoire, and that a quaint reason was given for it, viz., that money could not be sold;" and it is believed, that there may be such cases, but certainly there are also cases in which the contrary doctrine has been held. In 2 Show. 166, it is laid down expressly, that money may be taken on a *levari facias*, and no difference in this respect is perceived between the two sorts of execution. In Dalton's Sheriff, 145, it is also stated in terms, that money may be taken in execution on a *fieri facias*. The court can perceive no reason, in the nature of the thing, why an execution should not be levied on money. That given in the books, viz., that it cannot be sold, seems not to be a good one. The reason

[1] Blackwell *v.* Patton, 7 Cr. 471; Campbell *v.* Pratt, 2 Pet. 354; Greenleaf *v.* Borth, 5 Id. 132; Boardman *v.* Reed, 6 Id. 328; Phillips *v.* Preston, 5 How. 278; McMechen *v.* Webb, 6 Id. 292; Randon *v.* Toby, 11 Id. 493; Thomas *v.* Lawson, 21 Id. 343; Chandler *v.* Van Roeder, 24 Id. 225; Thompson *v.* Roberts, Id. 233; The Water Witch, 1 Black 494; Blackburn *v* Crawford, 3 Wall. 175; Dewry *v.* Cray, 10 Id. 263; Brobst *v.* Brock, Id. 519; Gregg *v.* Moss, 14 Id. 564; Grand Chute *v.* Winegar, 15 Id. 355; New Orleans Ins. Co. *v.* Piaggio, 16 Id. 378; Decatur Bank *v.* St. Louis Bank, 21 Id. 294; Chambers County *v.* Clews, Id. 317.

of a sale is, that money only will satisfy the execution, and if anything else be taken, it must be turned into money; but surely, that the means of converting the thing into money need not be used, can be no adequate reason for refusing to take the very article to produce which is the sole object of the execution.

The act of assembly concerning executions has also been relied on as showing that only such articles can be taken as may be sold. But the provisions of the act can only be considered as regulating the sale of such arti-
*134] cles as in their nature require to be sold, and not as exempting *from execution such property as need not be sold. The object is, not the sale, but money, and if the money can be made, without a sale, it cannot be unlawful to do so. But in the case of an execution for tobacco, money may be sold, and therefore, may be executed, and it would be strange, if, by an execution ordering a sheriff to make money, money could not be taken, and yet might be taken on an execution ordering him to make some other article.

It is the opinion of the court, that money may be taken in execution, if in the possession of the defendant; but the question of greater difficulty is, whether it may be taken by the officer before it has been paid to the person entitled to receive it?

The general rule of law is, that all chattels, the property of the debtor, may be taken in execution, and whenever an officer has it in his power to satisfy an execution in his hands, it is his duty to do so, and if he omits to perform his duty, he must be accountable to those who may be injured by the omission. But has money, not yet paid to the creditor, become his property? That is, although his title to the sum levied may be complete, has he the actual legal ownership of the specific pieces of coin which the officer may have received? On principle, the court conceives that he has not this ownership. The judgment to be satisfied is for a certain sum, not for the specific pieces which constitute that sum, and the claim of the creditor on the sheriff seems to be of the same nature with his claim under the judgment, and one which may be satisfied in the same manner. No right would exist to pursue the specific pieces received by the officer, although they should even have an ear-mark; and an action of debt, not of detinue, may be brought against him, if he fails to pay over the sum received, or converts it to his own use. It seems to the court, that a right to specific pieces of money can only be acquired, by obtaining the legal or actual possession of them, and until this is done, there can be no such absolute ownership, as that an execution may be levied on them. A right to a sum of money in the hands of a sheriff, can no more be seized, than a right to a sum of money in the hands of any other person, and however wise or just it may be, to give such a remedy, the law does not ap-
*135] pear yet to have given it. The *dictum* of Judge BULLER, *in the case in *The King* v. *Egginton*, 1 T. R. 370, proves that the mere possession of money, as a trustee, does not give to the possessor, before a conversion, such a property in it, as to render it liable for his debts; but does not manifest an opinion that the person for whose use it was received, but to whose possession it has not come, is to be considered as the legal owner of the specific pieces themselves, so that they have become, in contemplation of law, his goods and chattels. Indeed, it is observable in that case, that if the money had been due to the parish, at the time the bankruptcy of the defendant, who was an overseer of the poor, took place, the parish would have

been in no better condition than other creditors, and would have possessed no exclusive property in the money claimed. Although the *dictum* of Judge BULLER may appear to militate somewhat against this position, yet the principle of the decision is in its favor, for the judgment of the court is declared to be founded on the fact, that the debt was not a debt, until after the bankruptcy.

The case cited from Cro. Car. 166, 176 (*Benson* v. *Flower*), expressly states the property of the money while in the hands of the sheriff, not to be in the creditor; and although the inference of the court from that principle does not appear to have been warranted, yet the principle itself is believed to be certainly correct.

In the case of *Armistead* v. *Philpot*, Doug. 219, the court directed the money of the debtor to be paid to the creditor, whose execution was in the hands of the sheriff holding that money also; but this direction would have been unnecessary, if the sheriff had possessed a previous right to make the appropriation.

It is stated in Barnes's Notes, 214, to have been adjudged in Trinity term, 32 & 33 of Geo. II., in the case of *Staple* v. *Bird*, where a sheriff had levied an execution on money in his hands, that he should, notwithstanding this execution, pay the money to the person entitled to the benefit of the first judgment. It is true, that in that case, the person in whose name the judgment was rendered, was not entitled to the money received under it, but the case is not stated to have been decided on that principle; and *the very frequency of such a state of things, furnishes an argument of no [*136 inconsiderable weight against the right to levy an execution on money so circumstanced. The equitable right of persons, whose names do not appear in the execution, ought to be preserved; and considerable injustice might result from imposing on the sheriff the duty of deciding at his peril on such rights.

Considering the case, then, either on principle or authority, it appears to the court, that the creditor has not such a legal property in the specific pieces of money levied for him, and in the hands of the sheriff, as to authorize that officer to take those pieces in execution, as the goods and chattels of such creditor.

But the money becomes liable to such execution, the instant it shall be paid into the hands of the creditor; and it then becomes the duty of the officer to seize it. It appears unreasonable, that the law should direct a payment under such circumstances. If the money shall be seized, the instant of its being received by the creditor, then the payment to him seems a vain and useless ceremony which might well be dispensed with; and if the money should, by being so paid, be withdrawn from the power of the officer, then his own act would put beyond his reach, property rendered by law liable to his execution, and which, of consequence, the law made it his duty to seize. The absurdity involved in such a construction led the court to a further consideration of the subject.

The mandate of a writ of *fieri facias*, as originally formed, is, that the officer have the money in court on the return-day, there to be paid to the creditor. Forms of writs furnish strong evidence of what was law when they were devised, and of the duty of the officer, to whom they are directed. Originally, it was regularly the duty of the officer, to have the money in court, and it has been held, that not even payment to the creditor himself, could

excuse the non-performance of this duty. The rigor of this rule has been considerably relaxed, but the form of the writ, as directed by a late act of the legislature of Virginia, yet is, that the money shall be in court on the return-day, and there appears no excuse for omitting this duty, unless *137] *it shall have been paid to the creditor. The sheriff may certainly make such payment out of court, if no circumstance occurs which legally obstructs or opposes it, such as an injunction from the court of chancery, in which case, by the law of Virginia, the money must be retained; or an execution against the goods and chattels of the person to whom the money in his hands shall be payable. In the latter case, it seems to the court, still to be the duty of the sheriff to obey the order of the writ, and to bring the money into court, there to be disposed of as the court may direct. This was done in the case of *Armistead* v. *Philpot*, and in that case, the court directed the money to be paid in satisfaction of the second execution. This ought to be done, whenever the legal and equitable right to the money is in the person whose goods and chattels are liable to such execution.

In the case of *Turner* v. *Fendall*, the sheriff not having brought the money into court, but having levied an execution on it, while in his hands, has not sufficiently justified the non-payment of it to the creditor; and therefore, the court committed no error in rendering judgment against him, on the motion of that creditor. If the payment of the damages should be against equity, that was not a subject for the consideration of the court of law which rendered the judgment.

Judgment affirmed.[1]

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[1] He cannot levy on money in his own hands, arising from an execution in favor of the defendant. Baker *v.* Kenworthy, 41 N. Y. 215; nor will the court order it to be paid to the plaintiff in the second execution. Williams *v.* Rogers, 5 Johns. 163. But, it seems, that the sheriff may levy on a surplus in his hands, arising from an execution *against* the debtor. Harris's Appeal, 29 Penn. St. 240. See Means *v.* Vance, 1 Bailey 39.

FEBRUARY TERM, 1803.

WILLIAM MARBURY *v.* JAMES MADISON, Secretary of State of the United States.

Constitutional law.—Jurisdiction.—Mandamus.—Appointment and removal of officer.—Commission.

The supreme court of the United States has not power to issue a *mandamus* to the secretary of state of the United States, it being an exercise of original jurisdiction not warranted by the constitution.

Congress have not power to give original jurisdiction to the supreme court, in other cases than those described in the constitution.

An act of congress, repugnant to the constitution, cannot become a law.

The courts of the United States are bound to take notice of the constitution.

It seems, that a commission is not necessary to the appointment of an officer by the executive.

A commission is only evidence of an appointment.

Delivery is not necessary to the validity of letters-patent.

The president cannot authorize the secretary of state to omit the performance of those duties which are enjoined by law.

A justice of peace, in the District of Columbia, is not removable at the will of the president.

When a commission for an officer, not holding his office at the will of the president, is by him signed and transmitted to the secretary of state, to be sealed and recorded, it is irrevocable; the appointment is complete.

A *mandamus* is the proper remedy, to compel the secretary of state to deliver a commission to which the party is entitled.

AT the last term, viz., December term 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe and William Harper, by their counsel, Charles Lee, Esq., late attorney-general of the United States, *severally moved the court for a rule on James Madison, secretary of state [*138
of the United States, to show cause why a *mandamus* should not issue, commanding him to cause to be delivered to them, respectively, their several commissions as justices of the peace in the district of Columbia.

This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate, for their advice and consent, to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president, appointing them justices, &c., and that the seal of the United States was in due form affixed to the said commissions, by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison, as secretary of state of the United States, at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory explanation has not been given, in answer to that inquiry, either by the secretary of state, or any officer in the department of state; that application has been made to the secretary of the senate, for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate. Whereupon, a

rule was laid, to show cause on the fourth day of this term; this rule having been duly served—

Mr. Lee, in support of the rule, observed, that it was important to know on what ground a justice of peace in the district of Columbia holds his office, and what proceedings are necessary to constitute an appointment to an office, not held at the will of the president. However notorious the facts are, upon the suggestion of which this rule has been laid, yet the applicants have been much embarrassed in obtaining evidence of them. Reasonable information has been denied at the office of the department of state. Although a respectful memorial has been made to the senate, praying them to suffer their secretary to give extracts from their executive journals
*139] respecting *the nomination of the applicants to the senate, and of their advice and consent to the appointments, yet their request has been denied, and their petition rejected. They have, therefore, been compelled to summon witnesses to attend in court, whose voluntary affidavits they could not obtain. Mr. Lee here read the affidavit of Dennis Ramsay, and the printed journals of the senate of 31st January 1803, respecting the refusal of the senate to suffer their secretary to give the information requested. He then called Jacob Wagner and Daniel Brent, who had been summoned to attend the court, and who had, as it is understood, declined giving a voluntary affidavit. They objected to being sworn, alleging that they were clerks in the department of state, and not bound to disclose any facts relating to the business or transactions in the office.

Mr. Lee observed, that to show the propriety of examining these witnesses, he would make a few remarks on the nature of the office of secretary of state. His duties are of two kinds, and he exercises his functions in two distinct capacities; as a public ministerial officer of the United States, and as agent of the president. In the first, his duty is to the United states or its citizens; in the other, his duty is to the president; in the one, he is an independent and an accountable officer; in the other, he is dependent upon the president, is his agent, and accountable to him alone. In the former capacity, he is compellable by *mandamus* to do his duty; in the latter, he is not. This distinction is clearly pointed out by the two acts of congress upon this subject. The first was passed 27th July 1789 (1 U. S. Stat. 28), entitled "an act for establishing an executive department, to be denominated the department of foreign affairs." The first section ascertains the duties of the secretary, so far as he is concerned as a mere executive agent. It is in these words, "there shall be an executive department, to be denominated the department of foreign affairs, and that there shall be a principal officer therein, to be called the secretary of the department of foreign affairs, who shall perform and execute such duties as shall, from time to time, be enjoined on, or intrusted to him by the president of the United States, agreeable to the constitution, relative to correspondences,
*140] commissions *or instructions to or with public ministers or consuls from the United States; or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs as the president of the United States shall assign to the said department; and furthermore, that the said principal officer shall con-

duct the business of the said department in such manner as the president of the United States shall, from time to time, order or instruct."

The second section provides for the appointment of a chief clerk; the third section prescribes the oath to be taken, which is simply, "well and faithfully to execute the trust committed to him;" and the fourth and last section gives him the custody of the books and papers of the department of foreign affairs under the old congress. Respecting the powers given, and the duties imposed, by this act, no *mandamus* will lie: the secretary is responsible only to the president.

The other act of congress respecting this department was passed at the same session on the 15th September 1789 (1 U. S. Stat. 68), and is entitled "An act to provide for the safe-keeping of the acts, records and seal of the United States, and for other purposes." The first section changes the name of the department and of the secretary, calling the one the department, and the other the secretary, of state. The second section assigns new duties to the secretary, in the performance of which, it is evident, from their nature, he cannot be lawfully controlled by the president, and for the non-performance of which, he is not more responsible to the president than to any other citizen of the United States. It provides, that he shall receive from the president all bills, orders, resolutions and votes of the senate and house of representatives, which shall have been approved and signed by him; and shall cause them to be published, and printed copies to be delivered to the senators and representatives, and to the executives of the several states; and makes it his duty carefully to preserve the originals; and to cause them to be recorded in books to be provided for that purpose. The third section provides a seal of the United States. The fourth makes it his duty to keep the said seal, and to make out and record, and to affix the seal of the United States to all civil commissions, after they *shall have [*141
been signed by the president. The fifth section provides for a seal of office, and that all copies of records and papers in his office, authenticated under that seal, shall be as good evidence as the originals. The sixth section establishes fees for copies, &c. The seventh and last section gives him the custody of the papers of the office of the secretary of the old congress. Most of the duties assigned by this act are of a public nature, and the secretary is bound to perform them, without the control of any person. The president has no right to prevent him from receiving the bills, orders, resolutions and votes of the legislature, or from publishing and distributing them, or from preserving or recording them. While the secretary remains in office, the president cannot take from his custody the seal of the United States, nor prevent him from recording and affixing the seal to civil commissions of such officers as hold not their offices at the will of the president, after he has signed them and delivered them to the secretary for that purpose. By other laws, he is to make out and record in his office, patents for useful discoveries, and patents of lands granted under the authority of the United States. In the performance of all these duties, he is a public ministerial officer of the United States. And the duties being enjoined upon him by law, he is, in executing them, uncontrollable by the president; and if he neglects or refuses to perform them, he may be compelled by *mandamus*, in the same manner as other persons holding offices under the authority of the United States.

The president is no party to this case. The secretary is called upon to perform a duty over which the president has no control, and in regard to which he has no dispensing power, and for the neglect of which he is in no manner responsible. The secretary alone is the person to whom they are entrusted, and he alone is answerable for their due performance. The secretary of state, therefore, being in the same situation, as to these duties, as every other ministerial officer of the United States, and equally liable to be compelled to perform them, is also bound by the same rules of evidence. These duties are not of a confidential nature, but are of a public kind, and his clerks can have no exclusive privileges. There are, undoubtedly, facts, which may come to their knowledge by means of their connection with the
*142] secretary of state, respecting which *they cannot be bound to answer. Such are the facts concerning foreign correspondences, and confidential communications between the head of the department and the president. This, however, can be no objection to their being sworn, but may be a ground of objection to any particular question. Suppose, I claim title to land under a patent from the United States: I demand a copy of it from the secretary of state: he refuses. Surely, he may be compelled by *mandamus* to give it. But in order to obtain a *mandamus*, I must show that the patent is recorded in his office; my case would be hard indeed, if I could not call upon the clerks in the office to give evidence of that fact. Again, suppose a private act of congress had passed for my benefit: it becomes necessary for me to have the use of that act in a court of law: I apply for a copy: I am refused. Shall I not be permitted, on a motion for a *mandamus*, to call upon the clerks in the office to prove that such an act is among the rolls of the office, or that it is duly recorded? Surely, it cannot be contended, that although the laws are to be recorded, yet no access is to be had to the records, and no benefit to result therefrom.

The Court ordered the witnesses to be sworn, and their answers taken in writing, but informed them, that when the questions were asked, they might state their objections to answering each particular question, if they had any.

Mr. Wagner being examined upon interrogatories, testified, that at this distance of time he could not recollect whether he had seen any commission in the office, constituting the applicants, or either of them, justices of the peace. That Mr. Marbury and Mr. Ramsay called on the secretary of state respecting their commissions. That the secretary referred them to him; he took them into another room, and mentioned to them, that two of the commissions had been signed, but the other had not. That he did not know that fact of his own knowledge, but by the information of others. Mr. Wagner declined answering the question, "who gave him that information;" and the court decided, that he was not bound to answer it, because it was not pertinent to this cause. He further testified, that some of the commissions of the justices, but he believed not all, were recorded. He did not
*143] know whether the commissions of the applicants were *recorded, as he had not had recourse to the book, for more than twelve months past.

Mr. Daniel Brent testified, that he did not remember certainly the names of any of the persons in the commissions of justices of the peace, signed by

Mr. Adams; but he believed, and was almost certain, that Mr. Marbury's and Col. Hooe's commissions were made out, and that Mr. Ramsay's was not; that he made out the list of names, by which the clerk who filled up the commissions was guided; he believed, that the name of Mr. Ramsay was pretermitted by mistake, but to the best of his knowledge, it contained the names of the other two; he believed, none of the commissions for justices of the peace, signed by Mr. Adams, were recorded. After the commissions for justices of the peace were made out, he carried them to Mr. Adams, for his signature. After being signed, he carried them back to the secretary's office, where the seal of the United States was affixed to them. That commissions are not usually delivered out of the office, before they are recorded; but sometimes they are, and a note of them only is taken, and they are recorded afterwards. He believed, none of those commissions of justices were ever sent out, or delivered to the persons for whom they were intended; he did not know what became of them, nor did he know that they are now in the office of the secretary of state.

Mr. Lincoln, attorney-general, having been summoned, and now called, objected to answering. He requested that the questions might be put in writing, and that he might afterwards have time to determine whether he would answer. On the one hand, he respected the jurisdiction of this court, and on the other, he felt himself bound to maintain the rights of the executive. He was acting as secretary of state, at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as secretary of state.

The questions being written, were then read and handed to him. He repeated the ideas he had before suggested, and said his objections were of two kinds. *1st. He did not think himself bound to disclose his official transactions while acting as secretary of state; and 2d. He [*144 ought not to be compelled to answer anything which might tend to criminate himself.

Mr. Lee, in reply, repeated the substance of the observations he had before made in answer to the objections of Mr. Wagner and Mr. Brent. He stated, that the duties of a secretary of state were two-fold. In discharging one part of those duties, he acted as a public ministerial officer of the United States, totally independent of the president, and that as to any facts which came officially to his knowledge, while acting in this capacity, he was as much bound to answer as a marshal, a collector or any other ministerial officer. But that in the discharge of the other part of his duties, he did not act as a public ministerial officer, but in the capacity of an agent of the president, bound to obey his orders, and accountable to him for his conduct. And that as to any facts which came officially to his knowledge, in the discharge of this part of his duties, he was not bound to answer. He agreed that Mr. Lincoln was not bound to disclose anything which might tend to criminate himself.

Mr. Lincoln thought it was going a great way, to say that every secretary of state should, at all times, be liable to be called upon to appear as a

witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider of the subject.

THE COURT said, that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it; and if he thought that anything was communicated to him in confidence, he was not bound to disclose it; nor was he obliged to state anything which would criminate himself; but that the fact whether such commissions had been in the office or
*145] not, could not be a confidential fact; it *is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections.

Mr. Lincoln then prayed time until the next day, to consider of his answers, under this opinion of the court.

THE COURT granted it, and postponed further consideration of the cause until the next day.

At the opening of the court, on the next morning, *Mr. Lincoln* said, he had no objection to answering the questions proposed, excepting the last, which he did not think himself obliged to answer fully. The question was, what had been done with the commissions? He had no hesitation in saying, that he did not know that they ever came to the possession of Mr. Madison, nor did he know that they were in the office, when Mr. Madison took possession of it. He prayed the opinion of the court, whether he was obliged to disclose what had been done with the commissions.

THE COURT were of opinion, that he was not bound to say what had become of them; if they never came to the possession of Mr. Madison, it was immaterial to the present cause, what had been done with them by others.

To the other questions, he answered, that he had seen commissions of justices of the peace of the district of Columbia, signed by Mr. Adams, and sealed with the seal of the United States. He did not recollect, whether any of them constituted Mr. Marbury, Col. Hooe or Col. Ramsay, justices of the peace; there were, when he went into the office, several commissions for justices of peace of the district made out; but he was furnished with a list of names to be put into a general commission, which was done, and was considered as superseding the particular commissions; and the individuals whose names were contained in this general commission, were informed of their being thus appointed. He did not know that any one of the commissions was ever sent to the person for whom it was made out, and did not believe that any one had been sent.

*146] *Mr. Lee* then read the affidavit of James Marshall, who had been also summoned as a witness. It stated, that on the 4th of March 1801, having been informed by some person from Alexandria, that there was reason to apprehend riotous proceedings in that town, on that night, he was induced to return immediately home, and to call at the office of the secretary of state, for the commissions of the justices of the peace; that as

many as twelve, as he believed, commissions of justices for that county were delivered to him, for which he gave a receipt, which he left in the office. That finding he could not conveniently carry the whole, he returned several of them, and struck a pen through the names of those, in the receipt, which he returned. Among the commissions so returned, according to the best of his knowledge and belief, was one for Col. Hooe, and one for William Harper.

Mr. Lee then observed, that having proved the existence of the commissions, he should confine such further remarks as he had to make in support of the rule, to three questions: 1st. Whether the supreme court can award the writ of *mandamus* in any case? 2d. Whether it will lie to a secretary of state, in any case whatever? 3d. Whether, in the present case, the court may award a *mandamus* to James Madison, secretary of state?

1. The argument upon the first question is derived not only from the principles and practice of that country from whence we derive many of the principles of our political institutions, but from the constitution and laws of the United States. This is the *supreme* court, and by reason of its supremacy, must have the superintendence of the inferior tribunals and officers, whether judicial or ministerial. In this respect, there is no difference between a judicial and a ministerial officer. From this principle alone, the court of king's bench in England derives the power of issuing the writs of *mandamus* and prohibition. 3 Inst. 70, 71. *Shall it be said, that [*147 the court of king's bench has this power, in consequence of its being the supreme court of judicature, and shall we deny it to this court, which the constitution makes the *supreme* court? It is a beneficial, and a necessary power; and it can never be applied, where there is another adequate, specific, legal remedy.

The second section of the third article of the constitution gives this court appellate jurisdiction, in all cases in law and equity arising under the constitution and laws of the United States (except the cases in which it has original jurisdiction), with such exceptions, and under such regulations, as congress shall make. The term "appellate jurisdiction" is to be taken in its largest sense, and implies in its nature the right of superintending the inferior tribunals. Proceedings in nature of appeals are of various kinds, according to the subject matter. 3 Bl. Com. 402. It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress. 3 Bl. Com. 109. There are some injuries which can only be redressed by a writ of *mandamus*, and others by a writ of prohibition. There must, then, be a jurisdiction somewhere, competent to issue that kind of process. Where are we to look for it, but in that court which the constitution and laws have made supreme, and to which they have given appellate jurisdiction? Blackstone, vol. 3, p. 110, says, that a writ of *mandamus* is "a command, issuing in the king's name, from the court of king's bench, and directed to any person, corporation or inferior court, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice. It is a writ of a most extensively remedial nature, and issues in all cases

where the party has a right to have anything done, and has no other specific means of compelling its performance."

In the Federalist, vol. 2, p. 239, it is said, that the word "appellate" is not to be taken in its technical sense, as used in reference to appeals in the course of the civil law, but in its broadest sense, in which it denotes noth-
*148] ing more than the power of one tribunal to review the proceedings *of another, either as to law or fact, or both. The writ of *mandamus* is in the nature of an appeal as to fact as well as law. It is competent for congress to prescribe the forms of process by which the supreme court shall exercise its appellate jurisdiction, and they may well declare a *mandamus* to be one. But the power does not depend upon implication alone: it has been recognised by legislative provision, as well as in judicial decisions in this court. Congress, by a law passed at the very first session after the adoption of the constitution (1 U. S. Stat. 80, § 13), have expressly given the supreme court the power of issuing writs of *mandamus*. The words are, "the supreme court shall also have appellate jurisdiction from the circuit courts, and courts of the several states, in the cases hereinafter specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution. 2 Dall. 298.

The court has entertained jurisdiction on a *mandamus* in one case, and on a prohibition in another. In the case of *The United States* v. *Judge Lawrence*, 3 Dall. 42, a *mandamus* was moved for by the attorney-general, at the instance of the French minister, to compel Judge Lawrence to issue a warrant against Captain Barre, commander of the French ship of war Le Perdrix, grounded on an article of the consular convention with France. In this case, the power of the court to issue writs of *mandamus* was taken for granted, in the arguments of counsel on both sides, and seems to have been so considered by the court. The *mandamus* was refused, because the case in which it was required was not a proper one to support the motion. In the case of *The United States* v. *Judge Peters*, a writ of prohibition was granted. 3 Dall. 121, 129. This was the celebrated case of the French
*149] *corvette, the Cassius, which afterwards became a subject of diplomatic controversy between the two nations. On the 5th February 1794, a motion was made to the supreme court, in behalf of one John Chandler, a citizen of Connecticut, for a *mandamus* to the secretary at war, commanding him to place Chandler on the invalid pension list. After argument, the court refused the *mandamus*, because the two acts of congress respecting invalids did not support the case on which the applicant grounded his motion. The case of *The United States* v. *Hopkins*, at February term 1794, was a motion for a *mandamus* to Hopkins, loan-officer for the district of Virginia, to command him to admit a person to subscribe to the United States' loan. Upon argument, the *mandamus* was refused, because the applicant had not sufficiently established his title. In none of these cases, nor in any other, was the power of this court to issue a *mandamus* ever denied. Hence, it appears, there has been a legislative construction of the constitu-

tion upon this point, and a judicial practice under it, for the whole time since the formation of the government.

2. The second point is, can a *mandamus* go to a secretary of state, in any case? It certainly cannot in all cases; nor to the president, in any case. It may not be proper to mention this position; but I am compelled to do it. An idea has gone forth, that a *mandamus* to a secretary of state, is equivalent to a *mandamus* to the president of the United States. I declare it to be my opinion, grounded on a comprehensive view of the subject, that the president is not amenable to any court of judicature, for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution. The secretary of state acts, as before observed, in two capacities. As the agent of the president, he is not liable to a *mandamus;* but as a recorder of the laws of the United States, as keeper of the great seal, as recorder of deeds of land, of letters-patent, and of commissions, &c., he is a ministerial officer of the people of the United States. As such, he has duties assigned him by law, in the execution of which he is independent of all control but that of the laws. It is true, he is a high officer, but he is not above law. It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer, having public duties to perform, *should be above the compulsion of the law, in the exercise of those duties. As a ministerial officer, he [*150 is compellable to do his duty, and if he refuses, is liable to indictment. A prosecution of this kind might be the means of punishing the officer, but a specific civil remedy to the injured party can only be obtained by a writ of *mandamus*. If a *mandamus* can be awarded by this court, in any case, it may issue to a secretary of state: for the act of congress expressly gives the power to award it, "in cases warranted by the principles and usages of law, to any persons holding offices under the authority of the United States."

Many cases may be supposed, in which a secretary of state ought to be compelled to perform his duty specifically. By the 5th and 6th sections of the act of congress (1 U. S. Stat. 69), copies under seal of the office of the department of state are made evidence in courts of law, and fees are given for making them out. The intention of the law must have been, that every person needing a copy should be entitled to it. Suppose, the secretary refuses to give a copy, ought he not to be compelled? Suppose, I am entitled to a patent for lands purchased of the United States; it is made out and signed by the president, who gives a warrant to the secretary to affix the great seal to the patent; he refuses to do it; shall I not have a *mandamus* to compel him? Suppose, the seal is affixed, but the secretary refuses to record it: shall he not be compelled? Suppose, it recorded, and he refuses to deliver it; shall I have no remedy? In this respect, there is no difference between a patent for lands, and the commission of a judicial officer. The duty of the secretary is precisely the same.

Judge PATERSON inquired of *Mr. Lee*, whether he understood it to be the duty of the secretary, to deliver a commission, unless ordered so to do by the president?

Mr. Lee replied, that after the president has signed a commission for an office, not held at his will, and it comes to the secretary to be sealed, the president has done with it, and nothing remains, but that the secretary per-

form those ministerial acts which the law imposes upon him. It imme-
*151] diately becomes his duty to seal, record and deliver *it, on demand. In such a case, the appointment becomes complete, by the signing and sealing; and the secretary does wrong, if he withholds the commission.

3. The third point is, whether, in the present case, a writ of *mandamus* ought to be awarded to James Madison, secretary of state?

The justices of the peace in the district of Columbia are judicial officers, and hold their office for five years. The office is established by the act of congress passed the 27th of February 1801, entitled "An act concerning the district of Columbia" (1 U. S. Stat. 107, § 11, 14). They are authorized to hold courts, and have cognisance of personal demands of the value of twenty dollars. The act of May 3d, 1802 (1 U. S. Stat. 194, § 4), considers them as judicial officers, and provides the mode in which execution shall issue upon their judgments. They hold their offices independent of the will of the president. The appointment of such an officer is complete, when the president has nominated him to the senate, and the senate have advised and consented, and the president has signed the commission, and delivered it to the secretary to be sealed. The president has then done with it; it becomes irrevocable. An appointment of a judge, once completed, is made for ever: he holds under the constitution. The requisites to be performed by the secretary are ministerial, ascertained by law, and he has no discretion, but must perform them; there is no dispensing power. In contemplation of law, they are as if done.

These justices exercise part of the judicial power of the United States: they ought, therefore, to be independent. Mr. Lee begged leave again to refer to the Federalist, vol. 2, Nos. 78 and 79, as containing a correct view of this subject. They contained observations and ideas which he wished might be generally read and understood. They contained the principles upon which this branch of our constitution was constructed. It is important to the citizens of this district, that the justices should be independent; almost all the authority immediately exercised over them, is that of the justices. They wish to know whether the justices of this district are to hold their
*152] commissions at the will of a secretary of state. *This cause may seem trivial at first view, but it is important in principle. It is for this reason that this court is now troubled with it. The emoluments or the dignity of the office, are no objects with the applicants. They conceive themselves to be duly appointed justices of the peace, and they believe it to be their duty to maintain the rights of their office, and not to suffer them to be violated by the hand of power. The citizens of this district have their fears excited, by every stretch of power, by a person so high in office as the secretary of state.

It only remains now to consider, whether a *mandamus*, to compel the delivery of a commission by a public ministerial officer, is one of "the cases warranted by the principles and usages of law." It is the general principle of law, that a *mandamus* lies, if there be no other adequate, specific legal remedy. *King* v. *Barker et al.*, 3 Burr. 1267. This seems to be the result of a view of all the cases on the subject. The case of *Rex* v. *Borough of Midhurst*, 1 Wils. 283, was a *mandamus* to compel the presentment of certain conveyances to purchasers of burgage tenements, whereby they would be entitled to vote for members of parliament. In the case of *Rex* v. *Dr.*

Hay, 1 W. Bl. 640, a *mandamus* issued to admit one to administer an estate.

A *mandamus* gives no right, but only puts the party in a way to try his right. Sid. 286. It lies to compel a ministerial act which concerns the public (1 Wils. 283; 1 Bl. Rep. 640); although there be a more tedious remedy; 2 Str. 1082; 4 Burr. 2188; 2 Ibid. 1045. So, if there be a legal right, and a remedy in equity. 3 T. R. 652. A *mandamus* lies to obtain admission into a trading company. *Rex* v. *Turkey Company*, 2 Burr. 1000; Carth. 448; 5 Mod. 402. So, it lies to put the corporate seal to an instrument. 4 T. R. 699. To commissioners of the excise, to grant a permit. 2 Ibid. 381. To admit to an office. 3 Ibid. 575. To deliver papers which concern the public. 2 Sid. 31. A *mandamus* will sometimes lie in a *doubtful [*153
case (1 Lev. 113), to be further considered on the return. 2 Ibid. 14; 1 Sid. 169. It lies to be admitted a member of a church. 3 Burr. 1265, 1043. The process is as ancient as the time of Edw. II. 1 Lev. 23.

The first writ of *mandamus* is not peremptory, it only commands the officer to do the thing, or show cause why he should not do it. If the cause returned be sufficient, there is an end of the proceeding; if not, a peremptory *mandamus* is then awarded. It is said to be a writ of discretion. But the discretion of a court always means a sound, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court are bound to grant it: they can refuse justice to no man.

On a subsequent day, and before the court had given an opinion, *Mr. Lee* read the affidavit of Hazen Kimball, who had been a clerk in the office of the secretary of state, and had been to a distant part of the United States, but whose return was not known to the applicant until after the argument of the case.

It stated, that on the 3d of March 1801, he was a clerk in the department of state. That there were in the office, on that day, commissions made out and signed by the president, appointing William Marbury a justice of peace for the county of Washington; and Robert T. Hooe, a justice of the peace for the county of Alexandria, in the district of Columbia.

Afterwards, on the 24th February, the following opinion of the court was delivered by the Chief Justice:

Opinion of the Court.—At the last term, on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to show cause why a *mandamus* *should not issue, [*154
directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shown, and the present motion is for a *mandamus*. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded. These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided: 1st. Has the applicant a right

to the commission he demands? 2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? 3d. If they do afford him a remedy, is it a *mandamus* issuing from this court?

The first object of inquiry is—Has the applicant a right to the commission he demands? His right originates in an act of congress passed in February 1801, concerning the district of Columbia. After dividing the district into two counties, the 11th section of this law enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace, as the president of the United States shall, from time to time, think expedient, to continue in office for five years.

*155] *It appears, from the affidavits, that, in compliance with this law, a commission for William Marbury, as a justice of peace for the county of Washington, was signed by John Adams, then President of the United States; after which, the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out. In order to determine whether he is entitled to this commission, it becomes necessary to inquire, whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The 2d section of the 2d article of the constitution declares, that "the president shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for." The 3d section declares, that "he shall commission all the officers of the United States."

An act of congress directs the secretary of state to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the president, by and with the consent of the senate, or by the president alone; provided, that the said seal shall not be affixed to any commission, before the same shall have been signed by the president of the United States.

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations: 1st. The nomination: this is the sole act of the president, and is completely voluntary. 2d. The appointment: this is also the act of the president, and is also a voluntary act, though it can only be performed

*156] by and with the advice and consent of the senate. *3d. The commission: to grant a commission to a person appointed, might, perhaps, be deemed a duty enjoined by the constitution. "He shall," says that instrument, "commission all the officers of the United States."

1. The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. The distinction between the appointment and the commission, will be rendered more apparent, by adverting to that provision in the second section of the second article of the constitution, which authorizes congress "to vest, by law, the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments;"

thus contemplating cases where the law may direct the president to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.

Although that clause of the constitution which requires the president to commission all the officers of the United States, may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence, the constitutional distinction between the appointment to an office and the commission of an officer who has been appointed, remains the same, as if, in practice, the president had commissioned officers appointed by an authority other than his own. It follows, too, from the existence of this distinction, that if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the president, would either give him a right to his commission, or enable him to perform the duties without it.

These observations are premised, solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.

*This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment, otherwise than by providing the existence of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it. [*157

But at what stage, does it amount to this conclusive evidence? The answer to this question seems an obvious one. The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done everything to be performed by him. Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still, it would be made, when the last act to be done by the president was performed, or, at farthest, when the commission was complete.

The last act to be done by the president is the signature of the commission: he has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed: he has decided. His judgment, on the advice and consent of the senate, concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken, when the power of the executive over an officer, not removable at his will, must cease. That point of time must be, when the constitutional power of appointment has been exercised. And this power has been exercised, when the last act, required from the person possessing the power, has been performed: this last act is the signature of the commission. This idea seems to have prevailed with the legislature,

when the act passed converting the department *of foreign affairs into the department of state. By that act, it is enacted, that the secretary of state shall keep the seal of the United States, "and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the president;" "provided, that the said seal shall not be affixed to any commission, before the same shall have been signed by the President of the United States; nor to any other instrument or act, without the special warrant of the president therefor."

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act, supposed to be of public notoriety, the verity of the presidential signature. It is never to be affixed, until the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president. He is to affix the seal of the United States to the commission, and is to record it. This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state, to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the president. It is a ministerial act, which the law enjoins on a particular officer for a particular purpose.

If it should be supposed, that the solemnity of affixing the seal is necessary, not only to the validity of the commission, but even to the completion of an appointment, still, when the seal is affixed, the appointment is made, and *the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do, to invest the person with his office, is done; and unless the appointment be then made, the executive cannot make one without the co-operation of others.

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After searching anxiously for the principles on which a contrary opinion may be supported, none have been found, which appear of sufficient force to maintain the opposite doctrine. Such as the imagination of the court could suggest, have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed. In considering this question, it has been conjectured, that the commission may have been assimilated to a deed, to the validity of which delivery is essential. This idea is founded on the supposition, that the commission is not merely evidence of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But for the purpose of examining this objection fairly, let it be conceded, that the principle claimed for its support is established.

The appointment being, under the constitution, to be made by the president, personally, the delivery of the deed of appointment, if necessary to its completion, must be made by the president also. It is not necessary, that the delivery should be made personally to the grantee of the office: it never is so made. The law would seem to contemplate, that it should be made to

the secretary of state, since it directs the secretary to affix the seal to the commission, after it shall have been signed by the president. If, then, the act of delivery be necessary to give validity to the commission, it has been delivered, when executed and given to the secretary, for the purpose of being sealed, recorded and transmitted to the party.

But in all cases of letters-patent, certain solemnities are required by law, which solemnities are the evidences *of the validity of the instrument: a formal delivery to the person is not among them.[1] In cases [*160 of commissions, the sign manual of the president, and the seal of the United States are those solemnities. This objection, therefore, does not touch the case.

It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff. The transmission of the commission is a practice, directed by convenience, but not by law. It cannot, therefore, be necessary to constitute the appointment, which must precede it, and which is the mere act of the president. If the executive required that every person appointed to an office should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the president; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter inclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point, to inquire, whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume, it could not be doubted, but that a copy from the record of the office of the secretary of state would be, to every intent and purpose, equal to the original: the act of congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but not that the original had been transmitted. If, indeed, it should appear, that *the original [*161 had been mislaid in the office of state, that circumstance would not affect the operation of the copy. When all the requisites have been performed, which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labor of inserting it in a book kept for that purpose may not have been performed. In the case of commissions, the law orders the secretary of state to record them. When, therefore,

[1] But a pardon is a deed, to which delivery and acceptance are essential. United States *v.* Wilson, 7 Pet. 150; Ex parte De Puy, 3 Ben. 307. And see Commonwealth *v.* Halloway, 44 Penn. St. 210.

they are signed and sealed, the order for their being recorded is given ; and whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees to be paid by a person requiring a copy are ascertained by law. Can a keeper of a public record erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law? Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment, still less is its acceptance. The appointment is the sole act of the president ; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept : but neither the one nor the other is capable of rendering the appointment a nonentity.

That this is the understanding of the government, is apparent from the whole tenor of its conduct. A commission bears date, and the salary of the officer commences, from his appointment ; not from the transmission or acceptance of his commission. When a person appointed to any office refuses to accept that office, the successor is nominated in the place of the *162] person who *has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.

It is, therefore, decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made ; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern ; because the act is at any time revocable ; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled : it has conferred legal rights which cannot be resumed. The discretion of the executive is to be exercised, until the appointment has been made. But having once made the appointment, his power over the office is terminated, in all cases where, by law, the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute unconditional power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the president, and sealed by the secretary of state, was appointed ; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country. To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

2. This brings us to the second inquiry ; which is : If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

*163] *The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that pro-

tection. In Great Britain, the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the 3d vol. of his Commentaries (p. 23), Blackstone states two cases in which a remedy is afforded by mere operation of law. "In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded." And afterwards (p. 109, of the same vol.), he says, "I am next to consider such injuries as are cognisable by the courts of the common law. And herein I shall, for the present, only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognisance of either the ecclesiastical, military or maritime tribunals, are, for that very reason, within the cognisance of the common-law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behooves us, then, to inquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress. In pursuing this inquiry, the first question which presents itself is, whether this can be arranged *with that [*164 class of cases which come under the description of *damnum absque injuriâ;* a loss without an injury. This description of cases never has been considered, and it is believed, never can be considered, as comprehending offices of trust, of honor or of profit. The office of justice of peace in the district of Columbia is such an office; it is, therefore, worthy of the attention and guardianship of the laws. It has received that attention and guardianship: it has been created by special act of congress, and has been secured, so far as the laws can give security, to the person appointed to fill it, for five years. It is not, then, on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy? That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.

By the act concerning invalids, passed in June 1794 (1 U. S. Stat. 392), the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended, that where the law, in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country? What-

ever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. *No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone (vol. 3, p. 255), says, "but injuries to the rights of property can scarcely be committed by the crown, without the intervention of its officers; for whom the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice."

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By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river (1 U. S. Stat. 464), the purchaser, on paying his purchase-money, becomes completely entitled to the property purchased; and on producing to the secretary of state the receipt of the treasurer, upon a certificate required by the law, the president of the United States is authorized to grant him a patent. It is further enacted, that all patents shall be countersigned by the secretary of state, and recorded in his office. If the secretary of state should choose to withhold this patent; or, the patent being lost, should refuse a copy of it; can it be imagined, that the law furnishes to the injured person no remedy? It is not believed, that any person whatever would attempt to maintain such a proposition.

It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act. If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction. In some instances, there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the president is invested with certain important political powers, in the *exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived, by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president: he is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others.

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The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.[1]

If this be the rule, let us inquire, how it applies to the case under the consideration of the court. *The power of nominating to the senate, [*167
and the power of appointing the person nominated, are political powers, to be exercised by the president, according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the president, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed, cannot be made never to have existed, the appointment cannot be annihilated; and consequently, if the officer is by law not removable at the will of the president, the rights he has acquired are protected by the law, and are not resumable by the president. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner, as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which, a suit has been instituted against him, in which his defence had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority. So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment. That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is, then, the opinion of the Court: 1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him [*168
a justice *of peace for the county of Washington, in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years. 2d. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

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[1] See Gaines *v.* Thompson, 7 Wall. 347.

3. It remains to be inquired whether he is entitled to the remedy for which he applies? This depends on—1st. The nature of the writ applied for; and 2d. The power of this court.

1st. The nature of the writ. Blackstone, in the 3d volume of his Commentaries, page 110, defines a *mandamus* to be "a command issuing in the king's name, from the court of king's bench, and directed to any person, corporation or inferior court of judicature, within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice."

Lord MANSFIELD, in 3 Burr. 1267, in the case of *The King* v. *Baker et al.*, states, with much precision and explicitness, the cases in which this writ may be used. "Whenever," says that very able judge, "there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern, or attended with profit), and a person is kept out of possession, or dispossessed of such right, and *169] *has no other specific legal remedy, this court ought to assist by *mandamus*, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government." In the same case, he says, "this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one." In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, "to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice." Or, in the words of Lord MANSFIELD, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right. These circumstances certainly concur in this case.

Still, to render the *mandamus* a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1. With respect to the officer to whom it would be directed. The intimate political relation subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received, without much reflection or examination, and it is not wonderful, that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered *170] *by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have

been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[1]

But, if this be not such a question; if, so far from being an intrusion into the secrets of the cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control; what is there, in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a *mandamus*, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress, and the general principles of law?

If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended, that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is *again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation. But where he is directed by law to do a certain act, affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and therefore, is never presumed to have forbidden; as, for example, to record a commission or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived, on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department. [*171

This opinion seems not now, for the first time, to be taken up in this country. It must be well recollected, that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional;[2] but some

[1] Gelston *v.* Hoyt, 3 Wheat. 247; United States *v.* Palmer, Id. 610; Garcia *v.* Lee, 12 Pet. 511; Williams *v.* Suffolk Ins. Co., 13 Id. 415; Scott *v.* Jones, 5 How. 343; Luther *v.* Borden, 7 Id. 1; Kennett *v.* Chambers, 14 Id. 38; Clark *v.* Braden, 16 Id. 635; Fellows *v.* Blacksmith, 19 Id. 366; United States *v.* Holliday, 3 Wall. 407; Georgia *v.* Stanton, 6 Id. 50.

[2] Hayburn's case, 2 Dall. 410 n; United States *v.* Todd, 13 How. 52 n.

of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act, and to report in that character. This law being deemed unconstitutional, at the circuits, was repealed, and a different system was established; but the question whether those persons who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, congress passed an act, in February 1793, making it the duty of the secretary of war, in conjunction with the attorney-general, to take such measures as might be necessary to
*172] obtain an adjudication of the supreme court of the United *States on the validity of any such rights, claimed under the act aforesaid. After the passage of this act, a *mandamus* was moved for, to be directed to the secretary of war, commanding him to place on the pension list, a person stating himself to be on the report of the judges. There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant was deemed, by the head of a department, and by the highest law-officer of the United States, the most proper which could be selected for the purpose. When the subject was brought before the court, the decision was, not that a *mandamus* would not lie to the head of a department, directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a *mandamus* ought not to issue in that case; the decision necessarily to be made, if the report of the commissioners did not confer on the applicant a legal right. The judgment, in that case, is understood to have decided the merits of all claims of that description; and the persons, on the report of the commissioners, found it necessary to pursue the mode prescribed by the law, subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list. The doctrine, therefore, now advanced, is by no means a novel one.

It is true, that the *mandamus*, now moved for, is not for the performance of an act expressly enjoined by statute. It is to deliver a commission; on which subject, the acts of congress are silent. This difference is not considered as affecting the case. It has already been stated, that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not re-
*173] movable at the will of the executive; and being so *appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by any other person.

It was at first doubted, whether the action of *detinue* was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case, a *mandamus* would be improper. But this doubt has yielded to the consideration, that the judgment in *detinue* is for the thing itself, *or* its value. The value of a public office, not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to

nothing. He will obtain the office by obtaining the commission, or a copy of it, from the record.

This, then, is a plain case for a *mandamus*, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired, whether it can issue from this court?

The act to establish the judicial courts of the United States authorizes the supreme court, "to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States." The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of this description; and if this court is not authorized to issue a writ of *mandamus* to such an officer, it must be because the law is unconstitutional, and therefore, absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present *case; because the right claimed [*174
is given by a law of the United States.

In the distribution of this power, it is declared, that "the supreme court shall have original jurisdiction, in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction." It has been insisted, at the bar, that as the original grant of jurisdiction to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court, in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States

If it had been intended to leave it in the discretion of the legislature, to apportion the judicial power between the supreme and inferior courts, according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage—is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constituton has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance. Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.[1]

It cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it. *If the solicitude of the convention, respecting [*175
our peace with foreign powers, induced a provision that the supreme

[1] See Gittings *v.* Crawford, Taney's Dec. 1.

court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing, fundamentally, a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court, by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be, that in one class of cases, its jurisdiction is original, and not appellate; in the other, it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning. To enable this court, then, to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar, that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a *mandamus* should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original. It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet to issue such a writ to an officer, for the delivery of a paper, is, in effect, the same as to sustain an original action for that paper, and therefore, seems not to be-
*176] long to *appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction. The authority, therefore, given to the supreme court by the act establishing the judicial courts of the United States, to issue writs of *mandamus* to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire, whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental: and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The

government of the United States is of the latter description. The powers of the legislature are defined and limited ; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited *and acts allowed, are of [*177
equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it ; or that the legislature may alter the constitution by an ordinary act.

Between these alternatives, there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the constitution, is not law : if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory ; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. *So, if a law [*178
be in opposition to the constitution ; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution ; or conformable to the constitution, disregarding the law ; the court must determine which of these conflicting rules governs the case : this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the prin-

ciples and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing, what we have deemed the greatest improvement on political institutions, a written constitution, would, of itself, be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection. The judicial power of the United States is extended to all cases arising under the constitution. *Could it be the intention of those who gave this power, to say, that in using it, the constitution should not be looked into? That a case arising under the constitution should be decided, without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

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There are many other parts of the constitution which serve to illustrate this subject. It is declared, that "no tax or duty shall be laid on articles exported from any state." Suppose, a duty on the export of cotton, of tobacco or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or *ex post facto* law shall be passed." If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason, unless on the testimony of two witnesses to the same *overt* act, or on confession in open court." Here, the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution *contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

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The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear, that I will administer justice, without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as ———, accord-

ing to the best of my abilities and understanding, agreeably to the constitution and laws of the United States." Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States, generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

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*Bailey E. Clark *v.* Robert Young & Co. [*181

Promissory notes.

In Virginia, it is not absolutely necessary, in all cases, to sue the maker of a promissory note, to entitle the holder to an action against the indorser.

If a promissory note of a third person be indorsed by the purchaser of goods to the vendor, as a conditional payment for the goods: *quære?* whether the vendor is, in any case, obliged to sue the maker of the note, before he can resort to the purchaser of the goods on the original contract of sale.[1]

A suit against the defendant, as indorser of the note, and a suit against the defendant, for the goods sold, are upon distinct and different causes of action; and the first cannot be pleaded in bar of the second.

It is not necessary for the plaintiff to offer to return the note, to entitle him to bring suit for the goods sold.

Error from the Circuit Court of the district of Columbia, sitting in the county of Alexandria.

This was an action on the case, for goods sold and delivered by Young & Co. to Clark. The declaration had three counts; one for the price of the goods; one on a *quantum valebant;* and one for money had and received. The cause came on to be tried in the court below, on the general issue, at April term 1802.

The facts, on the trial, appeared to be, that on the 9th of September 1794, Young & Co. sold to Clark, 400 bushels of salt, at 4*s.* 3*d.* per bushel, amounting to $283.33. At the time of the sale and delivery of the salt, Clark assigned to Young & Co., a negotiable promissory note, made by one Mark Edgar to Pickersgill & Co., and by them indorsed to Clark, dated September 5th, 1794, for $289, payable sixty days after date, at the bank of Alexandria. That Young & Co. instituted a suit, in Fairfax county court, in Virginia, against Clark, on his indorsement of this note; upon the trial of which cause, Clark, by his counsel, "prayed the opinion of the court, whether the plaintiffs could maintain their action against him, previous to

[1] See Harris *v.* Johnston, 3 Cr. 311; Roach *v.* Hulings, 16 Pet. 326.

their having commenced a suit and obtained judgment against the drawer or maker of the note; and until his insolvency should appear;" and the court gave it as their opinion, that they could not; and directed the jury accordingly. Whereupon, a verdict was found for the defendant. It also appeared, that at the time the note was indorsed by Clark to Young & Co., as well as at the time when it became payable, Mark Edgar, the maker of the note, was in bad circumstances, and was supposed and reputed to be insolvent. And that, about the middle or last of December 1794, he left Alexandria, and had never returned to it.

*182] *The record which came up to this court contained three bills of exceptions:

1. The first contained a demurrer, on the part of the defendant below, to the evidence, which the circuit court refused to compel the plaintiffs to join. This exception was abandoned by the counsel for the plaintiff in error.

2. The second bill of exceptions was in these words: "Memorandum, in the trial of this cause, the defendant gave in evidence to the jury, that the plaintiffs had instituted a suit against him, in the county court of Fairfax, upon the indorsement of the promissory note of Mark Edgar, hereinbefore mentioned; the proceeding in which said suit are in these words, to wit" (here was inserted the record of Fairfax county court): "Whereupon, the counsel for the defendant prayed the court to instruct the jury, that if, from the evidence given in this cause, they should be of opinion, that the promissory note aforesaid, was indorsed by the defendant to the plaintiffs, in consequence of the goods, wares and merchandise, sold as aforesaid (although the said indorsement was not intended as an absolute payment for the said goods, wares and merchandise, or received as such by the plaintiffs, but merely as a conditional payment thereof), yet, the receipt of the said note, under such circumstances, and the institution of the aforesaid suit by the plaintiffs, against the defendant, upon his indorsement aforesaid, made the note so far a payment to said plaintiffs, for the said goods, wares and merchandise, as to preclude them from sustaining any action against the said defendant for the goods, wares and merchandise, until they had taken such measures against the said Mark Edgar, as were required by the laws of Virginia; and that the plaintiffs, having instituted the said suit upon the said note, against the defendant, and *that* having been decided against the said plaintiffs, were barred from sustaining this action against the said defendant. But the court refused to give the instruction as prayed, and instructed the jury, that if they should be of opinion, from the evidence, that the salt was sold and delivered by the plaintiffs to the defendant, and the note was indorsed by the defendant to the plaintiffs, in consequence of the salt sold,

*183] although the said indorsement was not intended *as an absolute payment, and received as such by the plaintiffs, but merely as a conditional payment thereof, then the same is a discharge for the salt sold, unless it is proved, that due diligence has been used by the plaintiffs to receive the money due on the note; but the bringing a suit against Mark Edgar is not absolutely a necessary part of said diligence; but the want of such suit may be accounted for, by the insolvency of the said Edgar, if proved; or by the conduct of the defendant himself preventing such suit; to which refusal and

direction of the court, the defendant, by his counsel, prayed leave to except," &c.

3. The third bill of exceptions stated, that "the defendant, by his counsel, then prayed the opinion of the court and their direction to the jury, that the defendant was entitled to a credit for the amount of the said note, unless the plaintiffs could show that they had instituted a suit thereon against Edgar; or that Edgar had taken the oath of an insolvent debtor, or had absconded, at the time the note became payable; or unless the plaintiffs could show that they had offered to return and re-assign the said note to the said defendant, previous to the institution of this suit. But the court having before, in the trial of the said cause, on application by the defendant to instruct the jury in the manner set forth in his second bill of exceptions, given directions to the jury, comprehending all the material points contained in the above prayer, refused to give the instruction as prayed, to which refusal, the defendant, by his counsel, prayed leave to except," &c.

Verdict and judgment for the plaintiffs, for the full amount of the salt sold; on which judgment, the defendant brought a writ of error to this court.

Swann and *Mason*, for the plaintiff in error. *C. Lee* and *E. J. Lee*, for the defendants.

Swann.—If a note is indorsed to the vendor, at the time of the sale of goods, although it is not agreed to be an absolute *payment, yet it is a conditional payment, viz., if the note be paid, or if it be indorsed over by the vendor, or if he is guilty of *laches*. (*Kearslake* v. *Morgan*, 5 T. R. 513.) In that case, the plea (which was adjudged good on demurrer) stated that the note of one W. Pierce was indorsed by Morgan to Kearslake, "for and on account" of the goods sold, and that Kearslake "then and there accepted and received the note for and on account" of the sum due for the goods. [*184

The defendants in error, if they have been guilty of *laches*, have made the note their own, and must suffer the loss. (*Chamberlin* v. *Delarive*, 2 Wils. 353.)

The question then arises, what was due diligence in this case? As the law stands in Virginia, Young & Co. ought to have sued Mark Edgar, the maker of the note. Such is the opinion of Judge Roane, in the case of *Mackie* v. *Davis*, 2 Wash. 230, which is confirmed by the judgment of the court of appeals in the case of *Lee* v. *Love*, 1 Call 497.

But it is unnecessary to resort to the general law in Virginia on this point, because the court of Fairfax county has decided the law in this case, and while that judgment stands unreversed, it is conclusive. The plaintiffs have made their election of two modes of proceeding to recover the money; having failed in one, they are barred as to the other. The same evidence is necessary to support both, and this is the test to prove that they are for the same cause. (*Kitchen* v. *Campbell*, 3 Wils. 304.)

That court has decided, that Clark was not liable on his indorsement of the note, because Young & Co. had not brought suit against Edgar; or, in other words, they have decided that Young & Co. have not used due diligence, and therefore, have made the note their own; and if so, the original contract for the salt is at an end. Yet the court below have decided this

very question differently; they have said that a suit against Edgar was not a necessary part of due diligence. The same question, between the same parties, has been differently decided by the two courts.

*185] *Mason*, on the same side.—The court below was concluded by the decision of the county court of Fairfax. *Nemo bis vexari debet.* The plaintiffs below had two modes of recovering their money from Clark, viz., by a suit for the salt sold, or by an action against Clark on his indorsement of the note. They made their election of the latter, and it has been decided against them. This ought to end the business. (*Kitchen* v. *Campbell*, 3 Wils. 304.)

E. J. Lee, contrà.—The question seems to turn on the second bill of exceptions. It appears by that, that the note was not given as an absolute, but a conditional payment. It is unreasonable to suppose, that the condition was, that Young & Co. should be obliged to prosecute a suit against Edgar through all the courts of Virginia. The prayer was to instruct the jury that a suit must be proved to have been prosecuted against Edgar, and his insolvency made to appear.

The judgment of the county court of Fairfax is no bar. It was not even a bar to a second suit by Young & Co. against Clark, on the same note. For the opinion of that court was not, generally, that the suit would not lie against Clark, on his indorsement, but that it would not lie against him, previous to a suit against Edgar, and his insolvency being made to appear. Therefore, after proving Edgar insolvent by a suit, Young & Co. might have brought a second suit against Clark, and recovered, for anything that appears by the opinion of that court. If, then, Young & Co. might have had a second action upon the note, they may well bring a suit upon their original cause of action. The opinion of the Fairfax court was only that the plaintiffs had brought their action too soon.

It is said, this is the same cause of action which has been decided in the county court of Fairfax, and that the judgment in that court is a bar to this *186] action. *In order to prove this, it is necessary to show, not only that the same evidence applies to both, but the former judgment must have been upon the same point. And that point must be on the merits. 5 Bac. Abr. (new ed.) p. 442.

In the case of *Kearslake* v. *Morgan*, cited from 5 T. R. 513, it did not appear what had become of the note; it might have been paid. Besides, that was a case under the statute of Anne, which makes promissory notes a payment. The case of *Chamberlyn* v. *Delarive*, in 2 Wils. 353, was decided on the gross negligence of the plaintiff, in holding the order four months, without making a demand of the money, until the drawee failed.

The refusal of the court below to give the instruction prayed, and the direction which they did give to the jury, are both justified by the decisions of the court of appeals of Virginia. That court has never decided, that a suit against the maker of the note is, in all cases, necessary, before resort can be had to the indorser. It is true, that in the case of *Mackie* v. *Davis*, Judge Roane said, that "the assignee of a bond acquires a legal right to bring suit upon it, and to receive the money, discharged from any control of the assignor over the subject;" and that "it is, therefore, his duty to bring

suit." But that was only an *obiter* opinion, not applicable to the point of the cause. It is certainly not a self-evident truth, nor is it very apparent, how the conclusion flows from the premises; and Judge CARRINGTON, in his opinion, in the same case (p. 231), says, "As to the lengths which it behooves the assignee to go in pursuit of the obligor, before he can resort to the assignor, it is unnecessary to lay down any general rule; it may suffice to say, that in the present case, he went far enough." In that case, indeed, a suit had been brought; but the courts of Virginia have never laid down any general rule as to what is due diligence in such a case. In the case of *Lee* v. *Love*, in 1 Call 497, and *Minnis* v. *Pollard*, Ibid. 226, it seems rather to be inferred, that a suit is not in all cases necessary. In the case of *Mackie* v. *Davis*, the court decided, that the remedy of the assignee of a bond against the assignor, was by the common law; and it is clear, from [*187
*the case of *Lambert* v. *Oakes*, in 1 Ld. Raym. 443, that, by the common law, the indorsee of a note had his remedy against the indorser, if the money was not paid by the maker of the note, on demand.

If, therefore, a suit against the maker of a note is not, in all cases, necessary to charge the indorser, the court below were right, both in refusing the instruction as prayed, and giving the opinion which they did.

C. Lee, on the same side.—1. The point arising from the first bill of exceptions is, that the court might well refuse to compel the plaintiffs below to join in demurrer to the evidence. This point being now agreed, I shall consider—

2. Whether the court did right in refusing the instruction to the jury, as prayed in the second bill of exceptions. It is not necessary to inquire whether the instruction which they did give was right, but whether they were bound to give that which was asked.

If the note was not received, at the time, as absolute payment for the salt, Young & Co. had a right of action for the price of the salt, upon demand and refusal of payment of the note by Edgar. The liability of the indorser to the indorsee of a note is at common law, and not by the custom of merchants, or the statute of Anne. And by the common law, nothing more was necessary to fix that liability, than a demand upon the maker of the note, and his refusal to pay. Upon this, and this only, the right of action accrued against the indorser. It is true, that Young & Co. had two remedies: they might either sue Clark upon his indorsement, or upon the original contract for the salt. Having failed in the former, they are not precluded from resorting to the latter: their election of the first is not a waiver of the last.

The action in Fairfax county, on the note, was no bar to the action in the district of Columbia, upon the account. The note was no payment of the account, nor *was the former action for the same cause as the [*188
present: the causes of action, and the evidence necessary to support them, were entirely different. The declaration in Fairfax county contained three counts: 1st. A special count on Clark's indorsement of the note; 2d. For money lent; 3d. For money had and received. In the present action, the declaration has also three counts: 1st. For the price of the salt sold; 2d. A *quantum valebat*; 3d. Money had and received. The same evidence will not support both actions: The indorsement of Clark is the evidence

necessary in one: the delivery of the salt is the evidence to support the other.

In the case of *Kitchin* v. *Campbell*, 2 W. Bl. 827, 831, the court said, "the principal consideration is, whether it be precisely the same cause of action in both, appearing by proper averments, in a plea; or by proper facts stated in a special verdict, or a special case. One great criterion of this identity is, that the same evidence will sustain both the actions;" and cited *Putt* v. *Royston*, 2 Show. 211; Ld. Raym. 472; 3 Mod. 1; Pollexfen 634; *Mortimer* v. *Wingate*, Moore 463; Bro. Action on the Case, 97, 105. And not only must it require the same evidence to support both, but in both, the question must be the same. *Kitchin* v. *Campbell*, 2 W. Bl. 832; *Ruff* v. *Webb*, 1 Esp. R. 130. That was an action for a servant's wages, against his master, who had given him a draft for the full amount of his wages, on a third person, which was not stamped. And although the plea stated, that he accepted it in absolute payment, yet it was held to be no bar.

The case of *Kearslake* v. *Morgan* depends on the statute of Anne, which declares that a note given for a debt due by account, shall be a satisfaction, unless the plaintiff uses due diligence: no such statute exists in Virginia. In the case of *Chamberlyn* v. *Delarive*, there was no demand at all upon the drawee of the bill. Neither of those cases, therefore, were like the present.

*189] *Swann*, contrà.—If a note is agreed to be taken in payment absolutely, it is a satisfaction; but where there is no such agreement, the law implies a condition, that the holder shall use due diligence. The county court of Fairfax has decided that Young & Co. have not used due diligence: that decision is valid and conclusive all over the world, until reversed by a competent authority. How, then, does this case stand? Young & Co. sold salt to Clark, and received a note, as a conditional payment, or a collateral security, no matter which; which note they have made their own by their own *laches*. The maker of the note has become insolvent and run away. Who ought to bear the loss? The law says clearly, the person who has been negligent, who has not complied with the requisites of the law.

It is immaterial, whether the judgment in Fairfax is an absolute or a temporary bar; for if it is a temporary bar only, yet Young & Co. have not done what that court decided to be necessary.

Mason, on the same side.—A judgment on the same question between the same parties is conclusive, until reversed. What is the same question? It is the real merits, the matter of right between the parties. The same evidence is not the criterion. Trespass and trover require different evidence; yet, if the merits of the same question are the gist of both, the one is a bar to the other. Here, the question was the same as in Fairfax, viz., whether Young & Co. had not been guilty of *laches* in respect to the note; for if they had, they had barred themselves not only from a right to recover upon the note, but upon the original contract for the salt. One and the same question will decide both cases. That question is upon the merits, and is, in fact, the only question in dispute between the parties.

It is not important whether the note was received as an absolute or a
*190] conditional payment. For if it was a *conditional payment, the *laches* of Young & Co., have made it absolute. There is no evidence of

notice to Clark of the default of Edgar, until the bringing of the suit in Fairfax county, which was eighteen months after the note began payable. Having two remedies for the price of the salt, Young & Co. could not resort to both. They made their election to sue upon the note, and having pursued that remedy to judgment against themselves, they are for ever barred. The county court of Fairfax have decided the only question which existed between the parties, the negligence of the plaintiffs below, whereby they had made the note their own; and therefore, they must abide the loss.

February 17th, 1803. The Chief Justice delivered the opinion of the court.

This was a suit brought by the defendants in error against the plaintiff, in the circuit court of the district of Columbia, sitting in the county of Alexandria, and the declaration contains two counts for goods, wares and merchandises sold and delivered, and one for money had and received to their use. The cause came on to be tried on the general issue, and a verdict was found for the plaintiffs below, on which the court rendered judgment.

At the trial of the cause, it appeared, that the suit was brought for a quantity of salt, sold and delivered by Robert Young & Co. to Clark; after which, Clark indorsed to Robert Young & Co., a promissory note made by Mark Edgar to John Pickersgill & Co., which had been indorsed by them to the said Clark, and which was payable sixty days after date. This note was protested for non-payment; after which, a suit was brought thereon by Robert Young & Co., in the county court of Fairfax, against Clark; and the declaration contained two counts, one on the indorsement, and the other for money had and received to the use of the plaintiffs. In this suit, verdict and judgment was given for the defendant Clark: the court of Fairfax being of opinion, that a suit could not be maintained against the indorser *of the note, until a judgment had been first obtained against the maker, and his insolvency made to appear. [*191

After the determination of that action, this suit was instituted on the original contract; and at the trial, the counsel for the defendant moved the court to instruct the jury, that if, from the evidence given in the cause, they should be of opinion, that the promissory note aforesaid was indorsed by the defendant to the plaintiffs, in consequence of the goods, wares and merchandise sold as aforesaid, although the said indorsement was not intended as an absolute payment for the said goods, wares and merchandise, or received as such by the plaintiffs, but merely as a conditional payment thereof, yet the receipt of the said note, under such circumstances, and the institution of the aforesaid suit by the said plaintiffs against the said defendant, on his indorsement aforesaid, made the said note so far a payment to the said plaintiffs, for the said goods, wares and merchandise, as to preclude them from sustaining any action against the said defendant for the said goods, wares and merchandise, until they had taken such measures against the said Mark Edgar, as were required by the laws of Virginia; and that the plaintiffs, having instituted the suit aforesaid, upon the said note, against the said defendant, and that having been decided against the said plaintiffs, they were barred from sustaining this action against the said defendant.

This instruction the court refused to give, but directed the jury, that if they were of opinion, from the evidence, that the salt was sold and delivered

as alleged, and that the promissory note aforesaid was indorsed by the defendant to the plaintiffs, in consequence of the salt sold as aforesaid, although the said indorsement was not intended as an absolute payment for the said salt, or received as such by the plaintiffs, but merely as a conditional payment thereof, the same is a discharge to the defendant for the salt sold to him, unless it is proved, that due diligence has been used to receive the money due on the note; but that the bringing suit on the said note against Mark Edgar, was not essentially necessary to constitute the said diligence; and that the said diligence may be proved by other circumstances, and their omitting to bring the said suit against Edgar may be accounted for, by the
*192] insolvency of Edgar, *if proved, or any conduct of the defendant which may have prevented the bringing of the said suit.

To this opinion, the counsel for the defendant excepted, and then prayed the court to direct the jury, that the defendant was entitled to a credit for the amount of the said note, unless the plaintiffs could show that they had instituted a suit thereon against Edgar, or that Edgar had taken the oath of insolvency, or absconded, at the time the note became payable, or unless the plaintiffs could show that they had offered to return and re-assign the said note to the said defendant, previous to the institution of this suit. This direction the court refused to give, and referred the jury to their opinion already given on the principal points now stated, and to which an exception had already been taken. This opinion was also excepted to. A verdict and judgment was then rendered for the plaintiff, without giving credit for Edgar's note, which judgment is now brought into this court by writ of error.

On these exceptions, it has been argued, that the court has erred, because: 1st. The conduct of the plaintiffs, Young & Co., has disabled them from maintaining this action, and such ought to have been the direction to the jury. 2d. The verdict and judgment in Fairfax court is a bar to this action.

The conduct of the plaintiffs was entirely before the jury, to be judged of by them from the evidence, excepting only that part of it respecting which the court gave an opinion. We are, therefore, only to inquire whether the opinion given by the court be erroneous.

It is agreed on both sides, that the note in this case was not received as payment of the debt, and consequently, did not extinguish the original contract. It was received as a conditional payment only, and the opinion of the court was, that in such a case, the want of due diligence to receive the money due thereon would discharge the defendant. But the court
*193] proceeded to state that due *diligence might be proved, although no suit was instituted; and that circumstances, such as the known insolvency of Edgar, the maker of the note, or any conduct of Clark, preventing a suit, would excuse Young & Co. for not having instituted one.

This opinion of the court seems perfectly correct. The condition annexed to the receipt of the note cannot be presumed to have required that a suit should be brought against a known insolvent, or that it should be brought against the will of the indorser; if he chose to dispense with it, or took means to prevent it, nothing can be more unreasonable, than that he should be at liberty to avail himself of a circumstance occasioned by his own conduct.

It is not intended to say, that the person receiving such a note is compellable, without special agreement, to sue upon it, in any state of things. It is not designed to say, that he may not, on its being protested, return it to the indorser, and resort to his original cause of action? it is only designed to say, that, under the circumstances of this case, nothing can be more clear, than that there was no obligation to sue.

The court gave no opinion, that the suit in Fairfax was, or was not, a bar to that brought in the county of Alexandria. It is, however, clear, that no such bar was created.

To waive the question, whether, in such a case as this, with declarations for such distinct causes, a verdict in a prior suit may be given in evidence as a bar to another suit, really for the same cause of action? it is perfectly clear, that in this case, the same question was not tried in both causes. In Fairfax, the point decided was, that the suit against the indorser would not lie, until a suit had been brought against the maker; in the suit in Alexandria, the point to be decided was, whether the plaintiffs had lost their remedy on the original contract, by their conduct respecting the note. These were distinct points, and the merits of *the latter case were not involved in the decision of the former. [*194

On the second bill of exceptions, the only real new point made, is, whether the action is maintainable, unless Robert Young & Co. had offered to return and re-assign the note, before the institution of the suit? Unquestionably, Clark is entitled to the benefit of the note, but as it was no extinguishment of the original cause of action, there was no absolute necessity to prove an offer of the note, before the institution of the suit. Indeed, it does not appear in this bill of exceptions, whether the note was merely a collateral security or a conditional payment: this is nowhere stated positively. In the first opinion of the court, it is stated hypothetically, and that opinion must be considered, on the presumption that such was the fact. But no such presumption is raised respecting the second bill.

Judgment affirmed, with costs.

Wilson *v.* Lenox & Maitland.

Action on bill of exchange.

A declaration in debt, under the law of Virginia, upon a protested bill of exchange, for the principal, interest, damages and costs of protest, must aver the amount of those costs of protest.

Quære? Whether, if the holder of the bill of exchange, after due notice to the indorser of the non-payment by the drawee, charge the bill in account-current against the drawer, and upon the whole of that account, the balance due is less than the amount of the bill, the indorser is thereby discharged?

Whether the indorser is discharged, by the holder's receipt of part from the drawer, after due notice given to the indorser?

Whether it be necessary to aver protest for non-acceptance, in an action on protest for non-payment?

Whether the drawer be a competent witness for the indorser, in an action against the latter?

Lenox *v.* Wilson, 1 Cr. C. C. 170, reversed.

Error to the Circuit Court of the district of Columbia, sitting at Alexandria, on a judgment obtained by the present defendants in error, against the plaintiff in error, in an action of *debt*, as indorser of a bill of exchange, for 300*l.* sterling, drawn on the 2d January 1799, at Alexandria, by A. &

W. Ramsay, on Findley, Bannatyne & Co., London, at ninety days' sight, payable to Wilson, the plaintiff in error, and by him indorsed to the defendants. This bill was presented for acceptance, on the 28th of February 1799, and refused, and on the 1st of June 1799, protested for non-payment.

The declaration was, "of a plea that he render unto them the sum of 300*l.* sterling, with damages, interest and charges of protest, on a protested bill of exchange, which *to them he owes, and from them unjustly detains," and went on to state the drawing of the bill of exchange "according to the custom of merchants," the indorsement by Wilson to Lenox & Maitland; the refusal of Findley, Bannatyne & Co. to accept the bill, on its being presented for acceptance (but did not state a protest for non-acceptance, nor notice of the non-acceptance given to Wilson), and the protest, "in due form, according to the custom of merchants," for non-payment; "of which, the said defendant, afterwards, to wit, on the ——— day of ———, in the year aforesaid, at the town and county aforesaid, had notice; whereby, and by force of the act of assembly of the commonwealth of Virginia, in such case made and provided, action accrued to the said plaintiffs to demand and have of the said defendant, the said sum of 300*l.* sterling, with damages, interest and charges of protest: nevertheless, the said defendant, although thereto often required, hath not paid unto the said plaintiffs, the said sum of three hundred pounds sterling, with damages, interest and charges of protest, but the same to pay, hath hitherto refused, and still doth refuse, to the damage of the plaintiffs, $750, and thereupon, they bring suit," &c.

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The act of assembly of Virginia, which gives the action of debt on a protested bill of exchange (Rev. Code, p. 121), provides, "that where any bill of exchange is, or shall be, drawn, for the payment of any sum of money, in which the value is, or shall be, expressed to be received, and such bill is, or shall be, protested for non-acceptance or non-payment, the drawer or indorser shall be subject to the payment of fifteen per centum damages thereon, and the bill shall carry an interest of five per centum per annum, from the date of the protest, until the money therein drawn for, shall be fully satisfied and paid."

§ 3. "It shall be lawful for any person or persons, having a right to demand any sum of money upon a protested bill of exchange, to commence and prosecute an action of debt, for principal, damages, interest and charges of protest, against the drawers or indorsers jointly, or against either of them separately; and judgment shall and may be given for such principal, damages *and charges, and interest upon such principal, after the rate aforesaid, to the time of such judgment, and for the interest upon the said principal money recovered, after the rate of five per centum, per annum, until the same shall be fully satisfied."

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§ 4. "In all bills of exchange, given for any debt due in current money of this commonwealth, or for current money advanced and paid for such bills, the sum in current money that was paid or allowed for the same, shall be mentioned and expressed in such bill, and in default thereof, in case such bill shall be protested, and a suit brought for the recovery of the money due thereby, the sum of money expressed in such bill shall be held and taken as current money, and judgment shall be entered accordingly."

§ 6. "In any action which hath been, or shall be, commenced, and is, or shall be, depending, for the recovery of any sterling money, in any court of

record within this commonwealth, wherein the plaintiff or plaintiffs shall recover, such courts shall have power. and are hereby directed, by rule to be entered at the foot of their judgment in such action, to order such judgment to be levied or discharged in current money, at such a difference of exchange as they shall think just."

The cause in the court below was tried upon the plea of *nil debet*, and the jury found a verdict for the debt in the declaration mentioned, and one cent damages; it was, therefore, considered by the court, "that the said plaintiffs recover against the said defendant, their debt aforesaid, amounting to three hundred pounds sterling, and their damages aforesaid, by the jurors aforesaid, in form aforesaid assessed, and also their costs by them about their suit in this behalf expended; and the said defendant in mercy, &c. But this judgment (damages and costs excepted) is to be discharged by the payment of eight hundred and fifty-five dollars and twenty-three cents." The record which came up contained six bills of exception.

*1. That the defendant Wilson produced in evidence to the jury, the accounts of the plaintiffs, Lenox & Maitland, against A. & W. Ramsay, the drawers of the bill, whereby the latter were charged as debtors to Lenox & Maitland, on the 22d of August 1799, for the amount of the bill and damages, in dollars and cents, among many other debts and credits, upon which whole accounts-current, a balance of $1095 only appeared to be due from A. & W. Ramsay to Lenox & Maitland; and thereupon, prayed the opinion of the court, whether, by making the said bill an item of account, as stated in the aforesaid accounts against the said A. & W. Ramsay, the said Wilson was not thereby, as indorser, discharged; and the court were of opinion, that he was not. [*197

2. That the defendant offered to prove, that the plaintiffs had received part of the money from the drawers of the bill, since the defendant Wilson had notice of the protest; but the court were of opinion, that the same, if proved, would not discharge Wilson as indorser.

3. That the defendant offered to prove, by the bill and protest, that after the protest of the said bill, at the request of Roberts, Curtis & Co., the then holders of the bill, it was paid by Dorin, Strange & Co., to Roberts, Curtis & Co., for the honor of Lenox & Maitland, the plaintiffs, and thereupon, prayed the opinion of the court, whether, as the bill had been so paid, this action would lie against the defendant, as indorser; and the court gave it as their opinion, that it would lie.

4. That the defendant prayed the opinion of the court, whether it was not incumbent on the plaintiffs, to prove the value of current money received here, for the bill upon which this action is brought, which bill is in these words: "Exchange for 300*l.* sterling, Alexandria, 2d January 1799. Ninety days after sight of this our first of exchange (second, third and fourth of the same tenor and date unpaid), pay to the order of William Wilson, Esq., the sum of three hundred pounds sterling, for value here received, and place it to account, as advised by Andrew & William Ramsay. To Messrs. Findley, Bannatyne & Co., London." And the court gave it as their opinion, that it is not necessary for the plaintiffs *to prove the value given here, in current money, for the said bill. [*198

5. That the defendant offered to prove, by the account thereunto annexed, that the bill upon which this suit was brought, was given in the

commonwealth of Virginia, either for dollars and cents due in the said commonwealth, from A. & W. Ramsay, to the plaintiffs, or for dollars and cents advanced by the plaintiffs, or some other persons, for the said A. & W. Ramsay, in the state of New York, and prayed the opinion of the court, whether, if the said facts were proved to the jury, the said bill ought not to be settled according to its nominal amount, as current money of Virginia. Whereupon, the court instructed the jury, that if they were of opinion, from the evidence offered, that the bill of exchange was given for any debt due from A. & W. Ramsay, in current money of the commonwealth of Virginia, or for current money advanced and paid for the said bill, and the sum in current money that was paid or allowed for the same, is not expressed in the bill, the sum expressed in the bill shall be held and taken as current money of Virginia; and if, from the evidence offered, they should not be of that opinion, that the sum expressed in the bill shall be taken and held, as so expressed, to wit, in sterling money.

6. That the defendant offered to examine William Ramsay, one of the drawers of the bill, to which the counsel for the plaintiffs objected; and the court gave it as their opinion, that the said W. Ramsay was an incompetent witness in the cause.

The 2d, 3d, 4th and 5th exceptions seem to have been abandoned in the argument in this court.

C. Lee, *E. J. Lee* and *Swann*, for the plaintiff in error. *Simms*, for the defendants.

The errors insisted on by the counsel for the plaintiff in error were—

1st. The opinion of the court below, as stated in the first bill of exceptions.

*199] *2d. The rejection of W. Ramsay as a witness.

3d. That there was no protest for non-acceptance of the bill.

4th. That the declaration does not state any demand of payment of the bill, made on the drawees.

5th. The damages are not laid in the same currency as the debt.

6th. The jury have awarded that the sterling debt should be discharged by the payment of $855.23.

7th. The debt demanded is not certain.

E. J. Lee, for the plaintiff in error.—1st. The court below erred, in not instructing the jury, that the defendants in error, by charging the bill in account against the drawers, in the manner stated in the accounts, had discharged the indorser. The court ought, at least, to have left it to the jury, to decide whether the circumstances did not amount to a discharge of Wilson. By the account of Lenox & Maitland against the drawers of the bill, it appears, that after charging the amount of the bill, and damages, interest and charges of protest, and turning the amount into dollars and cents, at such rate of exchange as the defendants in error pleased, there was only a balance of about $1000 due to them from the drawers; it is not reasonable, that they should recover more than is due to them, against an innocent indorser who must look to insolvent drawers for his indemnification. The defendants have, in fact, given credit to the drawers, for the amount due on the bill, and have agreed to liquidate it in account. If the holder of a bill receives part of the money from the acceptor, without giving notice to the drawer, the latter is

discharged. Bull. N. P. 275. So, if he receives part from the drawer, he discharges the indorser. Here no notice was given to Wilson ;(*a*) *or if there was, it is waived by the conduct of Lenox & Maitland. In [*200 the case of *Dingwall* v. *Dunster*, Doug. 247 (235), it is true, that Judge Buller says, that nothing but an express agreement can discharge an acceptor, but the court are careful to distinguish between the case of an acceptor, and that of a drawer or indorser. The implication is, that there are many circumstances which will discharge the latter, without an express agreement. The court ought, at least, to have instructed the jury that they might infer a discharge from the circumstances of this case. (*b*)

2d. W. Ramsay, the drawer of the bill, ought to have been admitted as a witness: he had no interest which would render him incompetent. The verdict in this case could not have been given in evidence either for or against the witness; and whether Lenox & Maitland recovered against Wilson, or not, he was still liable to an action as drawer, to Lenox & Maitland, if they failed against Wilson, or to Wilson, if they succeeded. In the case of *Smith, qui tam*, v. *Prager*, 7 T. R. 62, the rule is clearly laid down to be, that "no objection could be made to the competency of a witness, upon the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion, in support of his own interest." The objection only goes to his credit, unless the judgment can be given in evidence for him in any other suit. The same principle is confirmed in the case of *Jordaine* v. *Lashbrooke*, 7 T. R. 601, where, in a suit between the indorsee and the acceptor of a bill, the payee was called and allowed as a witness to defeat the action, by proving that the bill, although dated at Hamburg, was, in fact, drawn in London, and so void for want of a stamp. It may be observed in that case, that *it was admitted, that there could [*201 be no objection, on the ground of interest, but the objection relied on was, that the witness ought not to be permitted, from motives of policy, as it respected mercantile credit, to impeach a negotiable instrument to which he had assisted in giving currency by his indorsement; and even that objection was overruled. In the case of *Carter* v. *Pearce*, 1 T. R. 163, the court said, that "the bare possibility of an action being brought against a witness, is no objection to his competency;" and that, "in order to show a witness interested, it is necessary to prove, that he must derive a certain benefit from the determination of the cause, one way or the other."(*c*)

3d. Here was no protest for non-acceptance, nor does the declaration state a demand of payment from the drawees, nor notice of the non-pay-

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(*a*) Marshall, C. J.—Does the bill of exceptions state that notice was not given to Wilson? If it does not, you cannot argue upon the want of notice.

E. J. Lee.—It does not. But the declaration does not allege notice of the non-acceptance, nor of the non-payment; but only of the protest for non-payment, and a material fact, not averred, cannot be presumed to have been proved.

(*b*) Chase, J.—There is no doubt, a drawer or indorser may be discharged in express terms; or by facts amounting to a discharge; but where the discharge is not express, but by implication arising from facts, the jury, and not the court, are to decide whether it is a discharge; the court ought not to say it was a discharge.

(*c*) Chase, J.—Upon the statute of gaming, usury, and the like, but in no other case, are the drawers, indorsers, &c., competent witnesses. The cases all show it.

ment or non-acceptance given to Wilson. The protest for non-payment is not evidence that the money was demanded at the time the bill became payable. 4 Bac. Abr. 735 (Gwyllim's edition).

In the case of *Rushton* v. *Aspinall*, Doug. 679 (653), it is expressly decided, that the plaintiff must allege in his declaration, a demand and refusal of the acceptor, on the day when the note was payable, and notice thereof to the indorser, before he can be made liable; and that the want of such averments in the declaration, is not cured by a verdict. And Lord MANSFIELD there lays down the rule to be, "that where the plaintiff has stated his title or ground of action defectively, or inaccurately (because, to entitle him to recover, all circumstances necessary in form and substance to complete the title so imperfectly stated, must be proved at the trial), it is a fair presumption, after a verdict, that they were proved; but that where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore, there is no room for presumption." The demand and refusal of the drawee to pay, is the very substance of the plain-
*202] tiff's title to recover; and therefore, *the not setting it forth in the declaration, is a total omission of his cause of action.

4th. The damages are not laid in the same currency with the bills and the promise. To support this objection, he relied on the decision of the court of appeals of Virginia, in the case of *Scott's Executors* v. *Call*, 1 Wash. 115, and *Skipwith* v. *Baird*, 2 Ibid. 165.

C. Lee, on the same side.—1st. The question to the court below was, whether the plaintiffs, by making the bills an item of the accounts, as therein stated, had not discharged the indorser, Wilson. The accounts of Lennox & Maitland against the drawers of the bill, begin in 1798 and end in 1800. The bills are entered in account, on the 22d of August 1799, and charged with interest and damages; and the amount carried out from sterling into dollars and cents, at such rate of exchange as the defendants in error pleased. They have, therefore, changed the nature of the demand, and given credit to the drawers for a certain sum in the currency of the United States. They have, so far as they were able, manifested their intention to give credit to A. & W. Ramsay.

These circumstances being subsequent to the notice to Wilson, are a discharge in law, and are equivalent to an express discharge. If I am right, the court ought to have instructed the jury, that these facts discharged all persons but A. & W. Ramsay. Perhaps, the court might have left it to the jury, to infer an intention to discharge the indorser; but the court ought not to have instructed the jury, that Wilson was *not* thereby discharged as indorser.

2d. The objection to the competency of W. Ramsay as a witness, was not good. If he had any interest, it was in favor of the plaintiffs. The objection was made generally, and goes to his proving any fact whatever. A witness may be competent to prove some facts and not others. He was competent to prove, not only that the bill was charged in account, but that it was given up and came surreptitiously to the possession of the plaintiffs,
*203] if the fact had been so. I state this only to show that he ought not *to have been wholly excluded. On a criminal prosecution for forgery, the party whose name is forged may be a witness. 1 Dall. 110.

The doctrine that a man shall not be permitted to disprove a paper to which he has put his name to give it credit, is overruled in the case of *Jordaine* v. *Lashbrooke*, 7 T. R. 601. In the case of *Walpole* v. *Pulteney*, cited in Doug. 249 (237), in the note, at the second trial of the cause, at Guildhall, at the sittings after Michaelmas term 1779, before SKINNER, Chief Baron, Alexander, the indorser of the bill, was sworn as a witness for the acceptor, and no objection made to his competency. But in this case, there is not any interest whatever in the witness. For if the evidence of Ramsay went to discharge Wilson, still it would not go to discharge Ramsay himself. There is a case also in Espinasse's reports, in which the acceptor was sworn as a witness, in a question between the indorsee and drawer.

Simms, contrà.—1st. The charge of the bill in account against the drawers, does not amount to a legal discharge of the indorser. It is neither an express nor an implied discharge. The holder has a remedy against all or any of the indorsers or the drawer, until he gets full satisfaction. If he gives due notice to the party to whom he means to resort, he is not bound to commence suit *instanter*. If he receives part from the drawer, it is so much to the benefit of the indorser, and he has no right to complain. Due notice is all that the indorser has a right to require, and if he does not then secure himself, it is his own fault. The case from Buller's N. P. 275, is not denied to be law; but BULLER there says, "if the indorsee give credit to the drawer, without notice to the indorser, it will discharge him." But here, it is admitted, that notice was given, and the allegation is, that notwithstanding such notice, the subsequent charge in the accounts of Lenox & Maitland against the drawers, has discharged the indorser. Lenox & Maitland might have brought suit against the drawers, without prejudice to their claim against the indorser; *à fortiori*, the charging a bill in account against the drawers, cannot prejudice the claim against the indorser.

2d. W. Ramsay was offered as a witness, generally, *without a release from Wilson. The court were right in rejecting him, both on [*204
the grounds of interest and of public policy. If judgment should be rendered against Wilson, Ramsay, as drawer, would be clearly liable to refund Wilson the costs of suit; and a relief from that liability was a clear interest. A party to a negotiable paper ought not to be permitted to discredit it: an underwriter cannot be a witness for another underwriter, in an action upon the same policy.

The case in Doug. 247, does not affect the present. The note in 249, is of an ancient case; and there, Walpole's own book was produced, with a *memorandum* that Pulteney was discharged from his liability as acceptor. All the cases cited are where a party to the bill has been admitted as a witness either *ex necessitate*, or on the ground of public convenience and policy. The case of *Jordaine* v. *Lashbrooke* was one where the revenue would have been defrauded of the stamp duty, if the witness had been excluded; and to prevent that evil, he was admitted. In the cases of usury, the maker of the note or other security is not admitted, unless the debt has been paid. And in the case of forgery, it is a public criminal prosecution, in which the injured party is always admitted.

The fault of the declaration, if it does exist, is cured by the verdict, under the statute of *jeofails* of Virginia, which declares, that no judgment,

after verdict, shall be stayed or reversed, for mispleading, insufficient pleading, or for omitting the averment of any matter, without proving which the jury ought not to have given such verdict. Rev. Code, 118. But the averment was not necessary. The declaration contains an allegation that the bill was protested in due form, according to the custom of merchants, for non-payment; and, by the custom of merchants, the bill could not have been
*205] protested, until demand and refusal of payment. *But this action is grounded on the act of assembly, and not on the custom of merchants; and by the act, it is only necessary that it should be a protested bill of exchange.

As to notice of the non-acceptance and non-payment not being alleged in the declaration, the fact is not so. The declaration alleges that the bill was presented for acceptance, and refused; and afterwards, on the 1st of June, protested, in due form, according to the custom of merchants, for non-payment; of which (that is, of all the facts before recited), the defendant had notice, &c.

As to the damages being laid in current money; this is always done when tobacco or foreign money is sued for. There are some unintelligible cases in the court of appeals of Virginia; but they have never decided the present point. In one case, the court said, that if the suit is for a sterling debt, its value must not be laid in current money, because the law of Virginia authorizes an action of debt for sterling money.

Simms, on a subsequent day, stated that a demand of payment was not necessary, where the bill was not accepted; and cited Lilly's Entries, 44, 45. The declaration states the non-acceptance; and the protest for non-payment.(*a*) He also mentioned a case in Peake's Rep., where a party to a bill of exchange was refused as a witness; but did not produce the book.

Swann, in reply.—1. The plaintiffs below having assumed a rate of exchange, and charged the amount in account against the drawers, is conclusive evidence of their intention to extinguish the sterling debt.

2. The jury have awarded that the sterling debt should be discharged
*206] by the payment of $800,(*b*) the balance *of the account, therefore, and not the rate of exchange, must have been the guide of the jury.

3. The testimony of Ramsay was not to destroy the paper, but to explain the nature of the consideration; to show that it was given for current money of Virginia, so as to bring it within the operation of the 4th section of the act of assembly, respecting bills of exchange given for current money due in Virginia. This act applies as well between indorsee and indorser, as between payee and drawer;(*c*) and if the bill was given for current money due in Virginia, the sum mentioned in the bill is to be taken as current money, and not as sterling.

4. A protest for non-acceptance, and a demand of payment from the drawee, at the time the bill became payable, were requisite to enable the

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(*a*) CHASE, J.—A protest for non-acceptance is absolutely necessary, in the case of a foreign bill.

(*b*) The fact does not so appear in the record.

(*c*) MARSHALL, C. J.—The law has been so construed in Virginia.

plaintiffs below to recover. Kyd on Bills, 76, 87. It being an action on the statute, makes no difference, because the statute gives the action only to such persons as have "a right to demand any sum of money upon a protested bill of exchange." The holder, therefore, must show a right to demand the money, independently of the provisions of the statute; and to ascertain whether he has such a right, we must resort to the custom of merchants, and see whether he has complied with all the requisites of that custom.

5. This is an action of debt; and the demand is uncertain. The debt demanded is the principal, damages, interest and charges of protest, without stating the amount of the charges of protest. The principal is certain, because it is stated to be 300*l.*, and the damages and interest are certain, because the law has ascertained their relative proportion to the principal; but there is nothing in the declaration, by which the amount of the charges of protest can be rendered certain.

6. The damages ought to have been laid in sterling, and not in dollars. The damages follow the nature of the debt. The act of assembly has authorized sterling debts to be sued for and recovered as such. Sterling money is not to be considered as foreign money. *Skipwith* v. *Baird*, 2 Wash. 165. The court of appeals of Virginia, in *that case, decided that the damages must be laid in sterling.(*a*) The court are to fix the rate of exchange; but here the jury have awarded at what sum in current money the sterling debt should be paid, and it is evident that the $800 which the jury said should discharge the debt, is not the exchange, but the balance of account.(*b*) [*207

Simms cited *Brown* v. *Barry*, 3 Dall. 365, to show that a protest for non-acceptance was not necessary; and that a protest for non-payment being alleged in the declaration, it was not necessary to aver a demand of payment from the drawee.

C. Lee.—The act of *jeofails* in Virginia is construed to be the same as that of England, although the words are somewhat broader. *Stevens* v. *White*, 2 Wash. 203.(*c*)

(*a*) Marshall, C. J.—In that case, the court spake of the damages which constitute part of the debt, in an action under the statute, upon a bill of exchange, and not of those damages which are demanded at the end of the declaration for the non-payment of that debt. There is no such decision respecting the latter.

(*b*) Chase, J.—If you have no law of Virginia authorizing such a judgment, it is bad, because, at common law, no condition or alternative can be added to the judgment. It is not a good judgment at common law.

Marshall, C. J.—If it is bad, the defendant cannot complain. It is for his benefit.

Chase, J.—That may be the opinion of the chief justice; but I have considered the question in a greater case than this. I am well satisfied (and it will be difficult to alter my opinion), that at common law, no condition can be annexed to a judgment.

Simms.—It is the practice of Virginia. The law of Virginia allows discounts to actions of debt, and the judgment is to be rendered for the debt, to be discharged by the sum really due.

(*c*) Marshall, C. J.—The decisions have been so, although the statute of Virginia is broader than the English statute. The general principle decided by the court of appeals of Virginia is, that a verdict will not cure the want of an averment of a material fact, which goes to the gist of the action.

Feb. 22d. At a subsequent day, the court having suggested an error, not noticed by the counsel, or not much relied on at the argument, as being apparently fatal, viz., that the costs of protest, which are uncertain, are joined as part of the debt declared for—

*208] *Simms*, for the defendants in error, was now permitted to support the declaration.

1st. The declaration is sufficiently certain. An action of debt will lie for what may easily be reduced to a certainty. Nothing can be more easily ascertained and rendered certain, than charges of protest on a protested bill of exchange. They always appear upon the protest; and the indorsement on the protest is always considered as evidence of their amount: no other evidence is ever required. Debt may be brought for a sum capable of being ascertained, though not ascertained at the time of the action brought. (*Walker* v. *Witter*, Doug. 6.) It is not necessary that the plaintiff, in debt, should recover the exact sum demanded. (Ibid.; *Aylett* v. *Love*, 2 W. Black. 1221.) If so, then a demand of the charges of protest on a protested bill of exchange particularly described in the declaration, is good, because the sum or amount of those charges is capable of being ascertained by the protest, without further evidence. It is admitted, that the amount of damages or interest need not be stated in the declaration. To ascertain the amount of interest, reference must be had to the protest, to find its date, from which time the interest begins to accrue; a reference to the same protest, will ascertain the amount of charges.

2d. But if the charges of protest are not demanded with sufficient certainty, yet the judgment ought not to be reversed on that account; because the judgment is not rendered for the charges of protest, but is rendered for 300*l.* sterling, the principal of the bill. It is now well settled, that in an action of debt, judgment may be rendered for less than is demanded in the declaration. (*Walker* v. *Witter*, Doug. 6; *Mc Quillin* v. *Cox*, 1 H. Black. 249.)

*209] *In the present case, the demand is for the principal sum drawn for by the bill of exchange, with damages, interest and charges of protest thereon. It appears by the record, and by the evidence produced by the plaintiffs in error, which is made a part of the record, that a part only of the original demand on the bill was due, the residue having been settled and paid. Shall the judgment, then, be reversed, for not stating the amount of the charges of protest, which had been previously paid, and for which the judgment was not rendered?

No other action can be brought by Lenox & Maitland against Wilson, for the charges of protest on the bill of exchange stated in the declaration; no judgment has been rendered for them, in the present action. How, then, has he been injured, or how can he be injured, by the omission to state the amount of the charges in the declaration?

In the declaration, four distinct things are demanded, viz.: 1. The principal; 2. The damages on the protest; 3. The interest; 4. The charges of protest.

I take it to be settled law, that if a declaration be good in part, though bad as to another part, the plaintiff is entitled to judgment for so much as is well alleged, especially, if it be not of an entire demand.

An action of debt might be brought for the principal sum due on a bill of exchange, without including the damages, interest and charges of protest. If, then, an action of debt be brought for the principal, damages, interest and charges of protest, and the damages, interest and charges of protest, or either of them, should not be demanded with sufficient certainty, it would not be error, to render judgment for that which was sufficiently alleged. In this case, the principal sum is demanded with sufficient certainty, and for the principal sum only is the judgment rendered. *Woody's Case*, Cro. Jac. 104; 4 Bac. Abr. 25, 26.

*A man shall not reverse a judgment for error, if he cannot show that the error is to his disadvantage. *Tey's Case*, 5 Co. 39 *b*. It appears by the record, that judgment was not rendered for the charges of protest, therefore, the plaintiff in error has sustained no damage or injury, by reason of not alleging in the declaration the amount of the charges of protest. [*210

3d. If the omission of the amount of the charges of protest could in any stage of the proceedings be considered as an error, it is cured by the verdict. By the act of assembly of Virginia (Rev. Code, p. 118), it is declared, that after a verdict of twelve men, no judgment shall be stayed or reversed, for any mispleading or insufficient pleading. The omission, if it is an error, must be one or the other. In Jacob's Law Dict., it is said to be mispleading, if anything be omitted that is essential to the action or defence. The title to recover in the action is the protested bill of exchange; that is set forth in the declaration. The title, therefore, is not wholly defective in itself, though it may be set forth defectively, in not stating the amount of the charges of protest: so that it comes within the rule in the case of *Rushton* v. *Aspinall;* and *Vass* v. *Chichester*, 1 Call 98. The court is not bound to inquire into errors, if the party does not show them. 2 Bac. Abr. 217.

E. J. Lee, in reply.—The case of *Walker* v. *Witter*, Doug. 6, does not say that the sum demanded may be uncertain, but only that you may recover a less sum than that demanded. The demand must be certainly expressed, if it be possible, at the time of bringing the action. In the cases of *Scott's Ex'r* v. *Call*, 1 Wash. 115, and *Skipwith* v. *Baird*, 2 Ibid. 165, the amount of the charges of protest are particularly mentioned; in one they were 4*s*. 6*d*., in the other, 7*s*. 8*d*.

*February 26th, 1803. The Chief Justice delivered the opinion of the court.—In this case, there was an objection taken to the plaintiff's declaration, which was in debt on a protested bill of exchange. The declaration claims 300*l*. sterling, with damages, interest and charges of protest, on a protested bill of exchange, without stating, in any part of it, the amount of those charges. The verdict is for the debt in the declaration mentioned, on which judgment is rendered, to be discharged by a less sum. The objection is, that the demand is uncertain, inasmuch as the amount of the charges of protest, which constitute a part of the debt claimed, is not stated. [*211

The clause of the act on which this suit is instituted is in these words: "It shall be lawful for any person or persons," &c., "to prosecute an action of debt, for principal, damages, interest and charges of protest, against the drawers," &c. The charges of protest constitute an essential part of the debt, and the declaration would not pursue the act, if those charges should

be omitted. This part, therefore, cannot be considered as surplusage. It is a component part of the debt for which the action is given. Being a necessary part, its amount ought to be stated with as much certainty as the amount of the bill. As this is a mere technical objection, the court would disregard it, if it was not a principle, deemed essential in the action of debt, that the declaration should state the demand with certainty.

The cases cited by the counsel for the defendant in error do not come up to this case. They relate to different debts; this to a single debt, composed of different parts.

Judgment reversed and arrested.(*a*)

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*212] *Clarke *v.* Bazadone.

Jurisdiction in error.

A writ of error does not lie from the supreme court of the United States, to the general court for the territory northwest of the Ohio.

This was a writ of error issued from this court to the general court for the territory northwest of the river Ohio, to reverse a judgment rendered in that court against Clarke, the plaintiff in error, in favor of Bazadone, on a foreign attachment, for $12,200 damages, and $95.30 costs.

The general court of the North-western Territory was established by the ordinance of the old congress, under the confederation, and the principal question was, whether a writ of error would lie from this court to the general court of that territory? There was no appearance for the defendant in error.

Mason, for the plaintiff in error, contended: 1st. That this court possesses a general superintending power over all the other courts of the United States, resulting from the nature of a supreme court, independent of any express provisions of the constitution or laws of the United States. 2d. That this court has the power, under the constitution of the United States.

1. It is a general principle, that the proceedings of an inferior tribunal are to be corrected by the superior, unless the latter is expressly restrained from exercising such a control. This is a principle of the laws of that country from which we derive most of our principles of jurisprudence, and is so intimately connected with them, that it is difficult to separate them.

In the Saxon times, the Wittenagemote was the supreme court, and had the general superintendence. But in the time of William the Conqueror, the *aula regis* was established as the sovereign court of the kingdom, *213] *and to that court devolved all the former judicial power of the Wittenagemote; the power of superintending the other courts was derived from the principle of supremacy. 1 Crompton's Practice, 3, 5, 12, 21, 22, 26, 27, 28; 1 Bac. Abr. 553; 2 Ibid. 187. A writ of error is a commission to judges of a superior court, by which they are authorized to examine the record, upon which a judgment was given in an inferior court, and on such examination, to reverse or affirm the same, according to law. 2 Bac. Abr. 213. The court of king's bench superintends the proceedings of all

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(*a*) See the case of Rudder *v.* Price, 1 H. Black. 550.

other inferior courts, and by the plenitude of its power corrects the errors of those courts; hence it is, that a writ of error lies in that court, to a judgment given in the king's bench in Ireland. And upon a judgment in Calais, when under the subjection of the king of England, a writ of error lay in the king's bench. 4 Inst. 282. A writ of error would have laid to the king's bench from these colonies, before the revolution, but for the particular provisions of charters, &c. 2 Bac. Abr. 194. Wherever a new jurisdiction is erected by act of parliament, and the court acts as a court of record, according to the course of the common law, a writ of error lies on their judgments. The power is inherent in every superior court, to revise the judgments of its inferior.

2. By the constitution of the United States, Art. III., § 1, 2, the judicial power is vested in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish; and shall extend to all cases arising under the constitution and laws of the United States, and to controversies in which the United States shall be a party. And the supreme court is to have appellate jurisdiction, in all these cases, with such exceptions, and under such regulations, as congress shall make. Congress has made no exception of the present case; and no regulation of congress was necessary to give this court the appellate power. It derives it from the constitution itself.

This is a case arising under the laws of the United States. *The very existence of the court whose judgment is complained of, is derived from the United States. The laws adopted for the North-western Territory derive their whole obligatory effect from the ordinance of the old congress, and are, in fact, laws of the United States, although copied from state laws. All power and authority exercised in that territory have emanated from the United States; and all offences there committed are against the authority of the United States. [*214

If, then, this is a case, by the constitution, cognisable by the judicial authority of the United States; if, by the constitution, this court has appellate jurisdiction in all such cases, and if this case is not within any exception made by the constitution, or by any act of congress, nothing is wanting but to devise a mode to bring the cause before this court. The writ of error is the common and well-known process in like cases, and by the 14th section of the judiciary act of 1789, every court of the United States is expressly authorized "to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." If, then, the court has jurisdiction, no difficulty can occur as to a mode of exercising it.

The Court quashed the writ of error, on the ground, that the act of congress had not authorized an appeal or writ of error from the general court of the North-western Territory, and therefore, although from the manifest errors on the face of the record, they felt every disposition to support the writ of error, they were of opinion, they could not take cognisance of the case.

Hooe & Co. *v.* Groverman.

Charter-party.—Demurrage.

A charter-party which lets the whole tonnage of a vessel for the voyage, and contains covenants by the owner, that the outward and homeward cargo shall be delivered, damages of the seas excepted, and that he will keep the vessel apparelled and manned during the voyage, does not render the hirer the owner *pro hâc vice.*

If, by the terms of a charter-party, the ship is to be navigated at the charge and expense of the owner, and especially, if her whole tonnage is not let to hire, the charterer is not owner for the voyage.[1]

Error from the Circuit Court of the district of Columbia, in an action of covenant, by Groverman, owner of the brig Nancy, against Hooe & Co.,
*215] *the freighters, for demurrage, at the port of Falmouth, in England, from the 19th of June to the 11th of September 1798, at the rate of 6*l.* 6*s.* sterling *per diem.*

The declaration alleged the breach of the covenant in not paying the demurrage, and the cause went to trial in the court below, upon the issue of covenants performed. The jury found the following special verdict, viz.: We, of the jury, find that the defendants and plaintiff made and executed the charter-party hereunto annexed, in these words, to wit:

"This charter-party indented, &c., witnesseth, that the said Groverman hath granted and to freight letten, to the said R. T. Hooe & Co., the brig, whereof he is owner, called the Nancy, commanded by James Davidson, a citizen of the United States aforesaid, now lying in the port of Alexandria, of the burden of 197 tons or thereabouts; and for and in consideration of the covenants hereinafter mentioned, doth grant and to freight let, unto the said R. T. Hooe & Co., the whole tonnage of the aforesaid vessel, called the Nancy, from the port of Alexandria, in Virginia, to the port of Havre de Grace, in France, and back to the said port of Alexandria, in a voyage to be made by the said R. T. Hooe & Co. with the said brigantine, in manner after mentioned, that is to say, to sail, with the first fair wind and weather that shall happen after she is fully and completely laden, from the said port of Alexandria, with a cargo of tobacco, to be shipped by the said R. T. Hooe & Co. to the said port of Havre de Grace; and there deliver said cargo to Messrs. Andrews & Co., of that town, merchants, or to their assigns, in good order, the danger of the seas only excepted. And at the said port of Havre de Grace, to take on board a full freight or lading of such goods as the said Andrews & Co. may think proper to put on board said brig, as a return-cargo; with which, said vessel is to make the best of her way directly back to the port of Alexandria, and there safely deliver such cargo, the danger of the seas only excepted, to the said R. T. Hooe & Co. And the said Groverman doth further covenant and agree to and with the said R. T. Hooe & Co., their executors, &c., that the said brig now is, and at all times during
*216] the said *voyage, shall be, to the best endeavors of him the said Groverman, and at his own proper cost and charges, in all things made and kept tight, stiff, staunch, strong and well apparelled, furnished

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[1] And see Marcardier *v.* Chesapeake Ins. Co., 8 Cr. 39; Leary *v.* United States, 14 Wall. 607; The Volunteer, 1 Sumn. 551; Certain Logs of Mahogany, 2 Id. 589; The Nathaniel Hooper, 3 Id. 544; The Othello, 5 Bl. C. C. 342.

and well provided, as well with men and mariners sufficient and able to sail, guide and govern the said vessel, as with all manner of rigging, boats, tackle and apparel, furniture, provisions and appurtenances fitting and necessary for the voyage aforesaid. And the said Groverman doth further covenant and agree to and with the said R. T. Hooe & Co., that he will allow them twenty-five running days from the date hereof for the lading on board the said vessel, the aforesaid cargo of tobacco, at the port of Alexandria; ten working days for discharging said cargo at the port of Havre de Grace, to be computed from the day after she comes to her moorings at the said port; and twenty days more, after the said ten days run out, for lading on board the aforesaid return-cargo; also ten working days after said vessel arrives back and is permitted to an entry at the custom-house at Alexandria for receiving her inward cargo, which is to be delivered at the wharves of said R. T. Hooe & Co.

"In consideration whereof, the said R. T. Hooe & Co. do covenant, promise and grant to and with the said W. Groverman, his executors, &c., by these presents, that they the said R. T. Hooe & Co., or their consignee, shall and will pay to the said W. Groverman, or his assigns, at the port of Havre de Grace, the sum of 21,000 livres tournois, in hard money, on discharge of the cargo of tobacco aforesaid; also 7200 livres, in hard money, on shipment of the return-cargo aforesaid; and further, that they the said R. T. Hooe & Co. shall and will pay, or cause to be paid, to him the said W. Groverman, or his assigns, the sum of 8*l.* 8*s.*, current money of Virginia, day by day, and for every day's demurrage, if any there should be, by default of them the said R. T. Hooe & Co., at the port of Alexandria. And the sum of 150 livres, in hard money, day by day, and for every day's demurrage, if any there should be, by default of them the said R. T. Hooe & Co., or their assignee, at the port of Havre de Grace. And the said R. T. Hooe & Co. do further covenant to and with the said W. Groverman, and the aforesaid *James Davidson, commander of the brigantine aforesaid, that [*217
Andrews & Co., their consignee aforesaid, shall pay to the said captain, for his primage, five per cent. upon the outward and inward freights at Havre de Grace, and before his departure therefrom. For the true and faithful performance of the covenants in this charter-party, the parties bind themselves, each to the other, in the penal sum of 3000*l.* current money of Virginia, to be recovered by the party observing, against the party failing to perform the same. In witness whereof, we have hereunto interchangeably set our hands and affixed our seals, this tenth day of April 1798.

W. Groverman. [Seal.]
R. T. Hooe & Co." [Seal.]

And the provisional articles in these words, to wit: "The following provisional articles are concluded upon, made and agreed to by and between William Groverman, owner of the brigantine Nancy, commanded by James Davidson, and R. T. Hooe & Co., since entering into the charter-party hereto annexed.

"1. The captain or commander shall be instructed by his owner, previous to his sailing from the port of Alexandria, to touch at Falmouth, in such manner as to appear to his crew that there was a necessity for his so doing, there to lay off and on twenty-four hours, or longer if desired, in

day-light, during which time, there will come off orders from Mr. Fox, the American consul, Mr. Thomas Wilson, of London, or Messrs. Andrews & Co., of Havre de Grace. 2. On receiving these orders, the captain or commander must proceed directly for Havre de Grace, London, Hamburg, Bremen or Rotterdam, as he may be directed, and at one of these ports, deliver his cargo to such person or persons as the aforesaid orders may direct. 3. If the vessel arrives at any other of the aforesaid ports than Havre de Grace, the time of discharging the outward cargo, taking in her inward cargo, demurrage, if any there should be, her outward and inward freight, primage, &c., shall be the same as if she had arrived at and discharged at
*218] Havre *de Grace. 4. The outward freight shall be considered as 875*l.* sterling; the inward freight 300*l.* sterling, primage five per cent. on the freights, and the demurrage 6*l.* 6*s.* sterling per day. And if the vessel discharges in London, the payments shall be made in sterling cash; if at any other port, in good bills of exchange, at 60 days, on London, without diminution of the above sums, except so much as the captain may be authorized to receive for his port-charges and disbursements. 5. If the vessel is detained over twenty-four hours at Falmouth, demurrage shall be paid for the time, at the rate stipulated in the charter-party. 6. These articles shall not be made known to any person whatever, except the captain and chief mate. The vessel shall be cleared out for Havre de Grace only, and furnished with a *role d'equipage*, and all other papers whatever that may be necessary at this custom-house. No letters whatever shall be received on board, except such as the said R. T. Hooe & Co. puts into the possesion and care of the captain. 7. The charter-party first entered into, the copy of which is hereunto annexed, shall be in force and considered as the only contract between the parties for this voyage, and go, unconnected with these articles, to Havre de Grace, and there and from thence govern, unless in the case of the vessel being, from Falmouth, ordered to a different port; then, and in that case, the charter-party shall only be considered as the great outlines of the bargain between the parties, to be positively governed by these articles; but the 4th article to be in force as to payments at any place. In testimony whereof, we have hereunto set our hands and affixed our seals, this 11th day of April 1798.

William Groverman, [Seal.]
R. T. Hooe & Co." [Seal.]

We find, that James Davidson, master of the brigantine Nancy, in the said charter-party and provisional articles mentioned, on the morning before the departure of said vessel from the port of Alexandria, signed an acknowledgment, written on said provisional articles in these words, to wit:

*219] "I do acknowledge that I am *to act agreeably to the foregoing provisional articles, notwithstanding the charter-party to Havre de Grace.

James Davidson."

We find, that the said James Davidson, before he sailed from Alexandria, on the voyage in the said provisional articles mentioned, was told by R. T. Hooe, one of the defendants and freighters of said vessel, that on his arrival off Falmouth, a town in England, he would receive instructions from

Mr. Fox, the American consul, and that he must abide by such instructions. We find, that on the 20th of June 1798, the said vessel arrived in Falmouth roads, about three leagues from the port of Falmouth, and the said James Davidson, the master thereof, laid the vessel to, off Falmouth, and immediately proceeded in a pilot-boat to Falmouth, went on shore, and applied to the said Fox, the American consul, for orders where to proceed with the said brigantine and cargo. The said Fox told the said Davidson, that he had not received any orders for him, and that, therefore, he must bring the brigantine Nancy into the port of Falmouth, and there remain with the said brigantine and her cargo, until orders were received for him to proceed to his port of discharge. Upon receiving which answer and orders from the said Fox, the said Davidson, in conformity thereto, returned on board his said vessel, with a pilot employed by said Fox for the purpose of conducting said vessel into the port of Falmouth; and on the same day, the said Davidson brought said vessel to anchor in the port of Falmouth aforesaid. We find, that the said Fox informed the said Davidson, that he must wait with said vessel, at anchor in the port of Falmouth, until the said Fox could procure orders for him from Thomas Wilson, of London; which said Fox and Wilson are the same persons mentioned and named in the aforesaid provisional articles. We find, that on the 21st day of June 1798, the said James Davidson again went on shore and reported his said vessel, and delivered his papers to the collector of the customs for the port of Falmouth aforesaid, which papers the said collector refused to return, saying that he suspected the cargo on board said vessel was French property, and on the same day, caused the said vessel to be seized. We find, that on the 23d day of the said month of June, the said Davidson received orders from the said *Thomas Wilson, through the said Fox, to proceed with the said [*220 vessel and cargo to the Downs, and thence to London. We find, that the said vessel was detained in the port of Falmouth aforesaid, from the said 21st day of June 1798, until the 11th of September following, in consequence of the seizure aforesaid. We find, that on the said 11th day of September, the said vessel proceeded from the port of Falmouth to the Downs, by the aforesaid order of the aforesaid Thomas Wilson. We find, that the said brigantine and cargo were the *bonâ fide* property of American citizens alone. We find, that by an act of parliament of Great Britain, passed in the 29th year of George III., c. 68, § 12, and in force at the time the said brigantine arrived off Falmouth as aforesaid, it is enacted and provided in the following words, to wit:

"And be it further enacted, &c., and by the 30th section of the said act, it is enacted and provided in the following words, to wit, 'Provided always,'" &c.

We find, that the said Fox urged the danger arising under the said act, as a reason why the said vessel should be brought to anchor in the port of Falmouth, there to wait for the orders of the said Thomas Wilson, of London, and why the said vessel should not lay off Falmouth, without the limits of the said port. We find, that the said vessel was, on the said 20th of June, laden in part with 240,000 pounds of tobacco of the growth of the United States. We find, that the said Davidson, at Falmouth aforesaid, made and entered a protest in these words, manner and form following, to wit, "To all people," &c.

We find, that it was by the default of the defendants or their agents, in failing to have orders ready, on the arrival of the said vessel off Falmouth as aforesaid, designating and directing to which of the ports of discharge mentioned in the second article of the provisional articles aforesaid the said vessel was to proceed, and by the orders given to the said Davidson by the said Mr. Fox, that the said Davidson, did bring the said vessel to anchor in the said port of Falmouth, and that the said vessel and cargo were subjected to the seizure and detention aforesaid. If the law be for the plaintiff, we find
*221] for the plaintiff 794*l.* 19*s.* 9*d.*, Virginia *currency, damages; if the law be for the defendants, we find for the defendants.

The court below being of opinion, that the law was for the plaintiff, judgment was entered accordingly; and the defendants sued out the present writ of error.

Swann and *Simms*, for the plaintiffs in error. *C. Lee* and *E. J. Lee*, for the defendant.

Simms.—In this case, it is material to ascertain, whether Hooe & Co. ought to be considered as the owners of the vessel, and the master as their agent, for the voyage; or whether Groverman is to be considered as the owner, and the master as his agent. Whether the freighter or owner of a ship is to be considered as the owner for the voyage, depends upon the nature of the contract between them. If the freighter hires and employs the master, and the master is subject to his orders and direction, during the voyage, then the freighter is considered as the owner for the voyage; but if the owner hires and employs the master and hands, then he is the owner for the voyage, and liable for their misconduct. This fully appears from the case of *Vallejo* v. *Wheeler*, Cowp. 143.

In the present case, Groverman was to employ and pay the master and the mariners. He covenants that they shall perform a specific voyage; that the vessel shall sail with the first fair wind, after she is fully laden; that the cargo shall be delivered in good order, the danger of the seas only excepted; that the vessel was, at the time of making the charter-party, and should continue during the voyage, at his expense, tight, staunch and well found. The master and crew, therefore, must have been subject to the control of Groverman, during the voyage, and he was liable for their misconduct, and if any loss happened thereby, he, and not the freighters, was to bear it. Indeed, it is expressly stipulated, that the owners shall give instructions to the mas-
*222] ter to touch at Falmouth, *there to lay off and on twenty-four hours, or longer, if desired, in day-light, for orders from Mr. Fox, Mr. Wilson, or Messrs. Andrews & Co., and that on the receipt of such orders, he should proceed to the port directed by those orders.

If the master has disobeyed his instructions from his owner and employer the freighters surely cannot be liable. Groverman must look to his agent, the master, for redress. It is probable, however, that the master did the best he could for the interest of all concerned; and there is no more reason that the owner should look to the freighters for indemnification for the detention of his ship, than there is for the freighters looking to the owner for indemnification for the detentiou of their goods. If the master deviated from his instructions, it was at his and his employers' risk.

But the master was bound by the provisional articles to carry the vessel

into Falmouth. She was there, in the regular course of her voyage, and by the articles, Hooe & Co. had a right to detain her there, upon payment of the stipulated sum for demurrage. Being, then, in the regular course of the voyage, the detention by a foreign power, gives no right to claim demurrage for the time she was in the hands of the British government, under the seizure. The remedy of Groverman was against his insurers, and not against the freighters. If he has not insured, it was his own fault, and he must stand his own insurer. Park on Insurance, 87, 88, 89. *Goss* v. *Withers*, 2 Burr. 696. If the owner could recover demurrage from the freighters on the detention by a foreign government, that detention might continue so long that the stipulated demurrage might amount to twice the value of the ship and cargo. He had a right to abandon to the underwriters; but the freighters can never be presumed to have become insurers. Hooe & Co. contracted to pay demurrage for such detention only as should happen through their default; but here, the detention was by the British government. The court below have, therefore, erred in giving judgment for the plaintiff on the special verdict, for the whole demurrage, from 21st June to 11th of September 1798. The vessel was seized before the expiration of the twenty-four hours, which were allowed by *the agreement. [*223
Hooe & Co. therefore, were not liable to pay any demurrage at all. Or, if it shall be considered, that Hooe & Co. were liable for demurrage after the vessel had been twenty-four hours at Falmouth, until orders were received from Thomas Wilson, they could be bound to pay only for two days, because it is found that the master received his orders to sail for London, on the 23d of June. If Hooe & Co. were liable for those two days' demurrage, and no more, the court below ought to have awarded a *venire facias de novo.*

But if Hooe & Co. had not a right to order the brig to Falmouth, yet Groverman has not a right to recover the damages he may have sustained thereby, in the present action, but his remedy was by a special action on the case. An action of covenant can only be maintained, for not doing an act covenanted to be done, or for doing an act covenanted not to be done. There was no covenant on the part of Hooe & Co., that the vessel should not go into the port of Falmouth; and if there was, yet the plaintiff in his declaration does not aver such a covenant, nor declare on the breach of it: the only breach assigned is the non-payment of demurrage.

If the vessel had no right to go into the port of Falmouth, then her going in is not a case provided for by the contract, and consequently, the contract can form no rule for ascertaining the damages. If the vessel had a right to go into Falmouth, then the consequent seizure is not chargeable to Hooe & Co. If she had not a right to go in, then no damages can be recovered in the present form of action; nor in any other, because the act complained of is Groverman's own act, or the act of his agent, the master, for whose conduct Groverman himself is responsible.

It is true, the jury have found that it was by the default of Hooe & Co., in not having orders ready at Falmouth, that the vessel was obliged to go into the port, and that the seizure and detention took place. But if this is a breach of any one of the covenants, yet it is the breach of a covenant not declared upon; nor is the breach assigned, and therefore, no damages can be given in this action for the breach of that covenant.

E. J. Lee, for the defendant in error.—Hooe & Co. were owners for the voyage. The master was bound to obey their orders. Fox and Wilson were their agents. They, by their agent, ordered the vessel into port, contrary to the terms of their agreement; the detention was the consequence of their misconduct, and they ought to be liable for demurrage.

If a person hires a chattel, the hirer is the owner for the time for which he has hired it. *Vallejo* v. *Wheeler*, Cowp. 143. In that case, p. 147, it is said, that "there seems to be great reason for a distinction between a general ship, and one that is let to freight to a single person only. The former carries the goods of all mankind; every man that chooses it, is at liberty to load his goods aboard her; and the merchant who ships his goods in such a vessel has no command over her. He does not hire or employ the master; neither is the master subject to his order or direction during the voyage. But in the case of a vessel let to freight to one merchant only, and by him alone freighted, he may be supposed to employ the master, and have the direction of the vessel and the voyage; and therefore, whatever is done by the master is to be considered as done by the merchant's servant." The master, therefore, in taking the vessel into the port, when, by the agreement, he was only to lay off and on, acted as the servant of Hooe & Co., and by their orders, expressly given through their agent, Mr. Fox.

But if Hooe & Co. were not owners *pro hâc vice*, yet, having been the cause of the vessel's going into port, whereby she was seized, they are liable. It is said in Molloy, 375 (257), book 2, c. 4, § 9, that "if the ship, by reason of any fault arising from the freighter, as lading aboard prohibited or unlawful commodities, occasions a detention, or otherwise impedes the ship's voyage, he shall answer the freight contracted and agreed for." It is immaterial, what was the immediate cause of the detention; if it happened by the fault of Hooe & Co., here is a positive covenant to pay demurrage, if the vessel is detained.

*225] *But it is said, we have not brought our action for damages for carrying the vessel into port. It is true, that we have not; and the reason is, that the parties themselves having, by covenant, fixed the rate of damages, no action but covenant would lay.

The furnishing the vessel with men, furniture, &c., does not make Groverman the owner. The master signed the provisional articles, by which he bound himself to obey the orders of Fox and others, the agents of Hooe & Co., and whether the master was the agent of Groverman, or not, still, Hooe & Co. have rendered themselves liable, by ordering him to go into the port.

C. Lee, on the same side.—It is of no importance, who was the owner; for the detention is clearly the consequence of the default of Hooe & Co. The action is brought for not paying demurrage, according to express covenant. The defence set up is, that the vessel was improperly carried into the port; and that the master, being the agent of Groverman, he must abide the loss. We admit, that it was unlawful for the vessel to go into the port; this is the ground of our right. Suppose, the master was the agent of Groverman, and Fox the agent of Hooe & Co.; by whose fault or orders was the vessel carried in? Clearly, by the orders of Hooe & Co. No man has

a right to order my servant; but if he does, and by that means misleads him, and a loss happens, he must be liable. Hooe gave instructions to the master how to act. If it was lawful for him to do so, then he must be considered as the owner, and the obedience to his orders, in all its consequences, is chargeable to him. If it was not lawful, then his improper interference, if it misled the master, is also chargeable to him. Unless he was the owner, he had no right to instruct the master; it was a wrongful act. If he was the owner, there is no pretence for not paying the demurrage.

If it should be said, that the act of parliament referred to in the special verdict, and which is generally called *the *hovering* act, justified the orders to carry the vessel into port, the answer is, that the parties must be supposed to have understood that business, and agreed to the risk. [*226

The finding of the jury, respecting the orders not being ready, although it is apparently in favor of the defendant in error, is not considered as materially affecting the case, because, by the agreement, Hooe & Co. were not bound to have the orders ready, but might keep the vessel waiting, upon paying the stipulated demurrage.

Swann, for the plaintiffs in error.—The questions which seem to arise in this case are these: 1. Are Hooe & Co. liable at all for this detention? 2. If they are at all liable, are they liable in this form of action?

1st. The vessel had a right to go into the port of Falmouth, and was, therefore, in the regular course of her voyage. If so, then the seizure and detention of the vessel by the British government, was not by the default of Hooe & Co., and the case is not within the contract.

Hooe & Co. were not bound absolutely to have the orders ready, on the arrival of the vessel at Falmouth; but the contract provides for the case of the orders not being ready, and Hooe & Co. were at liberty to detain the vessel at Falmouth for orders, on paying a stipulated sum for demurrage. The words of the 5th provisional article are, that "If the vessel is detained over 24 hours at Falmouth, demurrage shall be paid at the rate stipulated in the charter-party." The parties are presumed to know the course of trade in the voyage about which they were contracting. (*Bond* v. *Nutt*, Cowp. 605.) They must have known that the vessel could not lawfully lay off and on, more than 24 hours, without being liable to seizure under the act of parliament: this created a necessity for the vessel's going into port. Not indeed a physical necessity; that was not requisite to justify it: it was *sufficient, if in prudence and discretion it was necessary and advisable for the general benefit of all parties concerned. (*Bond* v. *Nutt*, Cowp. 601; Park 310; Burn's M. Ins. 103, 133.) The words, "at Falmouth," strongly indicate this to have been the understanding of the parties themselves; and the very action itself, founded upon the contract for demurrage at the port of Falmouth, is a direct affirmance of the right to go into the port. If the vessel had no right to go into the port, then demurrage cannot be claimed under the contract, because it is a case not provided for by the contract. If the vessel had a right to go into the port, then she was still in the regular prosecution of her voyage, at the time when she was seized by the British government, and consequently, the detention cannot be chargeable to Hooe & Co. They have covenanted only [*227

against their own default, and their own acts. Groverman had other means of securing himself against all other risks. He ought to have insured; if he has not, it is his own fault; he stands as his own insurer, and his remedy is by recourse to the British government. Suppose, the vessel had been seized at Havre de Grace, by the French government; can it be supposed, that Hooe & Co. would have been liable? It will not be contended, that they would; and yet there is, in fact, no difference between the two cases.

Hooe & Co. cannot be considered as the owners, because, in the first place, the hiring of the vessel was not general, it is of the tonnage only; this excludes the cabin and the master's perquisites. Groverman employs the master and crew, and stipulates for the good condition of the vessel, during the voyage, and for the safe transportation of the goods, the danger of the seas only excepted; thereby clearly making himself responsible for the fidelity and good conduct of the master and mariners. Groverman was, therefore, clearly the owner of the vessel for the voyage. He covenants to instruct the master to touch at Falmouth and wait for orders. He covenants that the master shall proceed to such port as shall be mentioned in those orders. Now, he never would have done all this, if the master was not subject to his control. If, then, the master was the servant of Groverman, and has improperly carried the vessel into port, instead of laying off
*228] and on, how can Hooe & Co. be liable *for the consequences? It is said, because Fox advised or directed it; and Fox was the agent of Hooe & Co.

Then it amounts to this, that Groverman, by his agent the master, and Hooe & Co., by their agent, Mr. Fox, finding the vessel to be in danger by laying off and on, have consulted together as to the best means of preventing loss to all parties, and agreed, that the vessel should go into the port. To which of the parties is this error, if it is one, to be imputed? Certainly, to neither; it was their mutual act, intended for their mutual benefit, and neither has a right to complain, or to make the other liable for the subsequent, and perhaps consequent, seizure by the British government. Fox had no authority to order the vessel, except as to which of the ports mentioned in the provisional articles, she should go. The directions to the master, therefore, to come into the port, must have been considered by the captain only as a matter of advice: he was not bound to follow it.

Suppose, I advise an act to be done, and it turns out unfortunately; am I to be liable for the consequences? Suppose, even, that the vessel went in, purely to oblige and benefit Hooe & Co., yet they would not thereby become liable for accidents happening without their default. If my friend, in coming to serve me, receives an injury from a third person, am I liable? If the provisional articles do not provide for the vessel's going into the port, yet Mr. Fox and the master acted correctly. A case arose, not provided for by express contract; they did right, therefore, in mutually consulting for the common good of their employers, and although the result of their deliberations may have proved unfortunate, yet neither party can criminate the other.

2. If Hooe & Co. are liable at all, it is not in this form of action. The covenants which they are bound to perform are, 1. To pay the freight.
*229] *2. To furnish orders at Falmouth. 3. To pay so much *per diem* for their own detentions.

Now, it is admitted, that this detention was by the British government, and if the vessel was in her voyage while in the port of Falmouth, there was no default of Hooe & Co., by which that detention can be chargeable to them. But if the vessel was out of her voyage, and had been carried into port by Hooe & Co., contrary to the agreement, then it is a case not provided for by the charter-party, and therefore, demurrage, as such, cannot be claimed. In such a case, the remedy would be only for the tort. Suppose, they had burnt the vessel; no action of covenant would lay for that wrong. The injury complained of, is the ordering the vessel into port.

February 23d, 1803. The CHIEF JUSTICE delivered the opinion of the court.—This is a writ of error to a judgment rendered in the circuit court of the district of Columbia, sitting in Alexandria, on the following case:

A charter-party was entered into between the parties, on the 10th day of April 1798, whereby Groverman let to Hooe & Co., a vessel of which he was owner, for a voyage to Havre de Grace. The first article states the indenture to witness, "that the said Groverman hath granted and to freight letten, to the said R. T. Hooe & Co., the brigantine Nancy, whereof he is owner, commanded by James Davidson, a citizen of the United States, now lying in the port of Alexandria, of the burden of 197 tons or thereabouts; and for and in consideration of the covenants hereinafter mentioned, doth grant and to freight let, unto the said R. T. Hooe & Co., their executors and administrators, the whole tonnage of the aforesaid vessel called the Nancy, from the port of Alexandria, in Virginia, to the port of Havre de Grace, in France, and back to the said port of Alexandria, in a voyage to be made by the said R. T. Hooe & Co., with the said brigantine, in manner hereinafter mentioned; that is to say, to sail with the *first fair wind and weather that [*230
shall happen after she is completely laden, from the said port of Alexandria, with a cargo of tobacco, to be shipped by said R. T. Hooe & Co., to the said port of Havre de Grace, and there deliver the said cargo to Messrs. Andrews & Co., of that town, merchants, or to their assigns, in good order, the danger of the seas only excepted; and at the said port of Havre de Grace, to take on board a full freight or lading of such goods as the said Andrews & Co. may think proper to put on board said brigantine, as a return-cargo, with which the said vessel is to make the best of her way directly back to the port of Alexandria, and there safely deliver such cargo to the said R. T. Hooe & Co." Groverman further covenants with the said R. T. Hooe & Co., that the vessel is, and shall, during the voyage, be kept, in good condition, and furnished with all manner of necessary and proper rigging, &c., and with mariners to navigate her. He further covenants to allow twenty-five running days for lading the vessel at the port of Alexandria, thirty days for discharging her cargo and taking on board the return-cargo at Havre, and ten days for receiving her inward cargo at Alexandria. In consideration of these covenants, R. T. Hooe & Co. engage to pay the stipulated freight, and 8*l.* 8*s.* for every day's demurrage, if any there should be, by their default, at the port of Alexandria; and one hundred and fifty-one livres by the day, for every day's demurrage, occasioned by their default, at the port of Havre de Grace.

On the 11th day of April, provisional articles were entered into between the same parties, by which it was stipulated that, 1st. The captain or com-

mander shall be instructed by his owner, previous to his sailing from Alexandria, to touch at Falmouth, in such manner as shall appear to his crew that there was a necessity for his so doing, there to lay off and on twenty-four hours (or longer if desired), in day-light, during which time, there will come off orders from Mr. Fox, the American consul, Mr. Thomas Wilson, of
*231] London, or Messrs. Andrews & Co., of Havre de Grace. *2d. On receiving these orders, the captain or commander must proceed directly for Havre de Grace, London, Hamburg, Bremen or Rotterdam, as he may be directed, and at one of these ports deliver his cargo, to such person or persons as the aforesaid orders may direct. The third and fourth articles apply the covenants of the charter-party, respecting the conduct of the vessel in the port of Havre, to the contingency of her being ordered to some other port; and to the freight, and stipulate the demurrage to be 6*l.* 6*s.* sterling by the day. The fifth article is in these words: "If the vessel is detained over twenty-four hours at Falmouth, demurrage shall be paid for the time at the rate stipulated in the charter-party."

On the 20th of June 1798, the vessel arrived in Falmouth roads, about three leagues from the port of Falmouth, where the master laid her to, and immediately went on shore, and applied to Mr. Fox, the American consul, for orders where to proceed. Fox replied, that he had received no orders for him, and that, therefore, he must bring the vessel into the port of Falmouth, and there remain, until orders were received for him to proceed to his port of discharge. These orders were given to avoid the penalties of the British hovering act, which subjected to forfeiture the vessel and cargo, if found in the situation in which the Nancy would have been, if she had waited for orders, without entering the port. The master immediately brought his vessel into port, where she was seized on suspicion of being French property, and detained for nearly three months. After the seizure, on the 23d day of June, the master received orders from Thomas Wilson, through Fox, to proceed with his vessel to London, there to deliver her cargo.

This suit is brought by Groverman to recover damages against R. T. Hooe & Co. for this detention. The declaration states the charter-party and
*232] provisional agreement, and then assigns a breach of them in these *words: "And the said plaintiff doth aver, that the said brig arrived off Falmouth, on the 19th day of June 1798, when the master, by the orders of the aforesaid Mr. Fox, the agent of the said defendants, conveyed her into the port of Falmouth, by means whereof, the said brig was detained in the aforesaid port of Falmouth more than twenty-four hours, to wit, from the 20th day of June last aforesaid, to the 11th day of September, in the year 1798, when she sailed, by the orders of Andrews & Co., the agents for the said defendants, for the Downs." And the declaration then charges that the defendants had not paid the demurrage stipulated in the charter-party, or in the provisional articles.

Issue was joined on the plea of conditions performed, and the jury found a special verdict, containing the facts already stated, and further, that before the vessel sailed from Alexandria, the master was told by R. T. Hooe, that on his arrival off Falmouth, he would receive instructions from Mr. Fox, the American consul, and that he must abide by such instructions; and that it was by the default of the defendants, or their agents, in failing to have orders ready on the arrival of the said vessel off Falmouth as aforesaid,

designating and directing to which of the ports of discharge mentioned in the second article of the provisional articles aforesaid the said vessel was to proceed, and by the orders given to the said Davidson (the master), by the said Mr. Fox, that the said Davidson did bring the said vessel to anchor in the said port of Falmouth, and that the said vessel and cargo were subjected to the seizure and detention aforesaid; if the law be for the plaintiff, the jury find 794*l.* 19*s.* 9*d.*, Virginia currency, damages; if the law be for the defendants, then they find for the defendants. The circuit court was of opinion, that the law was for the plaintiff, and rendered judgment in his favor.

To support this judgment, the special verdict ought to show that R. T. Hooe & Co., the defendants in the circuit court, have broken some covenant contained in the agreements between the parties; and that the breaches assigned in the declaration are upon the covenant so broken. *The [*233
breach assigned is the non-payment of demurrage stipulated to be paid, for a longer detention than twenty-four hours, at Falmouth; and it is to be inquired, whether the declaration makes a case showing demurrage to be demandable, and how far the special verdict sustains that case. The case made by the declaration is, that on the arrival of the vessel off Falmouth, the master took her into port, by order of Mr. Fox, by means whereof, she was detained more than twenty-four hours. The question arising out of this case, for the consideration of the court, is, does it show a breach of covenant on the part of R. T. Hooe & Co., which subjects them to demurrage for the detention stated?

The fifth article is supposed to be broken. The words of the covenant are: "if the vessel is detained over 24 hours at Falmouth, demurrage shall be paid for the time, at the rate stipulated in the charter-party." If this clause provides for every detention whatever, however it may be occasioned, the inquiry is at an end, and the judgment should be affirmed. But on looking into the provisional articles, the general expressions here used will be found to be explained. The first of these articles stipulates that the master should touch at Falmouth, there to lay off and on for twenty-four hours (or longer if desired), in day-light, during which time, there will come off orders from Mr. Fox, the American consul, Mr. Thomas Wilson, of London, or Messrs. Andrews & Co., of Havre de Grace. Here, then, is a power given to R. T. Hooe & Co. to detain the vessel longer than twenty-four hours, lying off and on at the port of Falmouth, waiting for orders, and it is the only rational construction which can be given the contract, to suppose that the fifth article refers to the first.

*A certain number of days are allowed for lading the vessel in [*234
Alexandria. But more days may be required, in which case, demurrage is to be paid. So with respect to discharging and relading the vessel at the port of delivery in Europe; and so with respect to the return-cargo in Alexandria: in each case, demurrage is stipulated, in the event of a longer detention than is agreed on. When, then, a time is given to wait for orders at Falmouth, it is reasonable to suppose, that the demurrage, which is to be paid, for a longer detention than the time given, relates to a detention occasioned by waiting for orders, or some breach of covenant by R. T. Hooe & Co.

The declaration does not state the vessel to have waited, lying off and on, for orders, but to have been taken into port by the orders of Mr. Fox, when

she was seized and detained by the officers of the British government. The covenant, then, was broken by taking the vessel into port, and it is to be inquired, who is answerable for this breach?

It has been argued, that R. T. Hooe & Co. are answerable for it, because, 1. Their orders for the further prosecution of the voyage ought to have been in readiness as stipulated. 2. The vessel was taken into port by the orders of their agent, for whose acts they are accountable. 3. The master was, for the voyage, their captain; and the stipulation to lay off and on, therefore, being broken by him, was broken by them.

To the first argument, founded on the non-reception of orders, the observation already made may be repeated. The declaration does not attribute the detention to that cause, but to a compliance with the orders of Fox in taking the vessel into port. If, however, the charge in the declaration had been, that orders were not ready on the arrival of the vessel, *that charge would have been answered by the contract itself, which allows a delay of twenty-four hours for the reception of orders, without paying demurrage, and a longer time, if required, on paying therefor at the rate of 6*l.* 6*s.* sterling by the day.

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The failure, then, to have the orders, for the further destination of the vessel, in readiness, on the arrival of the master, or even within the twenty-four hours after his arrival, was no breach of contract on the part of R. T. Hooe & Co., since it was an event contemplated and provided for, by the parties; and the question whether, in the actual case which has happened, that is, of a delay longer than twenty-four hours in giving the orders, but of a seizure before that time elapsed, R. T. Hooe & Co. are responsible for demurrage accruing between the termination of the twenty-four hours and the receipt of the orders, cannot be made in this case, because there is no allegation in the declaration which puts that fact in issue.

2. The court will proceed, then, to consider whether, R. T. Hooe & Co. are made accountable for the vessel's being taken into port, since that measure was adopted, in pursuance of the instructions of their agent, Mr. Fox.

The finding of the jury goes far to prove that the defendants in the court below have made themselves responsible for the conduct of Fox. They find that R. T. Hooe informed the master, before he sailed from Alexandria, that on his arrival off Falmouth, he would receive orders from Mr. Fox, and that he must abide by such instructions. This finding creates some difficulty in the case. But this communication from Mr. Hooe to the master ought to be taken, it is conceived, in connection with the provisional articles. Those articles explain the nature of the orders to be received, and by which the master was directed to abide. In them, it is expressly stipulated, that on receiving these instructions, the master should proceed directly for Havre de Grace, London, Hamburg, Bremen or Rotterdam, as he should be directed. The orders, then, which he was to receive and obey, must be supposed compatible with this agreement. *This construction is the more reasonable, because, annexed to the provisional articles, is an acknowledgment on the part of the master, that he was to act conformable to them. He ought not to have understood declarations of the kind stated in the verdict, as directing a departure from a written agreement entered into by the owner and freighters of the vessel, and to which he had bound himself to conform. This article seems, too, to explain the power delegated by Hooe & Co. to

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Fox; and to show that he was their agent, for the purpose of directing the further destination of the vessel, but for no other purpose.

If this be the correct mode of understanding this part of the verdict, and it is believed to be so, then the particular conduct of Hooe & Co. did not authorize the master to obey the orders of the American consul, in taking the vessel into port; nor are they responsible for the consequences of that measure, unless they could be considered as responsible for a violation of the covenant by the act of the master.

If these facts are to be differently understood, and the communication made by Hooe to the master is to be understood as authorizing him to obey any order given by Fox, though that order should be directly repugnant to the provisional articles, still the liability of Hooe & Co. in this suit, will depend on the question whether the covenant to lay off and on at the port of Falmouth, was a covenant on the part of the owner, or of the freighters, of the vessel. This depends so much on the question whether Groverman or R. T. Hooe & Co. were owners of the vessel for the voyage, that it will more properly be considered with that point.

3. Was the master under the direction of Groverman or Hooe & Co. for the voyage? This is to be determined by the whole charter-party, and the provisional articles taken together.

It has been observed at the bar, and the observation has considerable weight, that Groverman lets the tonnage of *the vessel, and not the whole vessel, to the freighters. The expression of the charter-party, [*237 it will be perceived, varies in the part descriptive of the agreement, from what is used in the part constituting the written agreement. The indenture witnesses, "that the said Groverman hath granted and to freight letten, to the said R. T. Hooe & Co. the brigantine Nancy, whereof he is owner," &c., but immediately proceeds to say, "and for and in consideration of the covenants hereinafter mentioned, doth grant and to freight let, to the said R. T. Hooe & Co., the whole tonnage of the aforesaid vessel, from the port of Alexandria, in Virginia, to the port of Havre de Grace, in France," &c. As the latter are the operative words which really constitute the contract, it is conceived, that they ought to prevail, in construing that contract. Groverman, then, has only let to Hooe & Co. the tonnage of the vessel, and therefore, is the less to be considered as having relinquished ownership of her during the voyage. There are other circumstances which serve to show that the direction of the vessel, during the voyage, was intended to remain with Groverman. The cargo is to be delivered to Messrs. Andrews & Co., of Havre de Grace, in good order, the dangers of the seas only excepted. This is an undertaking on the part of Groverman, which he certainly would not have made, if he had relinquished the direction of the voyage to Hooe & Co. If the vessel, *pro hâc vice*, had been their vessel, Groverman would not have contracted for the delivery of the cargo; and for the delivery to a specified person.

If the freighters had owned and commanded the vessel, they might have delivered the cargo in Havre to any other person, or have discharged at a port short of Havre, without injury to Groverman. So, the cargo taken on board at Havre is to be such as Andrews & Co. may think proper; which return-cargo is to be delivered to Hooe & Co., in Alexandria. These stipulations all indicate that the voyage was to be performed under the orders

of Groverman, because the acts stipulated are to be done by him, and the covenants are his covenants.

This is further evidenced by the subsequent language of the charter-party. The succeeding sentence begins with the words, "and the said Groverman doth further *covenant to and with the said R. T. Hooe & Co.," &c., showing that the preceding covenants were all on the part of Groverman. This further covenant is not only for the present condition of the vessel, but that she shall be kept well apparelled and well manned by the said Groverman, during the voyage. The master, then, was Groverman's captain, the mariners were Groverman's mariners; and this furnishes an additional reason for supposing the master and mariners to be under his direction. After some further covenants on the part of Groverman, the charter-party proceeds thus: "In consideration whereof, the said R. T. Hooe & Co. do covenant, &c., to and with the said W. Groverman, &c., that they will well and truly pay the freight stipulated therein."

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Thus, the whole language of the charter-party goes to prove that the covenants respecting the voyage are on the part of Groverman, and on that account, as well as on the account of his letting only the tonnage of the vessel, and furnishing the master and mariners, &c., he is to be considered as the owner of the vessel for the voyage, under the charter-party. This opinion is strengthened rather than weakened by the provisional articles. The first article stipulates that particular instructions respecting the voyage shall be given to the master by Groverman, before its commencement. The words are: "The captain or commander shall be instructed by his owner, previous to his sailing from the port of Alexandria, to touch at Falmouth," "there to lay off and on twenty-four hours (or longer if desired) in day-light," &c. These orders, then, to the master were to be given by Groverman, and it was by his authority that the master was to act on that occasion. This explains the doubt as to the person who was to be considered as covenanting that the vessel should lay off and on, for twenty-four hours, at the port of Falmouth, and tends to show who was responsible for the breach of that covenant. This, too, is in addition to covenants in the charter-party, which are plainly Groverman's, and is, therefore, the more to be considered as a covenant on his part. The act was to be performed by his authority, and the covenant was his covenant.

*On a consideration, then, of the whole contract between the parties, the court is of opinion, that Groverman remained the owner of the vessel during the voyage, and is answerable for any misconduct of the master. The covenant to lay off and on at the port of Falmouth, being the covenant of Groverman, the freighters are not answerable in this action, for the breach of it, should the orders of Fox be understood as their orders. It is probable, that the course taken by the master was the most prudent course; but were it otherwise, the orders of of Fox might excuse the owner from any action brought by the freighters for loss sustained by them in consequence of going into Falmouth, but could not entitle him to this action against the freighters.

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It is, then, the opinion of this court, that on this special verdict, the law is for the defendants.

Judgment reversed, and the circuit court to enter judgment for the defendants.

GABRIEL WOOD, original defendant, *v.* WILLIAM OWINGS and JOB SMITH, assignees of WILLIAM ROBB, a bankrupt, original plaintiff.

Bankruptcy.—Deed.

A deed of lands in Maryland, signed, sealed and delivered on the 30th of May, and acknowledged on the 14th of June, is to be considered as made on the 30th of May; and its acknowledgment on the 14th of June, will not cause it to be such a deed as is contemplated in the bankrupt act which came into operation on the 2d of June.

ERROR from the fourth Circuit Court, sitting at Baltimore. This was an action on the case, for money had and received, by Wood, to the use of Robb, the bankrupt. Judgment below was entered by consent, subject to the opinion of the court on a case stating the following facts, viz.:

*On the 30th of May 1800, Robb, being in possession of his household furniture, and having two vessels, and no other property, [*240 on the high seas, signed, sealed and delivered a deed to Charles Garts and Gabriel Wood, trustees in behalf of themselves and other creditors of Robb, therein particularly named, and such others of his creditors as should, by a certain time, assent to the terms of the trust; by which deed, Robb, in consideration of five shillings, and towards payment of the debts due to the particular creditors therein named, in the first place, and in the next place, of such of his creditors as should agree to the terms of the trust; granted, bargained, sold, &c., to Garts and Wood, all his estate, real, personal and mixed, and choses in action, &c., in trust to sell the same, and collect the debts, &c., and on receipt of the money, to retain, in the first place, the amount due to Garts and Wood, for money lent, &c., then to pay the debts due to the other creditors particularly named, and then to pay the debts due to such of his other creditors as should, within a certain time, agree to the terms of the trust; and if there should be a surplus, to pay it over to Robb. This deed was acknowledged on the 14th June 1800. Robb did not, on the said 30th of May 1800, deliver to Wood his books, but they remained in Robb's possession. The vessels were not conveyed to Wood by any other conveyance than that before mentioned. Robb continued in possession of his household furniture, books of accounts, and all his papers, until the suing out of the commission of bankruptcy, except the policies of insurance on the vessels, which were delivered to Wood, at the time of delivering the deed. Robb considered Wood as having a right to take possession of the books and papers and personal estate, at any time after the delivery of the deed, but did not then expect to be obliged to stop business; on the contrary, that he actually went on, with the hope of retrieving his affairs, until the 20th June 1800. Robb was a trader, before and after the 1st of June 1800; at the time of signing, sealing, and delivering of the said deed, he was the legal proprietor of a lot of ground, in the state of Maryland, as assignee of a term of 99 years, renewable for ever, and was also possessed of personal property, and had debts due to him; Garts and Wood, and the other persons in the deed particularly named, were creditors *of Robb; and there were other creditors besides those particularly preferred in [*241 the deed. A commission of bankruptcy issued against Robb, on the 12th July 1800, founded on the execution and acknowledgment of the said deed, under which Robb was declared a bankrupt, and his effects were assigned

to the plaintiffs, Owings and Smith, by a deed of assignment, on the 1st of May 1801. And the action was brought to recover all moneys received by Wood, in virtue of the said deed to Garts and Wood. If, on the above state of facts, the plaintiffs were entitled to recover, then judgment was to be entered for the plaintiffs for $3000; but if, &c., then judgment of *non pros.*

By the bankrupt act of the United States, § 1, it is enacted, that "from and after the 1st day of June next (June 1st, 1800), if any merchant, &c., with intent unlawfully to delay or defraud his creditors, shall make or cause to be made any fraudulent conveyance of his lands or chattels, he shall be deemed and adjudged a bankrupt."

Two questions were made by the counsel in the court below, viz.: 1st. Whether this deed could be considered as made at the time of its acknowledgment, on 14th June, 1800, so as to constitute it an act of bankruptcy, under the bankrupt law of the United States, which came into operation on the 2d June 1800, or whether the acknowledgment should relate back to the 30th May 1800, the day on which the deed was signed, sealed and delivered, so that the deed should be considered as made on that day? 2d. Whether, if made after the 1st of June 1800, it could be considered as such a fraudulent conveyance, as is contemplated by § 1 of the bankrupt law?

Martin, for the plaintiff in error, now waived the second point, and relied entirely on the first.—

*242] This involves three questions: *1st. Whether the deed, signed, sealed and delivered on the 30th of May, and acknowledged on the 14th of June, is an act of bankruptcy, under the law which came into operation on the 2d of June? 2d. Whether the signing, sealing and delivery shall be considered as going forward to the time of acknowledgment? or 3d. Whether the acknowledgment shall refer back to the time of the signing, sealing and delivery?

The debtor, independently of the bankrupt act, may prefer one creditor to another. No creditor can prevent him, unless by taking out a commission of bankruptcy. This principle is acknowledged by all the state governments, and by the laws of England, in cases not within the bankrupt law.

In the case of *Hooper* v. *Smith*, 1 W. Bl. 441, one Hooper, being *bonâ fide* indebted to his mother, in the sum of 800*l.*, at 8 o'clock in the morning, assigned and delivered to his mother, half his stock in trade, which was taken away immediately to his mother's lodgings. On the evening of the same day, he committed an act of bankruptcy. His assignees, by stratagem, got possession of the goods and sold them: the mother brought trover against the assignees, and recovered. Lord MANSFIELD, in that case, said, that "a preference to one creditor, especially, by assigning only part of his goods, and to pay only part of the debt, has been frequently held to be good; particularly in the case of *Cock* v. *Goodfellow* (the case of a parent and child), *Small* v. *Owdley and others*." "Suppose, he had sold the goods in question to John or Thomas, and with that ready money, had paid his mother part of her debt; would that sale or payment have been void?" The courts of Virginia, Maryland and Pennsylvania have always recognised the

same principles. If the bankrupt law had never passed, this deed would have been protected in courts of law and equity.

Is this a fraudulent conveyance, under the bankrupt law? *The acknowledgment is necessary for some purposes, but not to constitute [*243 it a deed. A deed is defined to be, a writing on parchment or paper, sealed and delivered. Suppose, a mortgage of lands, containing a covenant to pay money, be not acknowledged, it would not, at law, convey a legal title to the land, but it would be good as a covenant to pay the money; and would be good to pass an equitable title to the land. Suppose, it contained a conveyance of land and chattels; it would be good as to the chattels. This shows that acknowledgment is not a necessary part of the deed; but only that a deed, not acknowledged, will not pass a legal estate in lands, as to creditors.

But the act of Maryland, November session 1766, c. 14, § 2, says, "that no estate of inheritance, &c., shall pass or take effect, except the deed or conveyance by which the same shall be intended to pass or take effect, shall be acknowledged before the provincial court, &c., and be also enrolled in the records of the same county," &c. It must, therefore, be a deed, before the acknowledgment. And by the 5th section of the same act, it is declared, that every such deed shall have relation, as to the passing and conveying the premises, from the day of the date thereof; thereby evidently contemplating it to be a deed from its date. This section was inserted because, by the former act of 1715, the deed took effect only from the time of its acknowledgment. But the law is the same, independent of the positive declaration of this act; 1 Bac. Abr. 277, Bargain and Sale; and 2 Inst. 674–5, where Lord Coke, in his exposition upon the statute of 27 Hen. VIII., c. 16, of enrolments, says, "And when the deed is enrolled within six months, then it passeth from the livery of the deed. And, albeit, after the delivery and acknowledgment, either the bargainor or bargainee die before enrolment, yet the land passeth by this act." "And by the words of this statute, when the deed is enrolled, it passeth *ab initio*." And he cites the case of *Mallery* v. *Jennings*, determined in the common pleas, 42 Eliz., which was this: "One Sewster was seised of certain lands in fee, and acknowledged a recognisance *to Turner, whose executrix brought a [*244 *scire facias* upon the recognisance, bearing date the 9th November, 41 Eliz., against Sewster, and alleged him to be seised of those lands *in dominico suo ut de feodo*, the day of the *scire facias* brought; and the truth of the case being disclosed by long pleading, was this: Sewster, 7th November, before the recognisance acknowledged, by deed indented, for money, had bargained and sold the said land to another, and the deed was enrolled the 20th November following. The question was, whether Sewster was, upon the whole matter, seised in fee, the 9th of November, the deed being not enrolled until the 20th of the same November. And it was adjudged, *und voce*, that Sewster was not seised in fee of the land, on the 9th day of November. For that when the deed was enrolled, the bargainee was, in judgment of law, seised of that land, from the delivery of the deed. And it was resolved, that neither the death of the bargainor, nor of the bargainee, before enrolment, shall hinder the passing of the estate. And that a release of a stranger to the bargainee, before enrolment, is good. So that it holds not by relation, between the parties, by fiction of law; but in point of estate, as well to them

as to strangers also. And that a recovery suffered against the bargainee, before enrolment (the deed indented being, afterwards, within the six months, enrolled), is good, for that the bargainee was tenant of the freehold, in judgment of law, at the time of the recovery. And *non refert* when the deed indented is acknowledged, so it be enrolled within the six months. And all this was afterwards affirmed for good law, by the court of common pleas, Trin., 3 Jac., upon a special verdict given in an *ejectione firmæ* between *Lellingham* and *Alsop;* and further, it was there resolved, that if the bargainee of land, after the bargain and sale, and before the enrolment, doth bargain and sell the same, by deed indented and enrolled, to another; and after the first deed is enrolled, within the six months, the bargain and sale, by the bargainee, is good."

In 18 Viner 289, tit. Relation, it is said, "when two times, or two acts, *245] are requisite to the perfection of an *act, it shall be said, upon their consummation, to receive its perfection from the first." If A. makes a deed to B., on the 30th of May; and another, for the same land, to C., on the 1st of June, and acknowledges it the same day; afterwards, on the 14th of June, he acknowledges the deed to B., this overreaches the deed to C., and the acknowledgment of the deed to B. is not a fraudulent act Suppose, A. makes a *bonâ fide* deed to B., for valuable consideration, on the 30th of May: on the 1st of June, A. commits an act of treason: on the 14th of June, he acknowledges the deed to B.: the land is not forfeited by the treason of A. If an indictment had been found for forging this deed, and to support the indictment, evidence had been given of the forgery of the acknowledgment only, would have that supported the indictment? If a declaration upon this deed, stating it to have been made on the 14th of June, had been drawn, would it have been supported, by producing in evidence this deed signed, sealed and delivered on the 30th of May?

This deed intends to convey *choses in action* and personal effects, as well as lands. As to the former, the deed is good, without acknowledgment; for as to the *choses in action*, the deed, without acknowledgment, is an equitable assignment, and if acknowledged, it would have amounted to nothing more.

But if the assignees are entitled, they must take the bankrupt's estate, subject to all the equity of others. 2 Vesey, sen., 585, 633; Cooke's Bankrupt Law, 203; *Taylor* v. *Wheeler*, 2 Vern. 564. Courts of law will protect equitable rights; as in the case of *Winch* v. *Keeley*, 1 T. R. 619, where the plaintiff having assigned his right of action to Searle, and having become bankrupt, was still held able to support the action for the benefit of Searle, notwithstanding the assignment of his effects under the bankrupt *246] laws. *And by the authority of *Ex parte Byas*, 1 Atk. 124, if the assignees had received the money due to Robb, the bankrupt, they would have been obliged to pay it over to Wood, the plaintiff in error, instead of receiving it from him.

The deed is not fraudulent *in se;* and would not now be questioned, if the bankrupt law had not been passed. Although it is a deed of all his effects, yet it is not an absolute deed, nor was it made on any secret trust, or for his own benefit. The only thing which can be alleged against it is, that it gives a priority to some of his creditors, and this he had a clear right to do, both in law and equity. It was not made in secret; it holds up no false colors; it enables him to receive no false credit. He might have sold the property

for ready money, and paid any one of his creditors in full. But making a deed of trust, he has prevented a sacrifice of his property, whereby it is competent to satisfy a greater number of his creditors, and he is himself rendered more able to pay the residue of his debts by his future industry.

The committing an act of bankruptcy is, in law, considered as criminal. The bankrupt law is, therefore, in this respect, to be construed strictly. It ought not to be extended beyond the letter of the law. Cooke's B. L. 67; Cowp. 409, 427, 428; 5 T. R. 575; *Fowler* v. *Padget*, 7 Ibid. 509.

But however fraudulent the deed might have been, yet it was no act of bankruptcy, under the act of congress; because not executed after the 1st of June; unless the acknowledgment can be considered as the making of the deed. And if it was not an act of bankruptcy, the title of the defendants in error fails.

Harper, contrà.—The act of bankruptcy charged, is the making a fraudulent deed, after the 1st of June 1800. The counsel for the plaintiff in error having abandoned the second point which was made, and strongly contended for, in the court below, the only question now to be considered is, whether the deed was made before or after the 1st of June.

*A deed, at common law, is an instrument in writing, signed, sealed and delivered. If it be signed and sealed, but not delivered, it is no deed; and the reason is, that until the last act of volition is performed, there is still a power of recalling it. The cases from the English books, respecting the statute of enrolments, are not applicable to the law of Maryland respecting acknowledgment. The English laws only protect creditors and purchasers without notice. But the law of Maryland is intended to protect the maker of the deed himself, to prevent forgeries and fraud, and to give a further solemnity, that the grantor may have more time to reflect, and to secure himself from being suddenly entrapped. The law, therefore, superadds to signing, sealing and delivery, a further act of volition. [*247

It is said, that a court of equity will set up such a deed; true, it would, in certain cases; but not because it is a paper signed and sealed; but because it is a contract for a valuable consideration. But this deed would never have been supported, in a court of equity, if it had not been completely valid at law. Suppose, Robb had refused to acknowledge it; and application had been made to chancery to carry the deed into effect; it would have been refused. Can a deed be said to be made, when it is not complete? It was not complete, on the 30th of May; something was still to be done, of which it would have been necessary to apply to a court of chancery to compel the performance.

If acknowledgment is necessary by statute law, it is the same as if necessary by common law. The one is as binding as the other. They are both derived from the same source, but evidenced in different modes. Signing, sealing and delivery only are necessary by the common law, but acknowledgment also is necessary by the statute.

The deed of land was an act of bankruptcy, and prevented the operation of the deed as a deed of personal estate. The deed for the land and for the chattels was executed *eodem instanti.*

*Chase, J.—The effect of an acknowledgment is to prevent the grantor from pleading *non est factum.* [*248

Harper.—By the law of England, acknowledgment is not necessary. By the law of Maryland, it is a necessary part of the conveyance, and can no more be dispensed with, than the signing, sealing and delivery. Having signed and sealed, the grantor may refuse to deliver; so, having signed, sealed and delivered, he may refuse to acknowledge, and in either case, it is no deed. The deed, therefore, was not made until the 14th of June.

Martin, in reply.—Acknowledgment is absolutely necessary in England, before enrolment; Viner, tit. Enrolment, p. 443; "No deed, &c., can be enrolled, unless duly and lawfully acknowledged, citing Co. Litt. 225 *b*." The acknowledgment is the warrant for the enrolment. An acknowledgment in Maryland has no greater effect than in England.

There was an enrolment at common law, for safe-custody, it makes an estoppel, and the party cannot plead *non est factum*. *Per* HOLT, Ch. J., Comb. 248, *Smart* v. *Williams*, cited in Viner, tit. Enrolment, p. 444. And in p. 445, it is said, "Enrolment of a deed is to no other purpose, but that the party shall not deny it afterwards," citing Bro., Faits, Enrol., pl. 4. And in Sav. 91, *Holland* v. *Downes*, cited in Viner, tit. Enrolment, pp. 446, 447, it is said, "the sealing and delivery is the force of such deeds, as deeds of bargain and sale, &c., and not the enrolment." And again, in the same case, "Bonds, indentures and deeds take their force by the delivery; so there is a perfect act, before the conusance is taken, and before any enrolment. The enrolment could not be made upon proof by witnesses. The acknowledgment was the only authority.

Harper.—The enrolment is the act of the grantee. The acknowledgment is the last act of volition of the grantor. It is wholly voluntary; he may refuse; and if he does, the deed has no effect. In England, the acknowledgment is *a regulation of the courts, not a provision of the statute of enrolments. That statute is different from the act of Maryland; the latter expressly requires the acknowledgment, and no estate passes at law, without it. It, therefore, becomes as much a requisite of a deed as sealing or delivery. It is not only an absolute requisite that the deed should be acknowledged, but the courts of Maryland have been very strict in requiring it to be done precisely in the mode prescribed. In the case of *Hall* v. *Gittings*, decided in the court of appeals in Maryland, the case was, that the grantor resided in Anne Arundel county, but the deed described him as a resident of Baltimore county, where the lands were situated; the acknowledgment was made in Prince George's county. This acknowledgment was decided by the court of appeals not to be good, and the cause was lost upon that ground, although the deed was twenty-five years old, and possession had been quietly enjoyed under it. The error was discovered by the court themselves, and had not been suggested by the counsel at the trial. It has also been decided, that the acknowledgment of a *feme covert* must be precisely in the form prescribed by the act. This shows the great importance of acknowledgments in Maryland.

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Martin, in reply.—The acknowledgment, in England, is not a regulation of the courts only, but is a principle of the common law relative to enrolment, which existed before the statute of enrolments. It was known, at the time of enacting that statute, that by the common law, an acknowledgment

was a prerequisite to enrolment. It was not necessary, therefore, that it should be expressly prescribed by statute. Acknowledgment and enrolment was a proceeding well known and understood, and was not originated by the statute of 27 Hen. VIII. The statute only applies the process to new cases, or makes it necessary where before it was only voluntary. As to the case of a *feme covert*, she could not, by the *common law, convey her land, except by fine and recovery. But the law of Maryland authorized her to do it in a certain mode. That mode must, therefore, be strictly pursued. [*250

March 1st, 1803. The CHIEF JUSTICE delivered the opinion of the court.—This is a writ of error to a judgment of the circuit court of the fourth circuit, sitting at Baltimore, in the following case:

On the 30th of May 1800, William Robb, who was then a merchant, carrying on trade and merchandise, in the state of Maryland, signed, sealed and delivered to Gabriel Wood, an instrument of writing, purporting to convey to the said Gabriel, his real and personal estate, in trust, to secure him from certain notes and acceptances made by him, on account of the said Robb, and afterwards, in trust for other creditors in the deed mentioned. This deed was acknowledged on the 14th of June; and was then enrolled, according to the laws of Maryland.

On the 12th of July 1800, a commission of bankruptcy was sued out, founded on the execution of the deed above mentioned, and the said William Robb being declared a bankrupt, his effects were assigned to William Owings and Job Smith, who brought this suit against Gabriel Wood, to recover the money received by him under the deed aforementioned. Judgment was confessed by the defendant below, subject to the opinion of the court on a case stated, of which the foregoing were the material facts. The court gave judgment in favor of the assignees, to which judgment a writ of error was sued out by the present plaintiff. The only question made by the counsel was, whether the deed stated in the case was an act of bankruptcy?

On the 4th of April 1800, congress passed an act to establish a uniform system of bankruptcy throughout *the United States, which declares, among other things, that any merchant who shall, after the first day of June next succeeding the passage of the act, with intent unlawfully to delay or defraud his creditors, make, or cause to be made, any fraudulent conveyance of his lands or chattels, shall be deemed and adjudged a bankrupt. It was admitted, in the argument, that this deed, if executed after the 1st day of June, would have been an act of bankruptcy, but that being sealed and delivered on the 30th of May, it was not within the act, which only comprehends conveyances made after the 1st of June. [*251

For the defendants in error, it was contended, that, by the laws of Maryland, a deed is not complete, until it is acknowledged, and therefore, this conveyance was made on the 14th of June, when it was acknowledged; and not on the 30th of May, when it was sealed and delivered.

The Maryland act alluded to was passed in 1766, and declares, "that after the 1st day of May next, no estate of inheritance or freehold, or any declaration or limitation of use, or any estate for above seven years, shall pass or take effect, except the deed or conveyance, by which the same shall be intended to pass or take effect, shall be acknowledged in the provincial

court, or before one of the justices thereof, in the county court, or before two justices of the same county where the lands, tenements or hereditaments, conveyed by such deed or conveyance do lie, and be also enrolled, &c., within six months after the date of such deed or conveyance." The 5th section gives the conveyance, so acknowledged and enrolled, relation to the date thereof.

It is a well-established doctrine of the common law, that a deed becomes complete, when sealed and delivered. It then becomes the act of the person who has executed it, and whatever its operation may be, it is his deed. The very act of livery, which puts the paper into the possession of the party for whose benefit it is made, seems to require the construction that it has become a deed.

*252] *The question now made to the court is, whether the act of the legislature of Maryland has annexed other requisites to an instrument of writing conveying lands, without the performance of which, not only the passing of the estate, intended to be conveyed, is arrested, but the instrument itself is prevented from becoming the deed of the person who has executed it. Upon the most mature consideration of the subject, the opinion of the court is, that the words, used in the act of Maryland, which have been recited, consider the instrument as a deed, although inoperative, until acknowledged and enrolled. The words do not apply to the instrument, but to the estate that instrument is intended to convey.

Since, then, the bankrupt law of the United States does not affect deeds made prior to the 1st of June 1800, and this deed was made on the 30th of May 1800, the court is of opinion, that the rights vested by the deed (whatever they might be) are not divested in favor of the assignees of the bankrupt, and therefore, that they ought not to have recovered in this case.

Judgment reversed, and judgment of *non-pros.* to be entered.

United States *v.* Simms.

Penal laws of the District of Columbia.

The acts of congress of 27th February and 3d March 1801, concerning the District of Columbia, have not changed the laws of Maryland and Virginia, adopted by congress as the laws of that district, any further than the change of jurisdiction rendered a change of laws necessary.[1]

Fines, forfeitures and penalties, arising from a breach of those laws, are to be sued for and recovered in the same manner as before the change of jurisdiction, *mutatis mutandis*.

Error from the Circuit Court of the district of Columbia, sitting at Alexandria, to reverse a judgment rendered by that court for the defendant, on an indictment for suffering a faro bank to be played in his house, contrary to an act of assembly of Virginia.(*a*)

The indictment set forth that Simms, "on the 1st April 1801, with

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(*a*) In the case of United States *v.* More (3 Cr. 159), it was decided, that no writ of error will lie in a criminal case.

[1] United States *v.* Heinegan, 1 Cr. C. C. 50; United States *v.* Gadsby, Id. 55; United States *v.* Ellis, Id. 125; United States *v.* Taylor, 4 Id. 731. And see Rhodes *v.* Bell, 2 How. 397.

force and arms, at the county of Alexandria, did suffer the game, called the faro bank, to *be played, by divers persons, in a house of which he, the said Jesse Simms, then and there, at the time of the said play, had the [*253 possession and use, contrary to the form of the statute in that case lately made and provided, and against the peace and government of the United States." The record which came up contained a bill of exceptions, taken by the attorney for the United States, to the opinion of the court; which opinion was, "that the proceeding by indictment, to recover the penalty imposed by law for the offence stated in the indictment in this case filed, was improper, illegal, and could not be sustained."

The act of assembly of Virginia, January 19th, 1798, p. 4, c. 2, § 3, upon which the indictment was founded, is in these words: "Any person whatsoever who shall suffer the game of billiards, or any of the games played at the tables commonly called the A. B. C., E. O., or faro bank, or any other gaming table, or bank of the same, or the like kind, under any denomination whatever, to be played in his or her house, or in a house of which he or she hath, at the time, the use or possession, shall, for every such offence, forfeit and pay the sum of one hundred and fifty dollars, to be recovered in any court of record, by any person who will sue for the same."

"§ 8. The presiding justice, as well in the district as in all the inferior courts of law in this commonwealth, shall constantly give this act in charge to the grand juries of their courts, at the times when such grand juries shall be sworn."

Mason, Attorney for the United States.—The only question is, whether an indictment was the proper process. This depends upon the act of assembly of Virginia of the 19th January 1798, and the acts of congress respecting the district of Columbia.

By the act of congress, 27th February 1801 (1 U. S. Stat. 103), § 1, it is enacted, that the laws of Virginia shall *be and continue in [*254 force in that part of the district which was ceded by Virginia. And by the act of congress of 3d March 1801 (Ibid. 115), § 2, supplementary to the act of 27th February, it is enacted, "that all indictments shall run in the name of the United States, and conclude against the peace and government thereof; and all fines, penalties and forfeitures accruing under the laws of the states of Maryland and Virginia, which by adoption have become the laws of this district, shall be recovered, with costs, by indictment or information in the name of the United States, or by action of debt in the name of the United States and of the informer; one-half of which fine shall accrue to the United States, and the other half to the informer; and the said fines shall be collected by, or paid to, the marshal, and one-half thereof shall be by him paid over to the board of commissioners hereinafter established, and the other half to the informer." By the act of Virginia the penalty is to be recovered by any person who will sue for the same. If the question had depended on this act alone, it would not have been brought before this court. But the act of congress has changed the mode of recovery, and made an indictment necessary.

C. Lee, for the defendant.—"When a statute appoints a penalty for the doing of a thing which was no offence before, and appoints how it shall be

recovered, it shall be punished by that means, and not by indictment." *Castle's Case*, Cro. Jac. 643; and *Rex* v. *Robinson*, 2 Burr. 803.

The statute of Virginia contains in itself the mode of prosecution; and it being such (to wit, an action of debt by an informer) as could not be affected by the transfer of jurisdiction, and the statute being adopted by congress *in toto*, there is no necessity of resorting to another mode. The supplementary act of congress, of the 3d of March 1801, was intended to operate upon those cases, under the laws of Virginia, where it had been necessary to use the name of the commonwealth in the recovery of fines, *255] forfeitures and penalties, and cannot be supposed to intend *to take away a private right, or to alter the mode of prosecution, unless some alteration had become necessary, in consequence of the change of government. That act must be construed, *reddenda singula singulis;* that is, where the mode of prosecution under the state laws was by indictment, or information in the name of the commonwealth, it should, in future, be by indictment or information in the name of the United States; and where, by the state laws, the mode of prosecution was an action *qui tam*, or an action of debt in the name of the informer, it should, in future, be an action *qui tam* in the name of the United States and of the informer, or an action of debt in the name of the informer alone.

Mason, in reply.—The legislature of Virginia certainly had the right and power to alter the mode of recovering the penalty, if they thought proper; so had congress, as soon as the jurisdiction devolved upon them. The words of the act of congress are sufficiently broad to take in this case. The act says, all fines, penalties and forfeitures shall be recovered by indictment, or information in the name of the United States, or by action of debt in the name of the United States and of the informer, that is, where the penalty is to be recovered without the intervention of an informer, there it shall be by indictment or information in the name of the United States; but where an informer appears and claims the penalty, there it shall be a *qui tam* action of debt; and half the penalty is to go to the United States, and half only to the informer. In this case, there was no informer who claimed the penalty. The presentment was made by the grand jury.

Congress did not mean simply to render *singula singulis*. It was found that the criminal code of Virginia could not be carried into effect in this district for want of a penitentiary house. Congress, therefore, took up the criminal system and revised it. They have pointed out both the mode of prosecution and the appropriation of the penalty. They have allowed an informer to come in, in all cases, and claim half of the penalty; and where, by the state laws, the whole went to the informer, they have declared that half shall go to the United States.

*256] *February 23d, 1803. The Chief Justice delivered the opinion of the court.—This is a writ of error to a judgment of the circuit court of the district of Columbia, sitting in the county of Alexandria, in the following case:

By an act of the legislature of Virginia, a penalty of $150 is imposed on any person who permits certain games, enumerated in the act, to be played in a house of which he is the proprietor. The penalty, by that act, is given to any person who will sue for the same. After the passage of this act,

congress assumed the government of the district, and declared the laws of Maryland to remain in force in that part of the district which had been ceded by Maryland; and the laws of Virginia to remain in force in that part of the district which had been ceded by Virginia. Subsequently to the act of assumption, an act passed, supplementary to the act entitled "an act concerning the district of Columbia;" the second section of which is in these words: (here the CHIEF JUSTICE read the whole section, and the substance of the indictment.)

It is admitted, that, under the laws of Virginia, an indictment for this penalty could not be sustained; but it is contended, that the clause in the supplemental act which has been recited, makes a new appropriation of the penalty, and gives a new remedy for its recovery. It is insisted, that the words "all fines, penalties and forfeitures accruing under the laws of Maryland and Virginia," &c., necessarily include this penalty, and by giving a recovery in the name of the United States, by indictment, appropriate the penalty to the public treasury. On the part of the defendant in error, it is contended, that the words relied on do not change the law further than to substitute, in all actions heretofore carried on in the names of the states of Maryland and Virginia, respectively, the name of the United States instead of those names; and that the provisions of the act apply only to [*257
*fines, penalties and forfeitures accruing to the government.

This subject will perhaps receive some elucidation from a review of the two acts of congress relative to the district of Columbia. The first section of the first act, declaring that the laws of the two states, respectively, should remain in force in the parts of the territory ceded by each, was, perhaps, only declaratory of a principle which would have been in full operation without such declaration; yet it manifests very clearly an intention in congress, not to take up the subject of a review of the laws of the district, at that time, but to leave things as they then were, only adapting the existing laws to the new situation of the people. Every remaining section of the act, to the 16th, is employed on subjects where the mere change of government required the intervention of the general legislature. The 16th section continues still to manifest a solicitude for the preservation of the existing state of things, so far as was compatible with the change of government, by declaring that nothing contained in the act should be construed to affect rights granted by, or derived from, the acts of incorporation of Alexandria and Georgetown, or of any body politic or corporate, within the said district, except so far as relates to their judicial powers.

This act had given to the circuit court which it established, cognisance of all crimes committed in the district, and of all penalties and forfeitures accruing under the laws of the United States. It was soon perceived, that the criminal jurisdiction of the court could not be exercised in one part of the district, because, by the laws of Virginia, persons guilty of any offence, less than murder in the first degree, were only punishable in the penitentiary house, erected in the city of Richmond, which punishment the court of Columbia could not inflict. *It was also perceived, that some em- [*258
barrassments would arise respecting the style in which suits, theretofore directed to be brought in the names of Maryland and Virginia, should thenceforth be prosecuted. The respective laws authorizing them, and which were considered as having been re-enacted by congress, *totidem verbis*,

directed such suits to be prosecuted in the names of Maryland and Virginia, respectively. The continuance of this style in the courts of the United States was glaringly improper, and it was thought necessary to change it by express provision. These objects rendered the supplemental act necessary, which provides, that the criminal law of Virginia, as it existed before the establishment of a penitentiary system, should continue in force, and that all indictments shall run in the name of the United States; and all fines, penalties and forfeitures, accruing under the laws of the states of Maryland and Virginia, shall be recovered with costs, &c. The residue of this supplemental act changes nothing, and only supplies provisions required by the revolution in government, and which had been omitted in the original act.

This view of the two acts would furnish strong reasons for supposing the object of congress to have been, not to change, in any respect, the existing laws, further than the new situation of the district rendered indispensably necessary; and that the fines, penalties and forfeitures alluded to in the act, are those only which accrued by law, in the whole or in part, to government; and for the recovery of which, the remedy was by indictment or information, in the name of the state in which the court sat, or by a *qui tam* action in which the name of the state was to be used. It cannot be presumed, that congress could have intended to use the words in the unlimited sense contended for.

By the laws of Virginia, an officer is liable to a heavy fine, for not returning an execution which came to his hands to be served, or for retaining in his hands money levied on such execution. This goes to the party injured, and on his motion, the judgment for the fine is to be rendered. It
*259] would be going a great way, to construe this act *of congress as making such a fine recoverable for the use of the United States; and yet this would be the consequence of construing it to extend to fines and penalties accruing by law, not to government, but to individuals.

If a penalty recoverable by any individual, by action of debt, was to be considered as designed to be embraced by the second section of the supplemental act, still an action of debt in the name of the United States and of the informer, would seem to be the remedy given by the act. The principle, *reddenda singula singulis*, would be applicable; and it would seem to the court more proper to suppose the *qui tam* action, given in this case, to be the remedy, than an indictment.

The court, therefore, is of opinion, that there is no error in the judgment, and that it be affirmed.(*a*)

(*a*) The defendant's counsel prayed that the affirmance might be with costs. It was suggested by some of the gentlemen of the bar, that the question of giving costs against the United States would be fully argued in the case of United States *v.* Hooe, at this term. The court, therefore, postponed the subject, until that argument should be had. That cause, however, went off upon another ground, without any argument on the question of costs. And the court did not give any directions respecting the costs, in the present case.

Fenwick *v.* Sears's Administrators.

Powers of administrators.—Notary-public.—Protest.—Notice to indorser.

An administrator having had letters of administration in Maryland, before the separation of the District of Columbia from the original states, cannot, after that separation, maintain an action in that part of the district ceded by Maryland, by virtue of those letters of administration; but must take out new letters within the district.

Quære? Whether the acts of a notary-public, who certifies himself to be duly commissioned and sworn, are valid, if he be duly appointed, but not actually sworn, in due form?

Whether, between contending parties, the certificate of a notary-public, that he is "duly commissioned and sworn," can be contradicted?

Whether a protest for non-payment of a bill of exchange must be made on the last day of grace?

Whether the reasonableness of notice be matter of fact or matter of law?

Whether, on a count for money had and received, notice of non-acceptance and of non-payment be necessary to charge an indorser, who knew, at the time of indorsement, that the drawer had no right to draw.

Error from the judgment of the Circuit Court of the district of Columbia, sitting at Washington, in an action on the case, on a foreign bill of exchange, by the administrators of the indorsee against the indorser. The case, as it appeared in the pleadings and bills of exceptions, was as follows:

Francis Lewis Taney, at Paris, in France, drew the following bill of exchange:

"Paris, 5th August 1797.

Sixty days after sight of this my second of exchange (first and third not paid), pay to the order of Mr. Joseph *Fenwick the sum of three hundred and fifty dollars, for value received in account, which [*260 charge as advised by your most obedient servant,

Fras. Lew. Taney.

"To Messrs. Ben. Stoddert and John Mason, Georgetown, Maryland."

This bill was indorsed by Fenwick to George Sears, of Baltimore, and on the 30th of March 1798, it was presented for acceptance, refused, and protested in the usual form for non-acceptance, by Samuel Hanson, of Samuel, styling himself notary-public for the county of Montgomery, in the state of Maryland, dwelling in Georgetown, in said county, duly commissioned and sworn.

On the 2d of June 1798, payment of the bill was demanded of the drawees by the same notary, and refused, whereupon, on the same day, he protested it in the usual form for non-payment. Fenwick, the indorser, was, at the time of indorsing, and had been for ten years before, a resident of France, but in the year 1800, he came to this country, and on the 4th of April 1801, the plaintiffs below brought suit against him here upon his indorsement. The declaration had two counts, one upon the non-acceptance of the bill, the other for money had and received.

The defendant below pleaded, 1st. *Non assumpsit.* 2d. That the plaintiffs "have not obtained letters of administration on all and singular the goods and chattels, rights and credits, which were of the said George, at the time of his decease, to wit, at Washington county aforesaid, and this he is ready to verify, wherefore he prays judgment," &c. To which the plaintiffs replied, that the said George Sears, the intestate, departed this life, in the town of Baltimore, in the county of Baltimore, in the state of Maryland, which was at that time his place of residence, on the ——— day

of———, in the year of our Lord 1800, intestate; and afterwards, to wit, on the 8th day of November, in the year aforesaid, administration of all and singular the goods and chattels, rights and credits of the said intestate, was *261] granted to the said John Stricker and Henry *Payson, in due form of law, by William Buchanan, register of wills for Baltimore county aforesaid; an exemplification of the letters of administration granted to the said Stricker and Henry Payson as aforesaid, duly authenticated, is now here to the court produced; and this they are ready to verify; wherefore they pray judgment," &c. To this replication, there was a general demurrer and joinder; which demurrer was overruled by the court below.(a)

On the trial of the issue in fact, five bills of exception were taken by the defendant's counsel. 1. The first stated that the defendant objected to the second bill of the set of exchange going in evidence to the jury, unless the plaintiff first offered evidence to account for the first and third of exchange, and to show that they, or either of them, were not paid, or passed in the course of business to some other person who still holds the same; but the court overruled the objection, and suffered the second bill to be read.

2. The second bill of exceptions stated, that the defendant objected to the admission of the two protests in evidence, because, as he alleged, Samuel Hanson, of Samuel, was not a notary-public, on the 30th of March 1798, nor on the 2d of June 1798, and to prove this, the defendant offered to give evidence, to prove that the said Hanson, previous to the 30th of March 1798, had been named and appointed by the governor of the state of Maryland, by and with the advice and consent of the council of Maryland, a notary-public, but that he never did take the oath or oaths prescribed for a notary-public to take, until after the 3d day of June 1798; but the court were of opinion, that the evidence so offered to prove that the said Hanson was not a notary-public, was not admissible for that purpose, and refused to let the said evidence be given; and the protests were permitted to be read to the jury.

3. That the defendant's counsel prayed the court to direct the jury, that *262] the protest for non-payment is not such *a protest as by the law of merchants is required, and was not made within the time by the law and custom of merchants required, and therefore, that the plaintiffs cannot in this case recover of the defendant upon the said bill of exchange; but the court refused to give such instruction.

4. The fourth bill of exceptions stated at great length the testimony of several witnesses, tending to show notice of the non-payment given to the defendant in this country, some time in 1800 or 1801, and that the defendant had made some propositions for settling the bill. That the drawees had no funds of the drawer in their hands. That the drawees held a deed from the drawer of certain lands in Georgia and North Carolina, and an assignment of a large demand on the French government, and of another large demand against an individual in France, which they held in trust to pay certain debts due from the drawer, and to pay him the surplus, if any. That they had permitted the drawer to go to France, and attend to these claims, and sell the lands, but that it was understood between them and the drawer, that he

(a) The jurisdiction of the several states of Virginia and Maryland over the territory ceded by them to the United States, for the seat of government, ceased on the first Monday of December 1800. United States v. Hammond, 1 Cr. C. C. 15.

should bear his own expenses, but that they did not inform the defendant of that circumstance. That at the time he went, they thought favorably of the trust, and wrote, by the drawer, to the defendant, expressing their opinion of it, and inclosing to the defendant a power of attorney to act for them in the business, and to receive any moneys that might be recovered under the trust, and informing him that the drawer would attend and look after the said concerns. That at the time of presenting the bill, they had not received any money under the trust, but were in advance on that account. That the bill was indorsed by the defendant, to enable the drawer to raise money in France, for the purpose of supporting his necessary expenses, whilst he was prosecuting there those claims in which the drawees were interested as trustees, and that the drawer sold them for that purpose. That the defendant came to this country on business, in October 1800, and returned to France in May 1802, and during his stay in this country, made Georgetown his place of residence.

That after this bill was drawn, the drawer received in France a sum of between $2000 and $3000, in the *beginning of the year 1798; that during the years 1798, 1799 and 1800, French ships were permitted to [*263 sail directly from America to France, for the purpose of carrying Frenchmen home; this happened perhaps twice a year, or oftener. That during these years, there was a communication between America and France for letters, &c., through the medium of London and Hamburg. That after the spring of 1798, American vessels were very often captured by the French armed vessels on the high seas; and that at the time, previous to the year 1798, American ships were embargoed in France.

The defendant then prayed the court to instruct the jury, that upon the whole evidence, as stated, the plaintiffs, by their neglect in not giving notice to the defendant, the indorser on the said bill, that it was protested for non-acceptance and for non-payment, sooner than they did, had released the defendant from all responsibility on the same, and could not recover thereon; which direction was not given as prayed, the court being divided in opinion, whether, in this case, the question of reasonable notice was a matter of law to be determined by the court, or a matter of fact to be determined by the jury. But the court were of opinion, and so directed the jury, that if they should be of opinion, from the evidence, that the defendant who indorsed the bill drawn by F. L. Taney in this suit, knew, at the time of such indorsement, that the said Taney had no effects in the hands of the drawers, on which he could draw, notice of the non-payment, or of the protest therefor, was not necessary to enable the plaintiffs to recover, in this action, on the count for money had and received.

5. The fifth bill of exceptions, after repeating the evidence at length, stated that the defendant prayed the court to instruct the jury, that although they might be of opinion, that Fenwick, the defendant, knew, at the time of his indorsement, that the drawer had no effects in the hands of the drawees, on which he could draw, yet, to support an action on the bill of exchange, against the defendant, it was necessary for the plaintiffs to give him reasonable notice of the protest of the bill for non-acceptance or non-payment, one or the other; and that, under the circumstances of this case, notice to the said Fenwick of *such protest for non-acceptance, or non-payment, in October 1800, was not reasonable notice; where- [*264

upon, the court were of opinion, and directed the jury, that if they were satisfied from the evidence, that the defendant, at the time he indorsed the bill, knew that Taney had no effects in the hands of the drawees, upon which he could draw, still it was necessary for the plaintiffs, in order to support their action against the defendant, upon the first count in the declaration, to give him reasonable notice of the protest for non-acceptance, or for non-payment, one or the other ; but whether, under the circumstances of this case, reasonable notice had been given to the said Fenwick, of the said protest, the court gave no opinion ; being divided in opinion, whether the same was matter of law to be determined by the court, or matter of fact to be determined by the jury.

Verdict for the plaintiff, $439.46, and judgment accordingly ; to reverse which, the present writ of error was brought by the defendant.

Mason, for the plaintiff in error. *Simms* and *C. Lee*, for the defendants.

Mason now waived the consideration of the first bill of exceptions, and relied upon the following points : 1st. That the protests ought not to have been admitted to be given in evidence, because Hanson, who made them, although he styles himself notary-public, was not a notary-public. 2d. That the protest for non-payment was not a sufficient protest to charge the indorser, because it was not made within the days of grace, but on the day after the last day of grace. 3d. That the notice of the non-payment given to the defendant was not given in reasonable time ; and did not come from an indorsee, but from Judah Hays, for whose use this suit is brought. The court, and not the jury, are to decide what is reasonable notice. *4th. The letters of administration granted in Maryland, before the jurisdiction over the district of Columbia vested in the United States, do not authorize the plaintiffs to maintain an action, as administrators, within the district, after the transfer of the jurisdiction.

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I. That Hanson was not a notary-public, and therefore, the protest void. A protest by a person having due authority, is the only evidence which can be received of the non-acceptance or non-payment of a foreign bill, to charge the indorser. Kyd 136, 142 (87, 91). The only person who can have such due authority is a notary-public. Kyd 137 (87). With regard to inland bills and promissory notes, the statute of Anne is adopted in Maryland, and the courts of Maryland are governed by the same rules, laws and authorities as the English courts. By the constitution of Maryland, § 48, notaries-public are to be appointed by the governor and council. The 55th section declares, "that any person appointed to any office of profit or trust shall, before he enters on the execution thereof," take the oath therein prescribed, "and shall also subscribe a declaration of his belief in the Christian religion." The act of assembly of Maryland, February 1777, c. 5, prescribes an oath of office to be taken before the officer enters into the execution of his office. The act of assembly, November 1779, c. 25, § 2, ascertains his fees, and the 8th section prescribes the form of another oath to be taken, before entering on the duties of his office, under a penalty of 150*l*.

If a man assumes a character which he does not possess, and a seal to which he has no right, his acts are not obligatory. No man can constitute

himself a notary-public. If not duly appointed and qualified, his protest is not better than the protest of any other person. If *Hanson had not [*266 taken the oaths, and if he could not act, until he had taken them, then the protest is not by a notary; and it was competent to the defendant to give evidence, to prove that he had not taken the necessary oaths.

II. The protest for non-payment was made a day too late. The bill was presented for acceptance on the 30th of March; the last day of grace was the 1st of June; the protest was on the 2d of June. The custom as to the days of grace, and the mode of computation of time, is stated in Kyd 9 (6). The bill must be presented for payment within the days of grace, and protested on the last day of grace. Kyd 136, 142 (87, 97).

Althought the bill be protested for non-acceptance, yet it must be presented for payment, at the time it becomes due, and regularly protested for non-payment. And although a right of action accrues upon the protest for non-acceptance, yet the holder is held to have discharged the drawer and indorsers, unless he presents it for payment when due, and regularly protests it for non-payment. Kyd 117, 120 (76, 79, &c.), 121, 137, 138, 151, 208.

III. The defendant had not such notice of the protests for non-acceptance and non-payment, as to render him liable. The case of *Brown* v. *Barry*, 3 Dall. 365, has no relation to this case. That was a bill drawn in America upon a person in Europe. This is a bill drawn in Europe on a person in America, and is, therefore, subject to the laws of the place where drawn and indorsed, as to the liability of the drawer and indorsers. The engagement of Fenwick, the defendant, was made in France, and his liability is to be determined by the laws there. The obligation of the drawer and indorsers is only conditional; the holder must do certain things to entitle him to call upon them. Kyd 117 (76). He is bound to give regular notice of non-acceptance to all the preceding parties to whom he means to resort.

*As to the protest being for want of funds in the hands of the [*267 drawees, it goes only to discharge the holder from his obligation to give notice to the drawer, but does not supersede the necessity of notice to the indorser. Kyd 129, 131 (82, 83). There is reason for this distinction. A drawer may have a good reason for drawing, although he has no effects in the hands of the drawee, but yet no injury can result to him by want of notice. But the indorser may know that the drawer has been in the habit of drawing; but may not know the exact state of the funds upon which he drew.(*a*) The indorser indorses on the credit of the drawer; and notice is necessary to enable him to take measures to secure himself from the drawer.

As to the time of notice; the non-acceptance was on the 30th of March 1798, and on that day, the holder's obligation to give notice accrued, but he did not give it until January or February 1801. The act of congress did not stop the intercourse between this country and France, until 1st July 1798. There is no evidence that any attempt was made, during this time, to send notice. The bill, in seven months, found its way from France to Georgetown, and what prevented its getting back again in seven months more? The evidence stated in the bill of exceptions shows that there was always a circuitous route by which letters and papers might have gotten to France.

(*a*) See Evans on Bills, 62, 67 (Am. edition).

There is also evidence that the drawer was able to pay, for some time after the drawing the bill, and that he afterwards left France. Notice must be given by the indorsee himself. Kyd 126 (79, 80). The only notice which was given in this case, was by Judah Hays, who is not a party on the bill.

The court, and not the jury, ought to have decided the question of reasonable notice, or due diligence. It is a question of law. Kyd 126, 127 (79, 80). Notice must be given by the first post. The courts in Maryland have always so decided. If the courts have not decided the question of due diligence, they have erred. They have also erred in the opinion which they did give. They admit, that reasonable notice is necessary, to enable the plaintiffs to recover upon the bill, on the first count, but that, in case the defendant below knew that the drawer had no *funds in the hands of the drawees, it is not necessary to prove such notice, in order to enable the plaintiffs to recover on the count for money had and received. It is not known, on what grounds the court below could take such a distinction. There was certainly nothing in the evidence which could support such an opinion. If the holder had been guilty of such negligence as to discharge the indorser from his liability upon the bill, he was not entitled to recover upon either count. It was an objection which went to the whole merits of the case; and it is not like the case where a security or instrument may be vacated, but the debt still remain.

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IV. The letters of administration, granted in Maryland, did not authorize the plaintiffs to administer assets in the district of Columbia. The laws of Maryland, which were adopted by congress for this district, do not authorize an administration of assets, under letters of administration granted in another state. And such has been the uniform course of decisions in the courts of Maryland; because, by the testamentary laws of Maryland, the administrator s to give bond, and render an account of his administration; and the assets are to be distributed in the manner prescribed by law. Although this is the law of Maryland, and the laws of Maryland have been adopted in this district by congress; yet they do not operate as laws of Maryland, but as laws of the United States. And although the law is the same, yet the jurisdiction is different. This district, and the state of Maryland, are to each other as separate states.

Simms, for the defendants in error.—I. As to the objection that the notary had not taken the necessary oaths. It is believed, that no case can be produced to support this exception. It would be extremely inconvenient, if the acts of a commissioned ministerial officer should be considered as invalid, because he had neglected to take an oath prescribed by law.(*a*)

*By the act of assembly of 1779, c. 25, § 8, a penalty is enacted for not taking the oath there mentioned. This does not make void the acts of the officer, if he neglects to take the oath required, but only subjects him to the penalty for acting without taking it. From this it may be inferred, that the legislature considered his acts as valid.

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The court did not err in refusing the evidence offered, because it was an

(*a*) See the case of Thurstan *v.* Slatford, in the exchequer, 1 Lutw. 377 (8vo. edition, 1618), where it was held, that the town-clerk of Oxford was entitled to recover his fees accruing before he had taken the oaths.

attempt to prove a negative. The oath might have been taken before any judge, or justice of the peace, in the state of Maryland, or any alderman in the city of Annapolis. The law does not require such oath to be recorded, or deposited in any particular place. A party can never be called upon to prove that a notary-public, who protests a bill of exchange, was duly qualified to make such a protest; consequently, the court ought not to admit evidence that he was not, so as to throw the burden of proof upon the other party. There is no penalty prescribed for not taking the oaths required by the constitution of Maryland, and by the act of 1779, but it does not follow from that circumstance, that the acts of the officer, duly appointed and commissioned, would be void, by his not having taken the oaths, because he might be indicted and punished for his contempt of the law, and his neglect of duty. Innocent people ought not to suffer by his negligence, especially, as they have no means of knowing whether he had taken the oaths or not. The public commission from the proper authority is all that can be required to protect the rights of third persons.

It is true, that in the passage cited from Kyd 136 (87), it is said, that "the person whose office it is to do these acts (that is, make protests, &c.) is, in common language, termed a public-notary;" but it is also said, in Evans 94, that when there is no public-notary in the place, the protest may be made by any other person.

II. As to the time of making the protest for non-payment. The time when a protest ought to be made, depends much on the custom of the place. 4 Bac. Abr. (Gwillim's ed.) 687. *The time in England was for a long while unsettled. In *Hill* v. *Lewis*, 1 Salk. 132, it was determined, [*270 that, with respect to foreign bills, the drawee had three days of grace to pay them in, and that no demand need be made until the expiration of the three days, consequently, that the protest need not be made until after the third day of grace. But in the case of *Tassel* v. *Lewis*, Ld. Raym. 743, it was held, that the time of payment is the last of the three days, and that the demand ought to be made on that day. In a late case of *Leftly* v. *Mills*, 4 T. R. 173, Lord Kenyon held, that the acceptor had until the last moment of the last day of grace, to pay the bill, consequently, the protest could not be made until the day after. But Buller held, that the acceptor was bound to pay the bill, on demand, on any part of the third day of grace, and that the bill ought to be protested on that day, and it is believed, that such is now the established custom in England. Kyd 120, 121 (79, 80).

But the custom of merchants in the United States differs in some respects from the custom of merchants in England. *Brown* v. *Barry*, 3 Dall. 365, 368. It is believed, that in the United States, the custom is to protest on the day after the last day of grace. Such is the custom in the banks of Alexandria and Columbia, in the case of promissory notes; and no difference is known in that respect between promissory notes and bills of exchange. There is no reason why a difference should exist, as the three days of grace are allowed in one as well as in the other.

But in this case, the bill was protested for non-acceptance, and the defendant thereupon became liable to the action of the plaintiff. In an action brought upon the non-acceptance, it is not necessary to aver a demand or protest for non-payment, on the day when the bill becomes due; and what it is not necessary to aver, it is not necessary to prove; *Dunstar* v. *Pierce*,

Lilly's Ent. 55 ; which was a case on a demurrer to the declaration ; demurrer overruled, and judgment affirmed in the exchequer.

But had the bill been accepted, then a protest for non-payment would have been absolutely necessary. Evans 66 ; Kyd 140 ; *Milford* v. *Mayor*,
*271] 1 Doug. 55 ; *Bright* v. *Parrier*, Bull. N. P. 269 ; *Kyd 110, 111 ; 3 P. Wms. 16, 17.

III. Under the circumstances of the present case, the plaintiffs were not bound to give the defendant notice at all ; the jury having found, in substance, that at the time the defendant indorsed the bill, he knew that the drawer had no effects in the hands of the drawees ; and was, therefore, guilty of a fraud on the plaintiffs' intestate, in selling him the bill. The plaintiffs, therefore, had a right to recover on the count for money had and received. Besides, the reason of the rule which dispenses with notice to the drawer, when the drawees have no effects, applies as strongly to the indorser, who knows that fact, as to the drawer. Notice to such an indorser can be of no benefit, because he knew, at the time of indorsing, that the bill would not be paid, and therefore, must have taken security from the drawer ; or, if he did not, it was his own fault. By knowing, at the time of indorsing, that the drawees had no funds of the drawer in their hands, he virtually had notice of the non-acceptance and non-payment. The rule which requires notice to an indorser, is made for his protection and benefit ; and ought not to be converted into the means of enabling him to practise a fraud.

The opinion of the court below, that although notice might be necessary, in order to support an action on the bill, upon the first count, yet it was not necessary, to maintain the count for money had and received, was certainly correct, and fully warranted by the case of *Bickerdike* v. *Bollman*, 1 T. R. 408, 409, 410. In that case, Ashhurst, Justice, says, that notice is not necessary to the drawer, when he has no effects in the hands of the drawee ; "for it is a fraud in itself, and if that can be proved, the notice may be dispensed with." Kyd 129 (82) ; Evans 59. Every indorser is, to his indorsee, as the drawer of a new bill. Kyd 113 (72); *Harry* v. *Perritt*, 1 Salk. 133 ; *Claxton* v. *Swift*, 2 Show. 501 ; and in *Heylin* v. *Adamson*, 2 Burr. 674, Lord Mansfield says, "that when a bill of exchange is indorsed by the person to whom it was payable ; as between the indorser and indorsee, it is a
*272] new bill of exchange, and the indorser *stands in the place of the drawer." If, therefore, the indorser, at the time he transfers a bill, knows that the drawer has no effects in the hands of the drawee, he is as guilty of fraud as the drawer himself; and in all cases where money is obtained from another by fraud of any kind, it may be recovered back, in an action for money had and received. *Moses* v. *Macferlan*, 2 Burr. 1012; *Hasser* v. *Wallis*, 1 Salk. 28. And in the case before cited, of *Bickerdike* v. *Bollman*, 1 T. R. 410, Buller, Justice, says, "Besides, in the present case, as the plaintiff's counsel have truly argued, the question is not whether an action could be maintained on the bill itself, but whether the want of notice extinguishes the debt. As to which, the case is this : A. not having any effects in C.'s hands, draws a bill of exchange for 100*l.* on him, in favor of B., for value received. Now, if C. does not accept, and B. does not give notice to A., there is an end of the bill. Then, how does the case stand ? A. has 100*l.* of B.'s in his hands, without any consideration, which, therefore, B. may undoubtedly recover. in an action for money had and received."

The reasoning in that case applies exactly to the present. Here, the defendant, Fenwick, by his indorsement of the bill, acknowledges that he has received its amount. He has received of the intestate $350, without any consideration, and, therefore, even although the remedy on the bill might have been lost, he ought to recover the amount of the consideration, on the count for money had and received.

It is true, that in the case of *Goodall* v. *Dolley*, 1 T. R. 712, it is said, that the fact of the drawer's having no funds in the hands of the drawee, would not discharge the obligation of the holder to give notice to the indorser, to whom he meant to resort; yet it is also expressly stated, that the indorser was ignorant of all the circumstances of the case. That opinion, therefore, cannot affect the present case, in which the indorser knew the circumstances.

As to the question, whether reasonable notice is matter of law to be determined by the court, or matter of fact to be determined by the jury; the practice in England, until lately, was for the jury to determine, by the circumstances *of each particular case, what time was reasonably to be allowed either for making demand, or giving notice. Kyd 127 (77); [*273 *Russel* v. *Langstaffe*, Doug. 515 (497); *Rushton* v. *Aspinall*, Ibid. 681. In the case of *Tindall* v. *Brown*, 1 T. R. 167, Lord MANSFIELD says, that "what is reasonable notice is partly a question of fact, and partly a question of law. It may depend in some measure on facts; such as the distance at which the parties live from each other, the course of the posts, &c. But whenever a rule can be laid down with respect to this reasonableness, that should be decided by the court, and adhered to by every one for the sake of certainty." And ASHHURST, Justice, said, it was "of dangerous consequence, to lay it down as a general rule, that the jury should judge of the reasonableness of time. It ought to be settled as a question of law. If the jury were to determine this question in all cases, it would be productive of endless uncertainty." It appears to have been the opinion of both these judges, that there were certain cases, in which it was proper for the jury to determine on the reasonableness of notice; but that in cases where a rule can be laid down, the court ought to decide the question. No certain rule can be laid down, except in cases where the parties live in the same place, or where there is a constant and regular communication by post between them.

In a much later case, 2 H. Bl. 569, it was determined, that what was reasonable time must depend on the particular circumstances, and it must be always for the jury to determine whether any *laches* is to be imputed to the plaintiff. In the case of *Mackie* v. *Davis*, 2 Wash. 231, CARRINGTON, Justice, says, "whether due diligence had been used by the assignee, to recover against the obligor, would necessarily be a matter in issue between the parties; and would, upon all the circumstances of the case, be decided by the jury." 1 Dall. 252, is to the same effect. A case to the same *effect [*274 also has been mentioned as having been decided in the circuit court of the United States, in Virginia, by Judge WILSON.

The instruction of the court below to the jury, that reasonable notice was necessary, to charge the defendant on the first count, was not objected to by the plaintiffs' counsel; but the court not having instructed them whether the notice was or was not reasonable, and a general verdict for the plaintiffs having been given, it is to be presumed, that the jury thought the notice

was reasonable, under all the circumstances: and they were certainly competent to decide that question.

The decisions, that notice must come only from the indorsee or the holder, have been since overruled. Evans 57.

III. As to the letters of administration. An administrator, in the United States, ought not to be considered precisely in the same point of view as in England. In England, he is the servant or agent of the ordinary, and acts in his place and stead. In the United States he is the representative of the intestate; and all the rights and credits of the intestate are vested in him.

Formerly, in England, the goods of an intestate were disposed of by the bishop or ordinary to pious uses. It was not until the statute of 13 Edw. I., c. 19, that the bishop or ordinary was compelled to satisfy the debts of the intestate, so far as the goods, which came to his hands, would extend. After this statute, an action might be brought against the ordinary, in the same manner as against an executor; but he was not compellable to grant administration, until the statute of 31 Edw. III., c. 11.

From this relation between the ordinary and the administrator, the power
*275] of the latter was necessarily limited *by the jurisdiction of the former. But the act of congress concerning the district of Columbia puts the question out of doubt. By that act, the laws of Maryland are continued in force in this part of the district; of course, all rights acquired under the laws of Maryland remained valid. It was not the intention of congress to divest any rights which had been acquired under those laws. If the separation of the district from Maryland took away the right which the plaintiffs before possessed of taking possession of the property, and collecting the debts of the intestate, in this part of the district, under their letters of administration granted in Baltimore county, it would have the same effect upon letters granted by the orphans' courts of Montgomery and Prince George's counties, before the separation, to persons resident in the district, so that their acts, done since the separation, are unauthorized, and they cannot lawfully act, until new administration has been taken out from the orphans' court within the district. The inconvenience, expense and oppression of such a construction, are too obvious, to admit the supposition that it was within the intention of congress. These letters were taken out from the proper authority, and at the time, vested a right in the plaintiffs to administer the assets within this part of the district.

C. Lee, on the same side.—I. As to the letters of administration. Admitting that letters of administration, granted out of the state of Maryland, will not authorize an administration of assets, within the state, yet in this case, the letters were granted in Maryland, while this district was part of Maryland, before the 1st Monday of December 1800, and did once authorize an administration of the assets here. A right was completely vested in the plaintiffs. The laws of Maryland are as fully in operation in this district, as they were or are in the state of Maryland. Congress could not mean to divest rights completely vested.

II. As to the second bill of exceptions.—It is admitted, that Hanson was duly appointed notary, but the objection is, that he had not taken the
*276] oath. The *exception is not to the opinion of the court, that he was not duly qualified to act; but simply, that it was not competent for the

defendant to give the evidence offered to prove that he had not taken the oaths. The intention of an oath is only to impose an additional obligation on the officer. It is a matter between the officer and the government; and generally, a penalty is imposed for not taking it; but the not taking the oath does not make the act void. Suppose, a member of the legislature should not take the oath prescribed; this would not vacate a law to which he had given his assent: such a doctrine would produce infinite inconvenience. No time is limited for making the objection; and twenty years after an act has been done, it may be offered to be proved, that the officer did not take the oath; if the court would do right in refusing such evidence in that case, they were right in refusing it in the present.

III. The third bill of exceptions is, that the court admitted the protest for non-payment to go to the jury, when it was not made in due time. The action being for non-acceptance, and not on the protest for non-payment, it was not necessary to produce that protest at all. The objection is, that it was not made on the last day of grace, but on the day after. The custom is different in different countries. From the general practice of the banks, it may be considered as the general rule in this country, to protest on the day after the last day of grace. The protest for non-acceptance is not objected to; it was made on the day on which the bill was presented. The court only refused to give the direction as prayed, but gave no opinion, that the protest was a good one.

IV. As to the fourth bill of exceptions. This record does not state the whole evidence in the cause. It is true, it is said, that this is all the evidence given of notice; but it does not state what other evidence there might be, to excuse the want of notice. This exception *may be divided into three points; 1st. As to the opinion prayed; 2d. As to the conduct [*277 of the court in not giving an opinion as to part of the prayer; and 3d. As to the opinion which the court did give.

The prayer is, to instruct the jury, that it was necessary to prove notice of non-payment as well as of non-acceptance. The plaintiffs, if anybody, had a right to complain of the opinion of the court, inasmuch as it did not declare notice of non-payment to be unnecessary. But they have waived their right to except. The opinion given is what is excepted to, and that was given only on the count for money had and received.

The bill and indorsement are stated to have been made in France. The law of France, then, is the *lex loci* by which this cause is to be decided, and by which the liability of the indorser is to be ascertained. By that law, no notice is necessary to the drawer or indorser, if there are no effects of the drawer, or of the indorser, in the hands of the drawee. Evans 60, 62. And what is meant by funds, is not securities lodged for raising money, upon which the money has not been raised; but is money in account. 2 Esp. 515; Evans 62.

As to the ground of fraud, the court left it to the jury, to decide whether the defendant knew that the drawer had no funds in the hands of the drawees. If he did know it, is it not as much a fraud, as in the case of a drawer drawing without funds? It is, in fact, an accumulated fraud. If, according to Justice Ashhurst, one is a fraud, the other must be a greater fraud.

As to due diligence, the exception is not, that no notice was given, but

that it was not given in due time. No doubt, but that by the laws in England, due notice is necessary as a general rule; but to this there are exceptions. There is an American law on this subject, which is, that in some cases the jury, and not the court, is to decide what is *laches*. When a particular case
*278] arises, and a variety of circumstances are given in evidence in excuse *for not giving notice sooner, there, by the American practice, the jury are to decide. This appears by the decisions in Pennsylvania down to the year 1795. *Robertson* v. *Vogle*, 1 Dall. 252; *Bank of North America* v. *McKnight*, 2 Ibid. 158; Ibid. 192, 233; *Mc Williams* v. *Smith*, 1 Call 123.

In this country, the line is more distinctly drawn between court and jury than it is in England. By the 9th article of the amendments to the constitution, a matter once tried by a jury shall not be otherwise re-examined than by a jury, according to the rules of the common law. If the court now make a rule as to what is due diligence in this case, they will, without a jury, try a fact which has once been decided by the jury in the court below. If the question involve matter of fact with the law, the jury must decide the facts; and it is no error in the court, to suffer them to decide the law also at the same time. When a rule can be laid down, then the court is to state the rule; but where that cannot be done, then it may be left with the jury. This is all that Lord MANSFIELD says in the case of *Tindall* v. *Brown*.

V. The fifth is an exception to the opinion which the court gave, and not to the conduct of the court in not giving an opinion. The opinion given was against the plaintiffs below, and they alone had a right to except to it. There was a decision of Chief Justice JAY, given upon the circuit, similar to that given by Judge WILSON, that the jury, and not the court, were to judge of the validity of excuses for giving notice. The judgment ought not to be reversed, because the court below did not give an improper instruction to the jury. It is hoped, that the court will decide the question of notice, as it is of great importance, that a general rule should be established and understood.

*279] *Mason*, in reply.—I. As to the letters testamentary. Antecedent to the revolution, the testamentary affairs in the state of Maryland were under the superintendence of a commissary-general, who had a deputy in each county. If there were *bona notabilia* in several counties, the administration was granted by the commissary-general. But if the goods of the intestate were all in one county, it might be granted by the deputy-commissary of that county. By the new system of testamentary laws, 1798, c. 101, § 3, the assets in Maryland cannot be administered but by letters of administration granted in Maryland.

In the district of Columbia, if a man now die intestate, the administration must be granted in the district. The laws of Maryland do not operate in the district as laws of Maryland, but as laws of the United States. Their obligatory force is not derived from the state of Maryland, but from the United States.

Does the fact that the letters were granted, before the separation of the district from Maryland, make any difference? If any right had vested, what was it? Was it a right to sue Fenwick, who was then in France, and who came to the district after its separation? But no right at all had vested in the plaintiffs. If the separation had not taken place, and Fenwick had

come, they might have sued; but as it had taken place before he came, they cannot. By the laws of this part of the district, the administrator must give bond duly to administer the estate, and to pay the debts *pari passu*. He must advertise in a certain manner, &c. The only evil resulting from this construction of the law is, that plaintiffs must take out letters of administration here.

II. As to the second bill of exceptions. The question is, whether Hanson was a notary, before he took the oath *prescribed by the law of 1779. [*280
The constitution says, that before he enters upon the duties of his office, he shall take the oath of allegiance. The law of 1779 says, he shall take the other oath therein prescribed, and if he acts without taking it, he shall be subject to a penalty. The constitution and the law are to be coupled together, and then the taking the oath prescribed by the act of 1779, becomes a prerequisite to his capacity to act as notary.

III. The third bill of exceptions is, that the protest for non-payment was not a proper one to go to the jury. It was not, in itself, evidence. It is no answer to say, that no protest for non-payment was necessary; the counsel below did not choose to risk their cause without it. If the opinion of the court is erroneous, and if the protest was improperly admitted to go to the jury, the judgment must be reversed. It may be a good reason why the court should refuse to let it go to the jury, that it was not necessary. It is, therefore, unimportant to decide whether it was necessary or not. But that it was necessary appears in Kyd 120, 137, 138 (77, 87).

As to the case of the notary who refused six pence for noting the bill. 4 T. R. 173. It is the opinion of Lord Kenyon only, that the acceptor had until the last moment of the last day of grace to pay the bill; and that was the case of an inland bill, and decided expressly upon the statute of William. But Buller states the law to be otherwise on a foreign bill, and that, by the custom, the bill is payable at any reasonable time of the last day of grace, when demanded. And the law is so stated in Kyd 121 (78). The practice in Alexandria may be as stated, but in Baltimore, they protest on the third day, in banking hours. There is a difference between the law respecting inland and foreign bills; and this difference arises from the statute of William, which gives the protest on inland bills, and requires it to be made after the expiration of the three days. Kyd 151 (91). It is upon this statute, which is in force in Maryland, that the banks have adopted the practice of protesting promissory notes on the day after the expiration of the three days of grace. A promissory note, as soon as it is indorsed, becomes an inland bill of exchange.

*IV. It is objected to the fourth bill of exceptions, that it does not contain the whole evidence. But if a bill of exceptions states [*281
evidence, it has been decided by this court, that it is presumed to state the whole evidence. *Bingham* v. *Cabott*, 3 Dall. 19, 38.

It is said, that the exception is not to the refusal of the prayer, but to the opinion which was given. If the opinion prayed was correct, and the court refused to give it, or, by being divided, failed to give the instruction to the jury as prayed, it is error. The court will disregard the inaccurate form of words, and come at the substance of the exception.

As to the want of funds in the hands of the drawees, the court are to presume, that the whole evidence is stated in the exception. We deny the

principle, that such funds can be only money in account. There was reason for Fenwick to believe that the drawees had funds, and he ought, therefore, certainly to have had notice. There is not the least ground for a suspicion of fraud in Fenwick.

As to the count for money had and received, it is a common-law count; but upon that count, the plaintiffs cannot recover, by means of evidence resulting from that bill, unless they have done everything to entitle them to recover upon the bill itself, by using due diligence, giving due notice, &c.

It is said, that the indorsement was made in France, and therefore, the law of France is to decide the responsibility of the indorser; and that by that law, notice is not necessary to the indorser, if neither the indorser nor the drawer has funds in the hands of the drawee; and Evans is cited as the authority. It is doubted, whether Evans is correct in that position; but whether correct or not, it does not apply, because the money was to be paid here, and the contract is personal. If Fenwick had been sued in France, it might have applied; but being sued here, the law of this country must decide his case.

As to the questions, what is due notice? and whether it be a matter of fact or of law? the decisions cited from Dallas are no authorities in this case.
*282] They all turned *upon the laws of particular states. This court is to be governed by the law of the place where the transaction happened, unless where the laws of the United States apply. The court, in this case, are to decide by the laws as they exist in Maryland; and there the laws of England respecting bills of exchange and promissory notes have always been the rules of decision. We are not, in Maryland, to be governed by whimsical opinions drawn from either Pennsylvania or Virginia. Virginia has not been remarkable for her progress in commerce; and were I to form a system of commercial law, I should certainly not draw it from the fantastical opinions adopted in either of those states. In England, what is due notice has been and is settled and determined to be matter of law to be decided by the court.

On the 25th of February, THE COURT gave the following judgment:

"It is decreed by the court, that the defendants Stricker and Payson, not having obtained letters of administration in the district of Columbia, were not competent to maintain this action; and that the circuit court of the United States in and for the said district erred in overruling the demurrer.[1] It is, therefore, considered by the court, that the judgment of the said circuit court, on the said demurrer, be and the same is hereby reversed, and that judgment thereon be rendered for the defendant in the original action.(*a*)

(*a*) The reporter was not in court when this judgment was entered, but he has understood, that the court did not assign the reasons upon which their opinion was grounded; and gave no opinion upon the other points. See Evans on Bills, 67, 68, 69, 70, 71, as to notice.

[1] So, a foreign executor cannot maintain an action in the District of Columbia, without first taking out letters testamentary there. Dixon *v.* Ramsay, 3 Cr. 219. Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and does not, *de jure*, extend to other countries; whatever oper-

Thompson *v.* Jameson.

Debt on decree in chancery.— Variance.

An action of debt for 860*l.* 12*s.* 1*d.*, founded on a decree in chancery, is not supported by a decree for 860*l.* 12*s.* 1*d.*, with interest from a certain day to the day of rendering the decree; but the variance is fatal.

Upon an attachment in chancery, under the laws of Virginia, the record stated that "I. T., in open court, became security that I. H. (the absent debtor) shall perform the decree of this court if against him:" *Quære?* Whether an action of debt will lie against I. T., for the amount decreed against I. H.?

Thompson *v.* Jameson, 1 Cr. C. C. 295, reversed.

Error from the Circuit Court of the district of Columbia, sitting in Alexandria.

*Thompson, in the year 1795, being indebted to Hadfield, a person residing out of the jurisdiction of the commonwealth of Virginia, [*283 and Hadfield being indebted to Jameson & Brown, as partners in merchandise, the latter obtained from the county court of Fairfax, an attachment in chancery, in the nature of a foreign attachment, to stay the effects of Hadfield, in the hands of Thompson, under an act of assembly of Virginia, entitled "An act directing the method of proceeding in courts of equity against absent debtors, or other absent defendants, and for settling the proceedings on attachments against absconding debtors." (Rev. Code, p. 122, c. 78.) This act directs, "that if in any suit which hath been or hereafter shall be commenced for relief in equity, in the high court of chancery, or in any other court, against any defendant or defendants who are out of this country, and others within the same, having in their hands effects of, or otherwise indebted to, such absent defendant or defendants, and the appearances of such absentees be not entered, and security given, to the satisfaction of the court, for performing the decrees; upon affidavit that such defendant or defendants are out of the country, or that upon inquiry at his, her or their usual place of abode, he, she or they could not be found, so as to be served with process; in all such cases, the court may make an order, and require surety, if it shall appear necessary, to restrain the defendants in this country from paying, conveying away, or secreting the debts by them owing to, or the effects in their hands, of such absent defendant or defendants; and for that purpose, may order such debts to be paid, and effects delivered, to the said plaintiff or plaintiffs, upon their giving sufficient security for the return thereof, to such persons, and in such manner, as the court shall direct." It further provides, that the court shall appoint some day in the succeeding term, for the absent defendant to enter his appearance, and give security for performing the decree; and shall order notice to be published, &c.; and if the absent debtor shall not appear and give such security, within the time limited, the court may proceed to take such proof as the complainant shall offer; and if they shall thereupon be satisfied of the justice of the demand, they may order the bill to be taken as

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ation is allowed to it, beyond the original territory of the grant, is mere matter of courtesy. Vaughan *v.* Northup, 15 Pet. 1. If an administrator desire to prosecute a suit in another state, he must first obtain a grant of administration therein, in accordance with its laws. Noonan *v.* Bradley, 9 Wall. 394; Brownson *v.* Wallace, 4 Bl. C. C. 465. And see Graeme *v.* Harris, 1 Dall. 456; Sayre *v.* Helme, 61 Penn. St. 299.

confessed, and make such order and decree therein, as to them shall seem just, and may enforce due performance thereof, &c.

*284] *In the record of that case, in Fairfax county court, it is stated, "that at a court continued and held for the said county, on the 18th day of June, in the year last mentioned, came the complainants aforesaid, by their attorney, and thereupon, Jonah Thompson, in open court, became security that the said Joseph Hadfield shall perform the decree of this court, if against him; and on motion of the said defendant, Joseph Hadfield, by his attorney, the attachment is discharged as to the effects in the hands of the other defendants." The court, at a subsequent term, on the 19th of November 1799, decreed, that "it having appeared to the satisfaction of the court, that the complainant's bill hath been duly taken for confessed, after his appearance by attorney, and giving security for performing the decree against him, the court doth adjudge, order and decree, that the complainants do recover against the said Joseph Hadfield, the sum of eight hundred and sixty pounds, twelve shillings and one penny, sterling (to be settled in Virginia currency, at the rate of twenty per cent. exchange), together with interest on the same, at the rate of five per cent. per annum, from the 8th day of March 1795, until the day of pronouncing this decree, and also his costs by him expended in the prosecution of his bill here."

Hadfield having failed to perform this decree, and Brown, the partner of Jameson, being dead, Jameson brought the present action of debt, in the circuit court of the district of Columbia, against Thompson, founded upon his responsibility as security for Hadfield's performing the decree. The declaration was "of a plea that he render unto him the sum of eight hundred and sixty pounds, twelve shillings and one penny, sterling, of the value of one thousand thirty-two pounds, fourteen shillings and six pence, Virginia currency, equal to three thousand four hundred and forty-two dollars and forty-one cents, United States currency, which to him he owes, and from him unjustly detains; for this, that whereas," &c., setting forth the substance of the proceedings on the attachment in Fairfax county court; "and whereas, afterwards, that is to say, at a court held for the said county of Fairfax, on the 18th day of June 1795, at the county aforesaid, the said Jonah, in open court, became security that the said Joseph would perform

*285] the decree of the said court in the said suit, if against him; *in which said suit, such proceedings were had, that the said court of the county of Fairfax, on the 19th day of November, that is to say, at the county of Alexandria aforesaid, did adjudge, order and decree, that the said Robert B. Jameson & Co. should recover from the said Joseph, the said sum of 860*l.* 12*s.* 1*d.*, sterling (to be settled in Virginia currency, at the rate of twenty per cent. exchange), together with interest on the same, at the rate of five per centum per annum, from the 8th day of March 1795, until the day of pronouncing the said decree, and also their costs by them expended in the prosecution of the said bill. All which, by the record thereof, now remaining in the office of the county court of Fairfax, will more fully and at large appear. And the said Robert B. Jameson, in fact avers, that the said Joseph has not in any manner performed the decree of the said court of Fairfax county, in the cause aforesaid made, in this, that he has not paid to the said Jameson & Co., in the lifetime of the said Brown, nor to the said Jameson, who has survived the said Brown, the said sum of 860*l.*

12*s.* 1*d.*, sterling, or the value thereof in Virginia currency, at the rate of exchange in the said decree mentioned, with interest thereon, as awarded by the said decree; which said decree, in form aforesaid, yet remains in full force and effect, not reversed or satisfied; by reason whereof, action accrued to the said Jameson & Co. to demand and have from the said Jonah, the said sum of 860*l.* 12*s.* 1*d.*, sterling, of the value aforesaid. And the said Jameson further avers, that the said Brown, on the ——— day of ———, in the year———, departed this life, to wit, at the county of Alexandria aforesaid, whereby the said cause of action survived to the said Jameson. Nevertheless, the said Jonah, the said sum of 860*l.* 12*s.* 1*d.*, sterling, of the value aforesaid, or any part thereof, to the said Jameson & Co., in the life-time of the said Brown, or to the said Jameson, since his death, has not paid, &c.; to the damage of the said Jameson, five hundred dollars, and therefore, he brings suit," &c.

There was an office judgment, at the rules, in November 1801, which was not set aside at the next succeeding court, in January 1802. At April term 1802, the defendant's counsel moved to set aside the office judgment on *pleading *nil debet.* The court being divided on the propriety of that plea to an action founded on the record of a court of one of the [*286 states, the plea was not received, and a bill of exceptions was taken by the counsel for the defendant, and signed by the judge who was against the admission of the plea. The pleas of *nul tiel record,* and payment, were then filed, and issues made up, on which the cause went to trial. The verdict upon the issue of payment was in these words: "we of the jury find for the plaintiff the debt in the declaration mentioned, and one cent damages, to be discharged by the payment of $2544.49.

And the defendant moved in arrest of judgment for the following reasons: 1st. Because the action is brought for sterling money, when it appears by the plaintiff's own showing in the declaration, that the original sterling debt has been changed by the decree of the county court of Fairfax, into the current money of Virginia. 2d. Because the plaintiff in his declaration, declares for a sterling debt, and lays his damages in current money. 3d. Because the jury have found their damages in current money, and have fixed the sum in current money, at which the said sterling debt might be discharged. 4th. Because it doth not appear by the plaintiff's declaration, what was the nature of the defendant's undertaking as security, whether it was by record, by bond, or by parol. 5th. Because the whole proceedings are irregular, informal and erroneous.

These reasons not being deemed sufficient by the court below, judgment was rendered for the plaintiff for "860*l.* 12*s.* 1*d.* sterling, of the value of 1032*l.* 14*s.* 6*d.*, Virginia currency, equal to $3442.41, United States currency, [*287 *the debt in the declaration mentioned, and one cent damages, by the jurors aforesaid, in form aforesaid assessed, and also his costs by him about his suit in this behalf expended; and the said defendant in mercy, &c. But this judgment (damages and costs excepted) is to be disharged by the payment of $2544.49." To reverse this judgment, the defendant below sued out the present writ of error.

Swann, for the plaintiff in error. *E. J. Lee* and *Key,* for the defendant.

Swann.—1st. The declaration does not show any obligation on Thompson,

upon which this or any other action will lie. 2d. If it does, it is not such a this one as will support an action of debt. 3d. If an action of debt will lie, still this action will not, because it is brought for part of the debt only. 4th. The action is brought for sterling money, whereas it ought to have been brought for Virginia currency. 5th. If properly brought for sterling money, the court below ought to have rated the exchange.

1st. The record simply states, that "the said Jonah (Thompson) in open court became security;" but does not state how; whether by bond, by parol, or by matter of record. It is only a record declaration, that he became security.

2d. The record states, that he became security that Hadfield would perform the decree of the court, if against him; and not that Thompson would pay the debt, or that he undertook to pay any sum of money whatever. Nor does it state that he became bound in any particular sum. It does not state
*288] that he undertook to pay the debt, *if Hadfield did not. There is nothing to support an action of debt. It is, if anything, a collateral undertaking; and if any action will lie, it must be covenant. To support an action of debt, there must be a direct obligation on the part of the defendant, moving to the plaintiff, to pay a certain sum, or a sum which may be rendered certain.

3d. The declaration is for 860*l.* 12*s.* 1*d.* sterling, of the value of 1032*l.* 14*s.* 6*d.*, Virginia currency, equal to $3442.41, United States currency. This is not the whole debt due by the decree. You must sue for the whole debt, or, if you sue for a part, you must state the residue to be satisfied. The decree of the court of Fairfax was rendered on the 19th of November 1799, and was, that the complainants recover against Hadfield the sum of 860*l.* 12*s.* 1*d.* sterling (to be settled in Virginia currency at the rate of 20 per cent. exchange), together with interest on the same at the rate of five per cent. per annum, from the 8th of March 1795, until the day of pronouncing that decree (19th November 1799), and also his costs by him expended in the prosecution of his bill. The debt was composed of the principal sum, reduced to Virginia currency at 20 per cent. exchange, and interest thereon, at five per cent. per annum, calculated from 8th of March 1795, to the 19th of November 1799, and costs. But the declaration is only for the principal. It is, therefore, only for a part of the debt, and does not state the residue to be satisfied. A debt cannot be divided, and the reason of the law is, that a multiplicity of actions may be prevented. *Marsh* v. *Cutler*, 3 Mod. 41; *Pemberton* v. *Shetton*, Cro. Jac. 498–9.

4th. The debt was originally due from Hadfield in sterling money, but the debt due by the decree is a current-money debt. The decree has changed it from sterling to currency. It is an express command that it shall be settled in current money, at a certain rate. It is no longer a sterling debt. If an action of debt will lie for it, it must be laid as a debt due in Virginia currency.

5th. But if it is a sterling debt, then the court below ought, under the
*289] act of the Virginia assembly (Rev. Code, *p. 121, c. 77, § 6), to have fixed the rate of exchange. The verdict ought to have been simply for the sterling debt and damages; but the jury have gone on and said that the debt should be discharged by the payment of $2544.49: and the court

have rendered judgment in the same manner, without fixing the rate of exchange.

6th. The declaration states the decree to have been made on the 19th of November, but does not say in what year. This omission was fatal on the plea of *nul tiel record.*

E. J. Lee, for the defendant in error.—1st. The record states the obligation of Thompson, in the very words of the act of assembly. It is the highest obligation which he could have entered into. It is an acknowledgment on record, and is stronger than his bond. Its meaning is evident, from the intention of the act of assembly; and is simply this, that Hadfield should pay the money decreed to be due, and if he did not, that Thompson would pay it for him.

2d. To the objection that this is not such an obligation as will support an action of debt, the answer is, that it is in the nature of a recognisance in chancery, and an action of debt will lie on such a recognisance. 1 Esp. N. P. 216.

3d. The case in 3 Mod. does not apply to the present. There, the action was upon a judgment. Here, it is upon the obligation or recognisance of Thompson. We have declared for as much as was due from Hadfield, and no more. The obligation of Thompson was to pay what Hadfield should fail to pay. Our action is for this. The record of Fairfax court, which is made part of the declaration, shows how the residue was discharged.

4th. The court of Fairfax did not convert the debt into Virginia currency. They only fixed the principles on which the exchange should be made. The decree is for sterling, to be discharged in current money, at a certain rate of exchange.

*5th. It is the province of the jury, and not of the court, to fix the value of sterling money. *Barnet* v. *Watson*, 1 Wash. 373, 378. [*290

6th. Although the year of the decree is not stated in the declaration, yet enough is stated to render it certain.

Key was to have argued on the same side, but on examination of the record of the decree in Fairfax, and comparing it with the declaration; and finding the decree to be for 860*l.* 12*s.* 1*d.* sterling, with interest from a certain day to the day of passing the decree, and the declaration being only for the principal, he considered the variance as fatal. He had not before noticed accurately the words of the decree, but had supposed the interest did not stop at any certain day, but was, by the decree, to run until the time of payment. He did not understand that this point had been made in the court below, and therefore, had not before examined the record with a view to it.

The Court gave no opinion upon the other points, but, considering this variance as fatal—

Reversed the judgment.

The Chief Justice observed, that there was no clause in the declaration, stating that Thompson undertook to pay, if Hadfield did not, and therefore, an action of debt would not lie.

Mandeville & Jameson *v.* Joseph Riddle & Co.

Promissory notes.—Action against remote indorser.

In Virginia, an indorsee of a promissory note cannot maintain an action against a remote indorser, for want of privity.[1]

Riddle *v.* Mandeville, 1 Cr. C. C. 95, reversed.

Error from the Circuit Court of the district of Columbia, sitting at Alexandria, in an action on the case, brought by the defendant in error, for money had and received, which was the only count in the declaration; and to which the defendant pleaded the general issue.

*291] *The evidence offered and admitted to support the declaration was a promissory note, made by Vincent Gray, dated at Alexandria, on the 2d of March 1798, by which he promised to pay, sixty days after date, to the order of Mandeville & Jameson, $1500 for value received, negotiable at the bank of Alexandria. This note was indorsed by Mandeville & Jameson to James McClenachan, and by him to Joseph Riddle & Co., the defendants in error. The protest of a notary-public, made on the 5th May 1798, attesting that he had on that day demanded payment of the note of the maker, who refused, and of Mandeville & Jameson, the first indorsers, who also refused, and that James McClenachan, the other indorser, did not dwell in his district. The record of a suit on the same note, brought by Joseph Riddle & Co., on the 14th of June 1798, against Vincent Gray, the maker, prosecuted to final judgment and execution, upon which execution he was committed to jail, took the oath of an insolvent debtor, and was discharged on the 6th of February 1799. The present action was commenced in July 1801.

A bill of exceptions was taken by the defendants below, stating these facts, and that they prayed the opinion of the court, 1st. Whether this action could be sustained by the present "plaintiffs against the present defendants, there being an intermediate indorser between them;" and 2d. "Whether, if the said action is sustainable, the said evidence is admissible upon a single count for money had and received;" and that the opinion of the court below was, that the action might be sustained, notwithstanding the intermediate indorser; and that the evidence was admissible, upon the single count for money had and received. Verdict and judgment for the plaintiffs for $1919 and costs; to reverse which, the defendants below sued out the present writ of error.

E. J. Lee and *Swann*, for the plaintiffs in error. *Simms*, for the defendants.

*292] **E. J. Lee.*—1st. The action of *indebitatus assumpsit* will not lie for the holder against a remote indorser, because there is no privity of estate or privity of contract. It is an action at common law; and by the common law, no action of *indebitatus assumpsit* for money had and received will lie except between privies. Kyd 175 (113, 114).

2d. There being only one count in the delaration, and that being only for

[1] Bradley *v.* Knox, 5 Cr. C. C. 297. But such remote indorser may be made liable in equity, though not at law. Harris *v.* Johnston, 3 Cr. 311; Riddle *v.* Mandeville, 5 Id. 322; United States Bank *v.* Weisiger, 2 Pet. 331.

money had and received, the note ought not to have been given in evidence, because it must have been a surprise to the defendants. In England, it is usual to give notice of the plaintiff's real ground of action, either by a special count, or by a formal notice. The defendants could not come prepared to defend the action. The action for money had and received is said to be in the nature of a suit in equity. But here, the defendants were in a worse situation than if a bill in chancery had been filed against them; for in that case, the bill must have stated the grounds of the claim, and shown the equitable circumstances which entitled the plaintiffs to recover.

A remote indorser is liable to the holder, only upon the custom of merchants, and therefore, there ought to have been a special count stating the custom. The English statute of Anne, respecting promissory notes, is not in force in Virginia; and the act of assembly which supplies its place only allows an assignee to bring an action of debt, in his own name, against the maker of the note, but gives no remedy against the assignors. Hence, it results, that the remedy of the assignee against the assignors is either at common law, or under the custom of merchants. By the common law, the action of *indebitatus assumpsit* lies only between privies; and here is no privity. And if resort be had to the custom of merchants; that custom must be averred in the declaration.

Simms, contrà.—Every indorser is as the maker of a new note. *Smallwood* v. *Vernon*, 1 Str. 479; Esp. N. P. 33; **Heylin* v. *Adamson*, 2 Burr. 674. He undertakes to pay the sum mentioned in the note, if the original maker does not. As soon as the original maker fails to comply with his engagement, that of the indorser becomes absolute. He then becomes the holder of so much money as is expressed in the note, to the use of his immediate indorsee, or of such person as he shall name. It is true, the plaintiffs below have sought their remedy at common law; and by common law, they are entitled to recover. Every man ought to be compelled to pay money which he has in his hands belonging to another, and which in equity and good conscience, he has no right to retain. And the principle is now well established, that at common law, he may be compelled to pay it by an action for money had and received. [*293

As to the evidence offered on this count, it was long doubted, before the statute of Anne, whether any other than an action of *indebitatus assumpsit* for money had and received, or for money lent, would lie upon a note. This was the ground of contention between Lord Holt and the merchants of Lombard street; he strenuously contending, that the action for money had and received, or for money lent, was the only proper remedy; and they endeavoring to bring into use the form of declaration upon a note as a specialty. Although a note may now, under the statute, be declared upon as a specialty, yet the statute has not taken away the common-law remedy which existed before.

As to surprise, the objection made would go to almost every case where money had and received is the proper action; such as where the consideration happens to fail, or where money has been paid by mistake, &c. Indorsement is evidence that the indorser has received money of the indorsee. And at and from the time of the indorsement, the indorser is debtor to the indorsee, and the debt may be proved under a commission of bankruptcy against the

indorser, before the note is payable. In this case, however, there could be no surprise; the defendants below had notice of the non-payment of the
*294] note, and that they would be held liable: and it is immaterial *by what means notice is given. *Longchamp* v. *Kenny*, 1 Doug. 138. In the case of *Grant* v. *Vaughan*, 3 Burr. 1516, the cases upon promissory notes, before the statute of Anne, are taken up and considered with great clearness and ability by the court. Every principle established in that case furnishes an argument for the original plaintiffs in this. The case there was, that Vaughan drew a check or order on his banker in these words: "Pay ship Fortune, or bearer, 70*l*.," and gave it to Bicknell, who lost it. It was found by some person, and honestly taken in payment for goods, by the plaintiff, in his way of trade as a mercer. Payment of the check being stopped at the banker's, the plaintiff brought suit against Vaughan, the drawer, and declared upon an inland bill, and for money had and received to his use. It was held, that these notes are, by law, negotiable, and were so before the statute of Anne, and that the bearer of them might maintain an action, as bearer, where he could entitle himself to them on a valuable consideration, and for this was cited *Hinton's Case*, 2 Show. 235 (in the reign of Charles II.); *Crawley* v. *Crowther*, 2 Freem. 257 (in the year 1702, before the statute of Anne); *Anon.*, 1 Salk. 126, pl. 5 (10 Wm. III.); and *Miller* v. *Race*, 1 Burr. 452 (31 Geo. II.).

That the only dispute, before the statute of Anne, was as to the mode of declaring: but that it never was disputed, "that an action upon an *indebitatus assumpsit* generally for money lent, might be brought upon a note payable to one or order;" citing *Clerke* v. *Martin*, 2 Lord Raym. 758. "Upon the second count," Lord Mansfield said, "the present case is quite clear, beyond all dispute. For, undoubtedly, an action for money had and received to the plaintiff's use may be brought by the *bonâ fide* bearer of a note, made payable to bearer. There is no case to the contrary. It was certainly money received for the use of the original advancer of it; and if so, it is for the use of the person who has the note as bearer."

And Wilmot, Justice, said, that it was notorious, that such notes were
*295] in fact and practice negotiated. "Probably, *the jury took upon themselves to consider, whether such bills or notes as this is, were in their own nature negotiable; but this is a point of law; and by law, they are negotiable." And again he says, "but this is a negotiable note; and the action may be brought in the name of the bearer. Bearer is *descriptio personæ*, and a person may take by that description as well as by any other. In the nature of the contract, there is no impropriety in his doing so. It is a contract to pay the bearer, or to the person to whom he shall deliver it (whether it be a note or a bill of exchange), and it is repugnant to the contract, that the drawer should object that the bearer has no right to demand payment from him. The reasons given in the cases that are opposite to this are altogether unsatisfactory. Even before the statute of 3 & 4 Anne, Lord Chief Justice Holt himself thought that an *indebitatus assumpsit* for money lent, or for money had and received, might be maintained upon such a note."

And Yates, Justice, said, "Nothing can be more peculiarly negotiable than a draft or bill, payable to bearer; which is, in its nature, payable from hand to hand, *toties quoties*. It had been doubted, it is true, whether that species of action, where the plaintiff declares upon the note itself, as upon a

specialty, was proper; but here is a count upon a general *indebitatus assumpsit*, for money had and received to the plaintiff's use. The question, whether he can maintain this action, depends upon its being assignable, or not. The original advancer of the money manifestly appears to have had the money in the hands of the drawer, and therefore, he was certainly entitled to bring this action. And if he transfers his property to another person, that other person may also maintain the like action. Whoever has money in the hands of another, may bring such an action against him. This appears from the determination in the case of *Ward* v. *Evans*, reported in 2 Lord Raym. 930, where not a shilling of money had passed between the plaintiff and defendant; and yet HOLT and POWELL both held, that an *indebitatus assumpsit*, for moneys received to the plaintiff's use, properly lay."

This case clearly shows, that actions upon promissory notes payable to bearer, or order, might have been maintained *before the statute of Anne; and that such actions did not depend upon the privity of contract. [*296 There certainly is not more privity of contract between the maker of a note, and the bearer (especially, after that note has been lost by the lawful owner, and comes to the hands of the plaintiff through the finder), than between the maker of a note payable to order, and the indorsee. It also shows, that there are certain instruments, which are negotiable in their own nature, by force of the contract itself, independent of statute law; and that a promisee may as well be described by being the bearer of a certain paper, as by being named with his Christian and surname. And if he may be designated by the fact of being the bearer of a paper, there is no reason why he may not equally be described by the fact of his being the nominee of a certain other person, and the holder of a certain note.

There is no doubt, that before the statute of Anne, notes were passed from one to another, and actions for money had and received were, on common-law principles, maintained by the bearers and indorsees. The indorsement was considered as conveying or assigning the money of the payee in the hands of the maker; and the original contract of the maker was, to hold the money to the use of the payee, or of such person as he should appoint. Privity of contract is not the ground of the action for money had and received. And among the many cases of that kind, there will be scarcely found one in which such a privity has existed. If I lose money, I may have this action against the finder. If A. delivers money to B., to be paid over to C., the latter may maintain this action against B. If a man, under pretence of authority from me, receive money due to me, I may recover it of him, in this form of action. So, if I pay money to another by mistake. So, if a man obtains money from me by fraud and deceit. So, if the consideration of a bargain fail. So, if one pretending a right to an office receive fees, the rightful officer may, by an action for money had and received, recover of him the amount of fees so received.

The indorser is a new maker as to all the subsequent parties. He has received money from his indorsee which he engages to hold to his use, or to the use of such person as he shall appoint, in case the maker does not pay *the note on demand. This principle results from the custom of mer- [*297 chants; for the moment a promissory note, payable to order, is indorsed, it becomes, in its nature, independent of any statute, an inland bill of exchange, both in form and substance. The indorser orders the maker to

pay to the indorsee, or his order, the sum of money mentioned in the note. The maker, by signing the note, acknowledges that he has effects of the payee, to the amount of the note, in his hands; and by making the note payable to the order of the payee, he authorizes the payee to draw upon him for that amount, and pledges himself to honor the draft. An acceptance may be made, before the bill is issued, and is equally binding as if made after. Kyd 48, 49. The signature of the maker to the note is an acceptance of the payee's bill. No part or circumstance of a bill of exchange is wanting.

The plaintiffs below, therefore, were clearly entitled to recover the money from the defendants; and therefore, the defendants ought not, in justice and good faith, to withhold it. In such a case, there never has been a doubt but that the bill may be given in evidence, on the count for money had and received.

Swann, in reply.—If the indorser is liable, it must be under the act of assembly. But the act of assembly gives an action only against the maker, as is evident from the provision for allowing all just discounts, not only against the holder, but against his assignor, before notice. No case can be found of an action for money had and received, brought by an indorsee against a remote indorser, either before the statute of Anne, or after. The cases cited are of a note payable to bearer. If any action will lie, it must be on the statute of Virginia.

Marshall, Chief Justice.—It is decided, in Virginia, that an action is maintainable by the assignee against the assignor, and not under the act of assembly.

*298] *February 26th, 1803. The Chief Justice delivered the opinion of the court.—The only question in this case is, whether an action of *indebitatus assumpsit* can be maintained by the assignee of a promissory note, made in Virginia, against a remote assignor.

The act of the Virginia assembly which makes notes assignable, gives the assignee an action of debt, in his own name, against the maker of the note, but is silent with respect to the claim of the assignee against the assignor. It was, therefore, long a doubt, whether the assignor became liable, on his mere assignment, without any special agreement, for the contents of the note, in the event of the insolvency of the maker. This doubt has at length been settled in Virginia, so far as to declare the liability of the assignor on such assignment; but not the amount for which he is liable. It seems to be yet a question, whether he is answerable for the sum mentioned in the note, or for only so much as he received for it, provided he shall be able to prove the sum actually received. It is also a question, whether the assignee can have recourse to any other than his immediate assignor.

As the act of assembly gives no right to sue the assignor, such an action can only be maintained on the promise which the law implies from the assignment, and consequently, can only be sustained by and against the persons to and from whom the law implies such a promise to have been made. As the assignment is made to a particular person, the law implies a promise to that person: but it raises no promise to any other. There is no fact on which to imply such promise. In the language of the books, there is a privity between the assignor and his immediate assignee; but no privity is perceived

between the assignor and his remote assignee. The implied promise, growing out of the indorsement, is not considered as having been made assignable by the act of assembly, and therefore, the assignee of that promise cannot maintain an action of *indebitatus assumpsit* on it.

*It is, therefore, the opinion of the court, that this action is no maintainable, and that the judgment ought to be reversed."(*a*) [*299

Stuart *v.* Laird.

Constitutional law.—Courts.

Congress has power to establish such inferior tribunals as it thinks proper, and to transfer pending proceedings from one such tribunal to another.

It is not required, that the judges of the supreme court should have distinct commissions as judges of the circuit courts.

A contemporaneous construction of the constitution, practiced under and acquiesced in, for a period of years, fixes the construction, and the courts will not shake or control it.[1]

Error from the Fifth Circuit, in the Virginia district.

An action of covenant was brought in January 1801, in "the court of the United States for the middle circuit, in the Virginia district," by John Laird, a citizen of the state of Maryland, for and on behalf of Laird & Robertson, of Port Glasgow, and subjects of the King of Great Britain, against Hugh Stuart, a citizen and inhabitant of the state of Virginia.

At the rules, in February 1801, there was an office judgment against the defendant for damages, &c., "which damages," said the record, "are to be inquired of and assessed by a jury to be summoned by the marshal, and empannelled before the next court of the United States for the middle circuit, in the Virginia district, which commences on the 22d day of May next ensuing; and so the cause aforesaid stood continued, by virtue of the statute in such case made and provided, until the court of the United States for the fourth circuit, in the Virginia district, continued by adjournment, and holden at the capitol in the city of Richmond aforesaid, on Thursday, the 17th day of December 1801; at which day, to wit, at a court of the United States for the fourth circuit, in the eastern district of Virginia, continued by adjournment, and holden at the capitol, in the city aforesaid, before the honorable the judges of the said court, came as well *the plaintiff," &c.; and the office judgment being set aside, and issue joined upon the plea of [*300 covenants performed, there was verdict and judgment for the plaintiff; upon which a *fieri facias* issued, reciting, in the usual form, the judgment recovered "in the court of the United States for the fourth circuit, in the eastern Virginia district," and returnable "before the judges of the said court, at Richmond, in the eastern Virginia district, on the 26th day of April next." "Witness, Philip Barton Key, Esq., chief judge of the said court." The return on this execution was as follows, viz:

"Executed on Maria and child, Paul, Jenny, Selah, Kate and Anna, and a bond taken with Charles L. Carter, security, for the delivery thereof at the

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(*a*) See note (A) in the appendix to this volume, p. 367.

[1] See Martin *v.* Hunter, 1 Wheat. 304; Cohen *v.* Virginia, 6 Id. 264; Prigg *v.* Pennsylvania, 16 Pet. 621; Cooley *v.* Board of Wardens, 12 How. 315.

Eagle tavern, in the city of Richmond, on the 20th day of April 1802, the condition of which was not complied with.

BEN. MOSLEY, D. M.,
for JOS. SCOTT, M., E. V. D."

The record then went on to state, "that heretofore, to wit, at a court of the United States for the fifth circuit, continued by adjournment, and held at the capitol, in the city of Richmond, in the district of of Virginia, before the Honorable the Chief Justice of the United States, on Thursday, the 2d of December 1802, came John Laird, on behalf of Laird & Robertson, by Daniel Call, gent., his attorney, and moved the said court for judgment and award of execution against Hugh Stuart and Charles L. Carter, upon a bond entered into by them for the forthcoming and delivery of certain property therein mentioned, to the marshal of the eastern Virginia district, on the day and at the place of sale, which was taken by virtue of a writ of *fieri facias* issued from the court of the United States for the fourth circuit, in the eastern Virginia district, against the estate of the defendant, Hugh Stuart, which bond is in the words and figures following, to wit," &c., the condition of which referred to the *fieri facias* sued out of the court of the United States for the fourth circuit, in the eastern Virginia district.

*301] *The defendants appeared and "showed as causes why the said execution should not be awarded—

"1. That the motion is authorized by no law of the United States, and by no part of the common law, and hath been hitherto, in similar instances, or such as are nearly similar, used and admitted, and awards of execution, such as that now prayed for, made in the courts of the United States upon the construction of an act of congress approved on the 24th day of September 1789, by virtue of which awards of execution, in such cases, have heretofore been made in the said courts, agreeable to an act of the general assembly of Virginia, passed on the 10th day of December 1793: and the said defendants do aver, that the said act of congress doth not make the laws of the several states rules of decision in the courts of the United States in any case whatever, except in trials at common law; and that no decision which can be given on the said motion, will be a decision in a trial at common law.

"2. That the said act of the general assembly of Virginia is in derogation of the common law, and deprives the citizen of trial by jury, and that the terms in all such acts prescribed should be regularly and strictly observed by all such as would entitle themselves to the benefit thereof, which hath not been done by the plaintiff in the present motion; 1st. Because agreeable to the said act, on forfeiture of such bond, the officer who hath taken the same, shall return the same to the office of the court from whence the execution issued, the levying whereof gave him authority to receive the same; and that such court may, upon motion of the person to whom it is payable, after the obligor hath failed in the performance of the condition thereof, award an execution thereon; but neither the said act of assembly or congress, nor any other act of assembly or congress, or part of the common law, doth give such power to any other court; and the said defendant avers, that it appears on the face of the notice grounding the plaintiff's motion, that the execution whereon the same was taken, was issued from the office of the United States for the fourth circuit, in the eastern Virginia district, where the judgment ground-

ing the same is there said to have been obtained; and 2d. Because *that court doth not now exist, and this honorable court is a different court from that court; 3d. That the act of congress passed on the 29th day of April 1802, entitled 'an act to amend the judicial system of the United States,' in so far as it annihilated the court of the United States for the fourth circuit, in the eastern Virginia district, wherein the said judgment was rendered, is unconstitutional and void, and doth not authorize this court to award an execution on the said bond on motion. All which matters and things the said defendant doth aver as causes why this honorable court ought not to award execution on the said bond, on the present motion, and is ready to prove the same as this honorable court shall direct; wherefore, they pray 'judgment whether the court here will take further cognisance of the said motion."

To this plea, there was a general demurrer, and joinder; and the court below being of opinion, that the plea was insufficient, gave judgment for the plaintiff. To reverse that judgment, the defendant Stuart sued out the present writ of error; and the errors assigned were, in substance, similar to those alleged in bar of the motion.

C. Lee, for the plaintiff in error.—The act of assembly of Virginia, which gives this summary remedy upon forthcoming bonds, allows the motion for judgment to be made only to the same court from which the execution issued. In this case, the execution issued from the court of the United States for the fourth circuit, in the eastern Virginia district, composed of Judges Key, Taylor and McGill. The motion was made to the court of the United States for the fifth circuit, in the Virginia district, holden by the Chief Justice of the United States.

This is not the same court from which the execution issued. The motion, therefore, in this court, was not regular, unless it be made so by the acts of congress of March 8th, 1802, c. 8, and 29th April, 1802, c. 31. The process in this case was summary, and the pleadings, although in *this instance they happen to be reduced to writing, are in fact *ore tenus*. A [*303 position will be taken, the direct reverse of that contained in the second point of the plea mentioned in the transcript of the record.

The court of the fifth circuit ought not to have taken cognisance of the motion; because the court of the fourth circuit did exist, and not because it did not exist, as alleged in the plea. If the acts of 8th March and 29th April 1802, are constitutional, then it is admitted, there is no error in the judgment; because, in that case, the courts ceased to exist, the judges were constitutionally removed, and the transfer from one court to the other was legal. But if those acts are unconstitutional, then the court of the fourth circuit still exists, the judges were not removed, and the transfer of jurisdiction did not take place. The legislature did not intend to transfer causes from one existing court to another. If, then, the courts still exist, the causes not being intended to be removed from existing courts, were not removed.

But we contend that those acts were unconstitutional so far as they apply to this cause. 1st. The first act (March 8th, 1802) is unconstitutional, inasmuch as it goes to deprive the courts of all their power and jurisdiction, and to displace judges who have been guilty of no misbehavior in their offices. By the constitution, the judges, both of the supreme and the infe-

rior courts, are to hold their offices during good behavior. So much has been recently said, and written, and published upon this subject, that it is irksome to repeat arguments which are now familiar to every one. There is no difference between the tenure of office of a judge of the supreme court and that of a judge of an inferior court. The reason of that tenure, to wit, the independence of the judge, is the same in both cases; indeed, the reason applies more strongly to the case of the inferior judges, because to them are exclusively assigned cases of life and death.

*304] *It is admitted, that congress have the power to modify, increase or diminish the power of the courts and the judges. But that is a power totally different from the power to destroy the courts, and to deprive them of all power and jurisdiction. The one is permitted by the constitution, the other is restrained by the regard which the constitution pays to the independence of the judges. They may modify the courts, but they cannot destroy them, if thereby they deprive a judge of his office. This provision of the constitution was intended to place the judges not only beyond the reach of executive power, of which the people are always jealous, but also to shield them from the attack of that party spirit which always predominates in popular assemblies. That this was the principle intended to be guarded by the constitution, is evident, from the contemporaneous exposition of that instrument published under the title of The Federalist, and written, as we all know, by men high in the esteem of their country. Federalist, vol. 2, No. 78. (*a*)

Mr. Lee also cited and read the speeches of Mr. Madison, in the convention of Virginia (Debates, vol. 1, p. 112), of Mr. Nicholas (vol. 1, p. 32, and vol. 2, p. 152), and of Mr. Marshall (in p. 125).

The words during good behavior cannot mean during the will of congress. The people have a right to the services of those judges who have been constitutionally appointed, and who have been unconstitutionally removed from office. It is the right of the people that their judges should be independent; that they should not stand in dread of any man who, as Mr. Henry said, in the Virginia convention, has the congress at his heels.

*305] *It is admitted, that the powers of courts and judges may be altered and modified, but cannot be totally withdrawn. By the repealing law, the powers of both are entirely taken away.

But the laws are also unconstitutional, because they impose new duties upon the judges of the supreme court, and thereby infringe their independence; and because they are a legislative, instead of an executive appointment of judges to certain courts. By the constitution, all civil officers of

(*a*) To show that such writings are to be regarded in forming the true construction of the constitution, he read from a newspaper what was said to be an answer from the President of the United States to an address from sundry inhabitants of Providence, in which the president is supposed to have said, "The constitution on which our Union rests, shall be administered by me according to the safe and honest meaning contemplated by the plain understanding of the people of the United States, at the time of its adoption; a meaning to be found in the explanations of those who advocated, not of those who opposed it; and who opposed it merely lest the construction should be applied which they denounced as possible. These explanations are preserved in the publications of the time, and are too recent in the memories of most men, to admit of question."

the United States, including judges, are to be nominated and appointed by the president, by and with the advice and consent of the senate, and are to be commissioned by the president. The act of 29th April, 1802, appoints the "present Chief Justice of the supreme court," a judge of the court thereby established. He might as well have been appointed a judge of the circuit court of the district of Columbia, or the Mississippi territory. Besides, as judge of the supreme court, he could not exercise the duties or jurisdiction assigned to the court of the fifth circuit, because, by the constitution of the United States, the supreme court has only appellate jurisdiction; except in the two cases where a state or a foreign minister shall be a party. The jurisdiction of the supreme court, therefore, being appellate only, no judge of that court, as such, is authorized to hold a court of original jurisdiction. No act of congress can extend the original jurisdiction of the supreme court, beyond the bounds limited by the constitution.

A party in this court has a right to have his cause tried by six judges. He has a right to an unbiased court, whether the whole six sit or not. A judge, having tried the cause in the court below, and given judgment, must be, in some measure, committed; he feels an anxiety that his judgment should be affirmed. The case of *Clark* v. *Nightingale*, 3 Dall. 415, will illustrate this principle. The suit was first tried before Chief Justice Ellsworth, whose opinion upon the merits was in favor of the plaintiff. A writ of error was brought, and the judgment reversed for error in pleading, and the cause remanded to be again tried. Judge Cushing held the court on the second trial, and his opinion also was in favor of the plaintiff upon the merits. A second writ of error was brought and tried in the supreme *court before Chief Justice Ellsworth, Judges Cushing, Paterson, [*306
Washington and Chase, and the judgment was reversed by the three last-mentioned judges, who made a majority of the court.

A degree of respect is certainly due to precedents and past practice. If it be said, that the practice from the year 1789 to 1801 is against us; we answer, that the practice was wrong, that it crept in unawares, without consideration and without opposition; congress at last saw the error, and in 1801 they corrected it, and placed the judicial system on that ground upon which it ought always to have stood. By the act of February 13th, 1801, the precedent was broken, so that now precedents are both ways. If there are twelve years' practice against us, there is one year for us. There has never been a judicial decision upon the subject. The time has now come when the true construction ought to be settled. If the construction is as we contend, then the court below had no jurisdiction. The power of congress to transfer causes from one court to another is admitted; but if the acts of March and April 1802, are totally unconstitutional, they are void; the causes have not been transferred, and the court of the fourth circuit still exists, with all its powers and jurisdiction.

Gantt, contrà.—This suit was originally instituted in the circuit court which existed under the law of 1789, and was transferred, by the act of February 13th, 1801, to the new circuit court by that act established. It was afterwards, by the act of 1802, re-transferred to the circuit court, under the act of 1789, so that if the transfer by the act of 1801 was constitutional, the re-transfer by the act of 1802 must be equally constitutional.

No error is relied on but the want of jurisdiction. It is admitted, that congress have power to transfer the jurisdiction of causes from one inferior court to another; and therefore, the question whether they have the power
*307] to deprive a judge of his office, does not belong to this *case: it has nothing at all to do with it. But admitting, for the sake of argument, that congress have not the latter power, yet an act may be constitutional in part, and unconstitutional in part. Congress have an express power, by the constitution, to constitute, and from time to time to ordain and establish tribunals inferior to the supreme court. The tenure of office may be a restraint in part to the exercise of this power, but cannot take away altogether the right to alter and modify existing courts.

There are not more instances of independent decisions by the judges, in England, since they have become independent of the crown, than before; for before that time, we find, that judges have been sent to the tower for the independence of their opinions. The provision of the constitution respecting tenure by good behavior was not intended to protect the judge; but for the benefit of the people, that judges might, by the permanence of their offices, be always men of experience and learning. It is admitted by Mr. Lee, that if any power remained in the circuit court of the fourth circuit, the act was constitutional. But even if the whole powers were taken away, yet new powers and new duties might have been given. It does not follow, that because the court is abolished, the office of the judge is taken away. And if the act of 1802 is unconstitutional, because it abolishes the circuit courts then existing, the act of 1801 is equally so, by abolishing the old circuit courts. But, as was before observed, there is no necessity or wish to go into this argument; it is not pertinent to the present cause; for the only question here is, whether congress had power to transfer the cause from the fourth to the fifth circuit court, and not whether the fourth circuit court, or its judges, are still in existence.

As to the objection that the law of 1789 is unconstitutional, inasmuch as it gives circuit powers, or original jurisdiction, to judges of the supreme court; it is most probable, that the members of the first congress, many of
*308] them having been members of the convention which *formed the constitution, best knew its meaning and true construction. But if they were mistaken, yet the acquiescence of the judges, and of the people, under that construction, has given it a sanction which ought not now to be questioned.

Lee, in reply.—The acts of 1801 and 1802 were not alike, in abolishing the circuit courts. The former, in abolishing the then existing courts, did not turn the judges out of office, nor in any degree affect their independence; but the act of 1802 strikes off sixteen judges, at a stroke, drives them from their offices, and assigns their duties to others. An error was committed in 1789. That act was unconstitutional, but the act of 1801 restored the system to its constitutional limits. We now contend for the pure construction of the constitution, and hope it will be established, notwithstanding the precedent to the contrary.

March 2d, 1803. The Chief Justice, having tried the cause in the court below, declined giving an opinion.

Stuart v. Laird.

PATERSON, J. (Judge Cushing being absent on account of ill health), delivered the opinion of the court.—On an action instituted by John Laird against Hugh Stuart, a judgment was entered in a court for the fourth circuit, in the eastern district of Virginia, in December term 1801. On this judgment, an execution was issued, returnable to April term 1802, in the same court. In the term of December 1802, John Laird obtained judgment at a court for the fifth circuit, in the Virginia district, against Hugh Stuart and Charles L. Carter, upon their bond for the forthcoming and delivery of certain property therein mentioned, which had been levied upon by virtue of the above execution against the said Hugh Stuart.

Two reasons have been assigned by counsel fer reversing the judgment on the forthcoming bond: 1. That as the bond was given for the delivery of property levied on by virtue of an execution issuing out of, and returnable to, a court for the fourth circuit, no other court could legally *proceed upon the said bond. This is true, if there be no statutable provision to direct and authorize such proceeding. Congress have constitutional authority to establish, from time to time, such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the constitution to prohibit or restrain the exercise of legislative power. The present is a case of this kind. It is nothing more than the removal of the suit brought by Stuart against Laird, from the court of the fourth circuit to the court of the fifth circuit, which is authorized to proceed upon and carry it into full effect. This is apparent from the 9th section of the act entitled, "An act to amend the judicial system of the United States," passed the 29th of April 1802. The forthcoming bond is an appendage to the cause, or rather a component part of the proceedings. [*309

2d. Another reason for reversal is, that the judges of the supreme court have no right to sit as circuit judges, not being appointed as such, or, in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.

Judgment affirmed.

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Thomas Hamilton *v.* James Russell.

Fraud in law.—Retention of possession by vendor of goods.—Charge of the court.

An absolute bill of sale of goods, is fraudulent as to creditors, unless possession accompanies and follows the deed.

The want of possession is not merely evidence of fraud, but is a circumstance *per se*, which makes the transaction fraudulent in point of law.[1]

The court are not bound to give an opinion on an abstract point of law, unless it be so stated as to show its connection with the cause.

Hamilton *v.* Russell, 1 Cr. C. C. 97, affirmed.

Error from the Circuit Court of the district of Columbia, sitting at Alexandria.

*310] *James Russell the defendant, having obtained a judgment against Robert Hamilton, brother of the plaintiff in error, ordered the marshal to levy the *fieri facias* upon sundry goods and chattels in the possession of Robert, the debtor; which was done accordingly; whereupon, the present plaintiff, Thomas Hamilton, brought an action of trespass against Russell, claiming the goods by virtue of an absolute bill of sale from his brother Robert, dated the 4th of January 1800, and acknowledged and recorded in the circuit court of the district of Columbia, for the county of Alexandria, on the 14th of April 1801. Notwithstanding which bill of sale, Robert, the vendor, continued in possession, and exercised acts of ownership over the property. There was a general verdict in the court below, and judgment for the defendant, upon the general issue. The transcript of the record contained two bills of exception.

The first stated that the defendant "prayed the court to instruct the jury, that if they should be of opinion, from the evidence, that the plaintiff, who claims the slave George, in the declaration mentioned, under an absolute bill of sale, for a valuable consideration" (which bill of sale, recorded before the issuing of the *fieri facias* upon which the property was seized, is set forth in the bill of exceptions), "permitted the vendor, Robert Hamilton, to continue in possession of the slave, and to exercise acts of ownership over the same, he, the said plaintiff, has not a good title to the said slave, against the execution of the defendant, who was a *bonâ fide* creditor of Robert Hamilton;" which execution the defendant directed to be served "on the said slave. And the court so instructed the jury;" to which the plaintiff excepted.

The second bill of exceptions stated, that the plaintiff prayed the court to instruct the jury, "that a plaintiff in trespass, whose property is loaned to a friend, and is in that friend's possession, at the time it is seized by a sheriff, in virtue of an execution against the person so in possession, can

[1] But see Davis *v.* Turner, 4 Gratt. 422, where it is said, that in Virginia, the retention of possession of personal property by the vendor, after an absolute sale, is *primâ facie* fraudulent, but the presumption may be rebutted by proof. This is a leading case upon the subject, and has been followed by the courts of Virginia, and of other states. Howard *v.* Prince, 1 Hughes 243. See Born *v.* Shaw, 29 Penn. St. 288; Baltimore and Ohio Railroad Co. *v.* Hoge, 34 Id. 214; Callen *v.* Thompson, 3 Yerg. 475. And this is the doctrine of the modern English cases, where Edwards *v.* Harben, 2 T. R. 587, is not now recognised in all its strictness. Warner *v.* Norton, 20 How. 459, and cases there cited.

sustain an action of trespass for a seizure upon such possession." But the court, being divided in opinion, did not give the instruction as prayed.

*Swann, for the plaintiff in error, contended that, 1st. The bill of sale being acknowledged and recorded according to the act of assembly of Virginia, respecting frauds and perjuries (Rev. Code, p. 18), is valid and not fraudulent as to creditors. That act of assembly contains provisions similar to those in the English statutes of 29 Car. II., c. 3, § 4; 13 Eliz., c. 5, § 2; and 27 Eliz., c. 4, § 2; and has, moreover, a clause in the following words, viz.: [*311

"If a conveyance be of goods and chattels, and be not on consideration deemed valuable in law, it shall be taken to be fraudulent within this act, unless the same be by will duly proved and recorded, or by deed in writing acknowledged and proved (if the same deed include lands also), in such manner as conveyances of land are by law directed to be acknowledged or proved; or if it be of goods and chattels only, then acknowledged, or proved by two witnesses in the general court, or court of the county wherein one of the parties lives, within eight months after the execution thereof, or unless possession shall really and *bonâ fide* remain with the donee."

"This act shall not extend to any estate or interest in any lands, goods or chattels, or any rents, common or profit, out of the same, which shall be, upon good consideration, and *bonâ fide*, lawfully conveyed or assured to any person or persons, bodies politic or corporate."

Under this act, he contended, the deed would be good against creditors, notwithstanding that the possession did not accompany the deed. And although the deed was not acknowledged within eight months after its execution, yet being acknowledged and recorded before the *fieri facias* issued, upon which the goods were seized, it was good against that execution; and for this he cited the case of *Eppes* v. *Randolph*, 2 Call 125.

2d. The court ought to have instructed the jury, as prayed in the second bill of exceptions. The law is well established, that he who has the general property of goods may maintain trespass against him who *tortiously takes them out of the possession of the owner's bailee. 5 Bac. Abr. (Gwillim's edit.) 164. [*312

Simms, for the defendant in error.—As to the first bill of exceptions. This deed is clearly fraudulent as to creditors. In the case of *Lavender* v. *Blackstone*, 2 Lev. 147, Lord HALE said, that "every conveyance shall be esteemed *primâ facie* fraudulent against a purchaser." And in *Edwards* v. *Harben*, 2 T. R. 594; it is said by BULLER, Justice, to have been the unanimous opinion of all the judges in England, "that unless possession accompanies and follows the deed, it is fraudulent and void." If the possession be inconsistent with the deed, it is clear and conclusive evidence of fraud. *Haselinton* v. *Gill*, cited in *Jarman* v. *Woolloton*, 3 T. R. 620; *Cadogan* v. *Kennet*, Cowp. 434.

The act of assembly of Virginia has similar provisions with the statutes of 13th and 27th Eliz., and nearly in the same words. Those provisions, however, were nothing more than a declaration of the principles of the common law. But this act of assembly, by making deeds absolutely void, which are not for a valuable consideration, unless acknowledged, cannot be construed to make good, as against creditors, a deed purporting to be for a

valuable consideration. The act makes the deeds therein mentioned, which are not for valuable consideration, absolutely void, even between the parties themselves; and it cannot be pretended, that the acknowledgment according to that act, would set up such a deed against *bonâ fide* creditors. The act was intended to suppress, and not promote or conceal fraud. If such a construction could be put upon the act, as is contended for, it would make valid, deeds which would before have been void, as being fraudulent against creditors. But the act takes no notice at all of such a deed as this, except in the second section of the law, where deeds made with the intent to defraud creditors are expressly declared to be void. So anxious is the act to suppress fraud, that in the case of a loan, if the lender does not demand the property lent in five years, and follow up that demand with a prosecu-
*313] tion at law to recover possession *of his goods, the possession becomes conclusive evidence of property.

2d. As to the second bill of exceptions, the court did right in not giving the instruction as prayed. Possession is necessary to support an action of trespass. Bull. N. P. 79. This ought to have been an action on the case, and not trespass. *Reynolds* v. *Clarke*, 1 Str. 635; *Ward* v. *Macauley*, 4 T. R. 489.

C. Lee, on the same side.—The case of *Ward* v. *Macauley* has overruled all the cases cited from Bacon's Abridgment, and has been recognized in the case of *Gordon* v. *Harper*, 7 T. R. 9, where the doctrine has been carried even farther, and held, that neither trespass nor trover would lie, unless the possession, or right of possession, was in the plaintiff. In that case, the goods of the landlord had been leased to the tenant, and during the lease, were taken in execution for the debt of a third person. The court held, that during the lease, the landlord had neither the possession, nor the right of possession, and therefore, he could maintain neither trespass nor trover. Now, in the case made by the second bill of exceptions, it is not stated, whether the loan was for a time certain, or at the will of the lender. If the loan was for a time certain, there is no difference between that case and a lease for a time certain. In neither case, is the possession, or the right of possession, in the plaintiff. The bailee by loan, for a time certain, has an equal right to the possession, during that time, with a bailee for hire: and either may maintain trespass against him who violates that possession, whether it be a stranger or the owner.

Chase, Justice.—There is here no exception applicable to this case. The bill of exceptions states only an abstract question. It is not, whether the plaintiff in this case can maintain an action of trespass, but whether any plaintiff can maintain trespass for property loaned to a friend.

*314] *Swann*, in reply, relied on the act of assembly of Virginia. The English cases do not apply; for in England they have no such statute authorizing the recording of deeds of personal property; nor any substitute for the actual delivery of possession of goods in any case whatever. Even a mortgage of personal property is there deemed fraudulent as to creditors, unless possession accompanies the deed; and the reason given in all the books is, that it gives a false credit to the mortgagor, enables him to impose

upon the world, and gives him a power to deceive and defraud those who deal with him. *Ryall* v. *Rolle*, 1 Wils. 260. But when such a deed is publicly made and exposed to view upon the public records, as this was, such reason must fail; and with the reason, the law must fail also.

As to the second bill of exceptions. There is certainly a difference between a loan and a lease. In a loan, the lender does not part with the right of possession, nor, in law, does he part with the actual possession; for the bailee's possession is the possession of the lender, who has a right to resume the thing into his own hands, at any moment. There is no adverse possession, nor adverse claim, as there is in the case of a lease.

Fraud or no fraud, is a point to be decided by the jury, and not by the court. It is a question of fact; and the court have instructed the jury as if it were a matter of law. The possession of the vendor is not, in itself, a fraud, but only a circumstance from which, connected with others, the jury may presume the fact of a fraudulent intent.

February 28th, 1803. The CHIEF JUSTICE delivered the opinion of the court.—On the 4th January 1800, Robert Hamilton made to Thomas Hamilton an absolute bill of sale, for a slave in the bill mentioned, which, on the 14th of April 1801, was acknowledged and recorded in the court of the county in which he resided. The slave continued in possession *of the vendor; and some short time after the bill of sale was recorded, [*315 an execution, on a judgment obtained against the vendor, was levied on the slave, and on some other personal property, also in possession of the vendor. In July 1801, Thomas Hamilton, the vendee, brought trespass against the defendant Russell, by whose execution, and by whose direction, the property had been seized; and at the trial, the counsel for the defendant moved the court to instruct the jury, that if the slave George, remained in the possession of the vendor by the consent and permission of the vendee; and if, by such consent and permission, the vendor continued to exercise acts of ownership over him, the vendee, under such circumstances, could not protect such slave from the execution of the defendant. The court gave the instruction required, to which a bill of exceptions was taken.

The counsel for the plaintiff then moved the court to instruct the jury, that a plaintiff in trespass, whose property is loaned to a friend, and is in that friend's possession, at the time it is seized by a sheriff, in virtue of an execution against the person so in possession, can sustain an action of trespass for a seizure, upon such possesssion. The court, being divided, refused to give the instruction required, and the jury found a verdict for the defendant. Judgment was accordingly rendered for the defendant, to which a writ of error has been sued out, and the question is, whether the court below has erred in the instructions given or refused.

In the opinion to which the first bill of exceptions was taken, it is contended, on two grounds, that the circuit court has erred. 1st. Because this sale is, under the act of the Virginia assembly against fraudulent sales, protected by being recorded. 2d. That if it be not protected by that act, still, it is only evidence of fraud, and not, in itself, a fraud.

*On examining the act of assembly alluded to, the court is of [*316 opinion, that it does not comprehend absolute bills of sale, among those where the title may be separated from the possession, and yet the conveyance

be a valid one, if recorded within eight months. On this point, one judge doubted, but he is of opinion, that this bill of sale was not recorded within the time required by the act, and that the decision in the case of *Eppes* v. *Randolph*, which was made by the court of appeals of Virginia, on a different act of assembly, would not apply to this act.

On the second point, there was more difficulty. The act of assembly which governs the case, appears, so far as respects fraudulent conveyances, to be intended to be co-extensive with the acts of the 13th and 27th of Eliz., and those acts are considered as declaratory only of the principles of the common law. The decisions of the English judges, therefore, apply to this case. In some cases, a sale of a chattel, unaccompanied by the delivery of possession, appears to have been considered as an evidence or a badge of fraud, to be submitted to the jury, under the direction of the court, and not as constituting, in itself, in point of law, an actual fraud, which rendered the transaction as to creditors entirely void. Modern decisions have taken this question up upon principle, and have determined, that an unconditional sale, where the possession does not "accompany and follow the deed," is, with respect to creditors, on the sound construction of the statute of Elizabeth, a fraud, and should be so determined by the court. The distinction they have taken is between a deed purporting on the face of it to be absolute, so that the separation of the possession from the title is incompatible with the deed itself; and a deed made upon condition, which does not entitle the vendor to the immediate possession.

The case of *Edwards* v. *Harben, Ex'r of Tempest Mercer*, 2 T. R. 587, turns on this distinction, and is a very strong case. William Tempest Mercer, on the 27th of March 1786, offered to the defendant Harben, a bill of sale of sundry chattels, as a security for a debt due by Mercer to Harben. This Harben refused to take, unless he should be permitted, at the expiration of fourteen days, if the debt should *remain unpaid, to take possession *317] of the goods and sell them, in satisfaction of the debt; the surplus money to be returned to Mercer. To this Mercer agreed, and a bill of sale, purporting, on the face of it, to be absolute, was executed, and a corkscrew delivered in the name of the whole. Mercer died within the fourteen days, and immediately after their expiration, Harben took possession of the goods specified in the bill of sale, and sold them. A suit was then brought against him by Edwards, who was also a creditor of Mercer, charging Harben as executor in his own wrong, and the question was, whether this bill of sale was fraudulent and void, as being on its face absolute, and being unaccompanied by the delivery of possession. It was determined to be fraudulent; and in that case, it is said, that all the judges of England had been consulted on a motion for a new trial in the case of *Bamford* v. *Baron*, 2 T. R. 594, and were unanimously of opinion that "unless possession accompanies and follows the deed, it is fraudulent and void;" that is, that unless the possession remain with the person shown by the deed to be entitled to it, such deed is void as to creditors, within the statutes. This principle is said, by Judge Buller, to have been long settled, and never to have been seriously questioned. He states it to have been established by Lord Coke, in 2 Bulst., so far as to declare, that an absolute conveyance or gift of a lease for years, unattended with possession, was fraudulent. "But if the deed or conveyance be conditional, there the vendor's continuing in possession, does not

avoid it, because, by the terms of the conveyance, the vendee is not to have the possession till he has performed the condition." "And that case," continues Judge BULLER, "makes the distinction between deeds or bills of sale which are to take place immediately, and those which are to take place at some future time. For, in the latter case, the possession continuing with the vendor till such future time, or till that condition be performed, is consistent with the deed, and such possession comes within the rule as accompanying and following the deed. That case has been universally followed by all the cases since." "This," continues the judge, "has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se*, as makes the transaction fraudulent in point of *law; that is the point which we have considered, and we are all of opinion, that if there is nothing but the absolute conveyance, without the possession, that in point of law is fraudulent."[1] [*318

This court is of the same opinion. We think, that the intent of the statute is best promoted by that construction; and that fraudulent conveyances, which are made to secure to a debtor a beneficial interest, while his property is protected from creditors, will be most effectually prevented, by declaring that an absolute bill of sale is itself a fraud, unless possession "accompanies, and follows the deed." This construction, too, comports with the words of the act. Such a deed must be considered as made with an intent "to delay, hinder, or defraud creditors."

On the second bill of exceptions the court did right in refusing to give the instruction required. The question propounded seems to have been an abstract question, not belonging to the cause.

Judgment affirmed, with costs.

UNITED STATES *v.* R. T. HOOE and others.

Practice on appeal.—Statement of facts.

Under the judiciary act of 1789, in chancery cases, a statement of facts must accompany the transcript.

This provision was revived by the repeal of the act of February 1801.

THIS was a writ of error to a decree of the Circuit Court of the district of Columbia, sitting as a court of chancery.

The case was, that Colonel Fitzgerald, in the year 1794, was appointed collector of the customs for the port of Alexandria, and gave bond to the United States in the penalty of $10,000, with R. T. Hooe, as his surety, for the faithful performance of the duties of the office. In consequence of misapplication of large sums of money by the chief clerk, who was intrusted with almost the whole *management of the business, Col. Fitzgerald became deficient in his accounts with the United States to the amount of $57,000. After this fact was discovered, he executed a deed of trust, of part of his real estate, to trustees, to be sold to indemnify [*319

[1] But see Wood *v.* Dixie, 7 Q. B. 894; Martindale *v.* Booth, 3 B. & Ad. 498; Benton *v.* Thornbel, 2 Marsh. 427; Lattimer *v.* Batson, 4 B. & C. 652; Arundell *v.* Phipps, 10 Ves. 145; Eastwood *v.* Browne, 1 Ry. & Moo. 312.

Hooe from the demands of the United States against him, as security of Fitzgerald, and also to secure him against sundry notes which he had indorsed for him at the bank of Alexandria, as well as to enable him to take up further sums at the bank, as his exigencies might require. After the death of Col. Fitzgerald, the trustees advertised the property for sale, and the United States obtained an injunction to stay the sale, alleging that by the acts of congress, they were entitled to a prior lien upon the estate of their debtor; and that the deed, as to them, was fraudulent. In the court below, the claim of the United States was rested altogether upon the prior lien created by the act of congress; and the court being of opinion, that the act did not create a lien on the real estate, and that there did not appear to be any fraud in the transaction, dissolved the injunction, with costs, and ordered $10,000, part of the proceeds of the sale, to be paid into the treasury of the United States, in satisfaction of the bond in which Hooe was the surety, and the residue, after paying the notes due at bank, to be paid into the treasury of the United States, in part satisfaction of the balance due from the estate of Fitzgerald; it having been proved to the satisfaction of the court, that the money, arising from the notes discounted at the bank, had been before paid by Fitzgerald to the United States. To reverse this decree, the present writ of error was sued out by the attorney for the United States.

The decree of the court below did not state the facts upon which the decree was founded; and although the record contained the bill, answers, exhibits and all the evidence which was before the court below, yet no statement of facts, according to the provision of the judiciary act of 1789, c. 20, § 19, was made by the parties or by the court.

The Attorney-General (Mr. *Lincoln*) opened the cause on the part of
*320] *the United States, and was going on to show that the deed was fraudulent as to creditors, upon general principles of law (a ground not taken in the court below), when he was stopped by an inquiry from the court, whether there was any provision in the act concerning the district of Columbia, by which the case was taken out of the operation of the 19th section of the judiciary act of 1789, which required a statement of the facts to accompany the record. Upon recurring to the act of congress, 27th February 1801, concerning the district of Columbia, c. 86, § 8, it was found, that writs of error were to "be prosecuted in the same manner, under the same regulations, and the same proceedings shall be had therein, as is, or shall be, provided in the case of writs of error on judgments, or appeals upon orders or decrees rendered in the circuit court of the United States."

Upon which, The Court said, that the decisions on the act of 1789, § 19, had been, that unless a statement of facts appeared upon the record, they could not say there was error. *Jennings* v. *The Brig Perseverance*, 3 Dall. 337. It is true, that the act of February 13th, 1801, c. 75, § 33, remedied the evil, but that act was repealed in 1802, so that the law now stands as it did before the act of 1801. And the act concerning the district of Columbia, by saying that writs of error shall be prosecuted in the same manner as is, or shall be, provided, &c., places this case under the law of 1789. Whatever might be the present opinion of the court, if this were the first time of being called upon to give a construction to that clause of the act, yet the

question has been solemnly settled. One legislature has taken cognisance of the construction given by the court, and has provided for the case, but another legislature has repealed that provision, and thereby given a subsequent legislative construction, or, at least, shown such a legislative acquiescence under the construction which this court formerly gave to the act, as is now conclusive.

At the request of the Attorney-General, the writ of error was dismissed.(*a*)

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*Hepburn & Dundas *v.* Colin Auld. [*321

Tender.

A tender must be unconditional; a tender, accompanied by a demand for a release, before delivery of what is tendered, is bad, unless justified by the express stipulation of the parties.

This was an action of debt, brought by Hepburn & Dundas against Colin Auld, in the Circuit Court of the district of Columbia, for the penalty of an agreement, dated 27th September 1799, between the plaintiffs, merchants of Alexandria, and the defendant, as agent for John Dunlop & Co., merchants in Glasgow.

The agreement recited, that whereas, the plaintiffs had had extensive dealings with Dunlop & Co., in the course of which the former appeared to have fallen in debt to the latter, by the accounts by them exhibited, some articles of which accounts having been objected to by the plaintiffs, they had agreed with the said agent, to submit all matters in dispute to arbitration. And whereas, the plaintiffs, by an article of agreement between them and a certain William Graham, dated 12th March 1796, did covenant with him (for the consideration of $18,000 to be by him paid to him, at certain times in the said article expressed) to convey to him, the said Graham, his heirs and assigns, 6000 acres of land on the Ohio; but the said Graham failing to make the first payment upon the day stipulated, the plaintiffs considered the said contract as thereby annulled, and in consequence thereof, brought an ejectment to recover possession of the land, which they had permitted Graham to occupy, which ejectment had been abated by his death, and another ejectment had been, or was about to be, commenced.

The indenture then witnessed, that each party covenanted to furnish their accounts to the arbitrators, so as to enable them to make their award by the 1st day of January then next, being the time stipulated by the arbitration bonds. That Auld covenanted that he, or the agent of Dunlop & Co., would, on the 2d day of January then next, accept and take of the plaintiffs the amount *which should be awarded to Dunlop & Co., in [*322
bills of exchange of a certain description, or in any money which might by law be a legal tender; and on such payment being made, in either way, give the plaintiffs a full receipt and discharge of all claims and demands of Dunlop & Co. against them. That the plaintiffs covenanted, that in case

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(*a*) Congress being in session at this time, an act was introduced and passed, containing a clause similar to the 33d section of the act of 13th February 1801, respecting writs of error and appeals in cases of equity and maritime jurisdiction, &c. (2 U. S. Stat. 244).

they did not, on the 2d of January then next, pay to the defendant, or the then agent of Dunlop & Co., the amount of the award, in bills or money, they would, on that day, assign and transfer to the defendant, or the then agent of Dunlop & Co., in the fullest manner, the aforesaid contract entered into by them with Graham, for the sale of the land, and all and every interest, right and claim, of whatever kind, of the plaintiffs, arising out of and from the said contract; with full power to proceed and act thereupon and therein, as the defendant or the then agent of Dunlop & Co. should think proper; and that they would, for that purpose, give him a full and ample power of attorney, irrevocable, to pursue in their names, if necessary, all legal ways and means, either to recover the possession of the land, or to enforce payment of the $18,000 and interest, whichever of the measures he might be inclined to pursue; and that in case they should so assign the said contract, they would not thereafter in any manner interfere with the measures he might choose to pursue, either for the recovery of the lands, or to enforce the payment of the purchase-money. And that whenever the ejectment should be judicially determined, or settled by compromise, they would convey the lands to the person who, by such determination or compromise, should be acknowledged to be entitled to them. And that in case the said purchase-money, which, with interest to the said 2d day of January, would amount to $21,112, should not prove sufficient to satisfy the award, they would, on that day, pay the balance to the defendant, or the then agent of Dunlop & Co.

And the defendant covenanted, that in case it should not be convenient for the plaintiffs to pay the amount of the award in bills or money, on the 2d day of January, he would accept and take an assignment of the said Graham's contract, at $21,112, towards the discharge of the said award; and that in case it should exceed the amount of the award, he would, at the time *323] of making the said *assignment, pay them the excess. For the faithful performance of these articles, the parties bound themselves to each other in the penal sum of $45,000. The sum of $21,112 exceeded the amount of the award, by the sum of 494*l.* 6*s.* 7*d.*, Virginia currency. For the non-payment of this excess, the present action was brought by the plaintiffs, after having tendered an assignment of Graham's contract and a power of attorney, which was refused by the defendant. There were four issues in fact, but to the 5th plea, there was a general demurrer and joinder. Judgment below being in favor of the defendant upon this demurrer, the issues in fact were not tried, and the plaintiffs sued out the present writ of error.

The fifth plea was as follows: "and the said defendant, by virtue of the act, &c., and by leave of the court, for further plea, protesting that the said deed of assignment of the contract aforesaid, with the said William Graham, so as aforesaid pretended to have been executed, sealed and tendered by the plaintiffs, on the 2d day of January, in the year 1800, was not a good, lawful and sufficient assignment thereof, according to the true intent and meaning of the said articles of agreement between the plaintiffs and defendant, he, the defendant, saith, that the said deed of assignment was not tendered to him unconditionally, but upon the condition that the said John Dunlop & Co. should first sign, seal and deliver, by the said Colin Auld, their attorney, on the same day, unto the plaintiffs, a release and acquittance of all the claims and demands of the said John Dunlop & Co. against the said plaintiffs; and the said defend-

ant then and there refused to comply with the said condition, and the said plaintiffs then and there refused to deliver the aforesaid deed of assignment to the said defendant, unless he complied with the condition aforesaid; and this he is ready to verify; wherefore, he prays judgment, whether the plaintiffs their action aforesaid against him ought to have and maintain," &c.

Swann, for the plaintiffs in error.—It will be perceived by the agreement, that the plaintiffs had the choice of three modes of paying the award; *1. By bills of exchange; 2. By cash; and 3. By an assignment of Graham's contract. It is true, that the words are, that the defendant [*324 will take the assignment "towards" the discharge of the award. But the reason of using the word "towards" is plainly, because the amount of the award not being then known, it remained an uncertainty, whether the the $21,112 of Graham's purchase-money would be sufficient in amount to meet and satisfy the award. The word towards, therefore, was not used to exclude the idea that the assignment should be a complete discharge of the award, in case the award did not exceed the purchase-money; but only to prevent Auld from being compelled to accept the assignment in full discharge of the award, if the purchase-money should fall short of the sum awarded. 1st. We contend, that the assignment was a good and sufficient assignment, within the meaning and intention of the agreement. 2d. That the plaintiffs had a right to a release of all demands, upon tender of the assignment. 3d. That the plaintiffs had a right to make such release a condition of their tender.

I. It is no objection to the assignment, that it expresses the consideration to be a release of all demands from Dunlop & Co.; for if the plaintiffs had a right to such a release, it was proper to state it, as part of the consideration. 2. The preamble of the assignment states the defendant to be agent of Dunlop & Co., and the *habendum* is to the said Colin Auld, which refers to the premises where he is styled agent; so that it is, in fact, as it ought to be, to Colin Auld, agent of Dunlop & Co.

II. As to the right of the plaintiffs to insist upon a release of all demands. 1st. It is due, by the terms of the contract. 2d. If not due by the terms of the contract, yet it was due of common right.

*1. It is due by the contract. Every contract ought to have a [*325 reasonable construction, according to the intention of the parties. Such a release is expressly agreed to be given in case of payment by bills or cash. A payment by the assignment was as complete a discharge of the award, as payment in either of the otner modes. The discharge of the amount of the award, and not the particular mode of discharge, was to be the consideration of the release: and having stipulated to give it, in the one case, it ought to be presumed to be the intention of the parties, that it should be given, in the other, unless there can be shown some difference in the consideration, or some reason operating upon the mind of the defendant which might have induced the omission of an express agreement to that effect. By agreeing to give it, in case of payment by cash or bills, he allows that the plaintiffs have a right to such a release, upon discharge of the award. The submission was of all demands; a discharge of the award, then, was a discharge of all demands; and, therefore—

2. Such a release was due of common right. A man has a right to de-

mand evidence of his payment, and of the claims which are thereby satisfied. It is true, he may call witnesses, but they may die. If a man pay money upon a specialty, he has a right to written evidence of the payment. Shep. Touch. 348.

III. The plaintiffs had a right to make the release a condition of the tender. All things were to be done on the same day: they were concurrent conditions, to be performed at the same time. If one party is ready and willing, and offers to perform, and the other will not, the first is discharged from the performance of his part, and may maintain an action against the other. *Goodisson* v. *Nunn*, 4 T. R. 761; *Jones* v. *Barkley*, 2 Doug. 684.

Such a release could not operate to the injury of the defendant, or of Dunlop & Co. It would not have released any right accruing under the agreement, as was decided in the case of *Thorpe* v. *Thorpe*, 1 Ld. Raym. 235. The covenants of the plaintiffs respecting the lands and the ejectment
*326] are all future and contingent, and therefore, *could not have been released by a release of all demands. Nor was the penalty a present duty. It could only be incurred by a future breach, and therefore, is not like a bond to pay a smaller sum at a future day. Shep. Touch. 339, 340. Bull. N. P. 160. *Carthage* v. *Manby*, 2 Show. 90; Esp. N. P. 307; *Hancock* v. *Field*, Cro. Jac. 170; *Porter* v. *Philips*, Ibid. 623; *Hoe* v. *Marshall*, Cro. Eliz. 580; *Hoe's Case*, 5 Co. 70 *b*.

E. J. Lee, contrà.—The assignment in this case tendered, was not good, because it stated part of the consideration to be a release of all demands, which the defendant was not bound to give; and if he had accepted of the assignment, in that form, it would have been an acknowledgment that he was bound to give it. Whether Auld might with safety have given such a release, is not now the question; he has not contracted to give it, and it is not for us to inquire, why he did not. He was unskilled in the law, and he might have supposed that in some way or other it would embarrass the claims of Dunlop & Co. against the plaintiffs, for a future performance of their covenants respecting the land.

2. The assignment is made to the use of Colin Auld, and not to the use of Dunlop & Co. The rents and profits are to be received to his use, and not to that of his constituents. In the operative parts of the assignment he is not named as agent.

3. The power of attorney is insufficient, because it does not give full power to act therein, as the defendant should think proper, and does not authorize him to compromise the ejectment.

But the principal question is, whether the defendant was bound to give a release of all demands. The plaintiffs only tendered the papers, but did not deliver them, so that the defendant could not see whether they were correct. They were to do the first act: they were first to make and deliver
*327] the assignment before they *were entitled to the balance: the words of the agreement plainly show this. The agreement does not require him to give such a receipt, in the case of payment by the assignment of Graham's contract. It would certainly have been as easy to have covenanted to give such a release in that case, as in the event of payment by bills or cash. The not doing so, in the former case, and the express agreement for it in the latter cases, creates the strongest presumption that it was

not intended by the parties to be given in the former case; and the intention of the parties constitutes the agreement.

Admitting that, by common right, they were entitled to a receipt, it could only be a receipt for the assignment itself. There was at least a doubt whether such a release as was demanded would not have discharged the penalty annexed to the contract, or at least, the covenants respecting the land. A release of all demands is certainly a release of all present duties, and it is said, in *Altham's Case*, 8 Co. 154 *a*, that a release of all demands is a release of all causes of demand.

As the plaintiffs have demurred to our plea, we have a right to look into their declaration; to which there are two objections. 1st. That it contains no *profert* of the award, which is the foundation of their action; and 2d. That it does not aver the difference between the amount of the award and the purchase-money due upon the contract tendered. The declaration only states that the arbitrators awarded the sum of 4379*l.* 9*s.* $0\frac{3}{4}$*d.*, sterling, to be due from the plaintiffs to Dunlop & Co., and that the plaintiffs having elected to assign Graham's contract in discharge of the award, tendered an assignment thereof, together with a power of attorney, according to the true intent and meaning of the agreement, in consequence whereof, the plaintiffs then and there became entitled *to have and receive of the said defendant the sum of 494*l.* 6*s.* 7*d.*, Virginia currency, which said sum [*328
the defendant, although required, had not paid, whereby action accrued to the plaintiffs to have $45,000, the penalty of the articles of agreement.

C. Lee, on the same side.—The *protestando* in the plea saves all objections to the sufficiency of the assignment; and we conceive the objections which have been stated are substantial.

But the principal question is, whether any release at all could be demanded. The contract does not, in any of the cases of payment of the award, require a release; which is a technical word, and means an instrument under seal. But we do not insist upon this distinction, as the law is full in our favor upon the other points. We might safely admit, that the defendant was bound to give a receipt for the assignment; but even that is not due, under the contract, nor of common right. However, such a receipt was not demanded, and therefore, it is unnecessary to inquire whether the defendant was, or was not, bound to give it.

The release required would have discharged the penalty of this agreement. Viner, tit. Release, P. pl. 18. It is not contended, that a release contained in an instrument, will release demands growing out of that instrument; this was the case of *Thorpe* v. *Thorpe*. *Hoe's case* does not apply to the present; that was a case of mere possibility of a demand. The covenant of the plaintiffs not to interfere with the ejectment, was a present duty.

This is a case of construction only, and the only question is, what was the intention of the parties. If the deed of assignment was not a proper one, or the release demanded was such a one as the defendant was not bound to give, the plea is good, and the judgment must be affirmed.

Mason, in reply.—All the instruments are to be taken together. *Crop* v. *Norton*, 2 Atk. 74. Through the whole, it appears, that what *the [*329
plaintiffs are bound to do, the defendant was bound to receive. The payment by the assignment was not more for the benefit of the plaintiffs

than of the defendant. If they did not, on the 2d of January, pay in bills or cash, they were absolutely bound to assign Graham's contract ; and the defendant might then refuse the bills or cash, and insist on the assignment ; and a court of chancery would have compelled a specific assignment, if they had refused. The discharge of the award by the assignment, was the same thing as the discharge by bills of exchange or cash. It would have been a complete discharge of the award, and there is no reason why he should not give a release as well in the one case as the other.

It is alleged, that the release would have discharged the other covenants, and the penalty of the agreement. But the case cited from Viner shows that the covenants would not have been discharged by the release, nor would it have discharged the penalty. The covenant not to interfere was not a present duty ; the covenant of the plaintiffs is, that after the assignment they would not interfere. But a release of all demands does not discharge a covenant, before it is broken ; until that time, it is no demand. The same observation applies to the penalty; it is not a present duty, until a breach of the covenant. A bond in the penalty of 200*l.* to pay 100*l.* at a future day, is a present duty. But in a bill penal, the penalty is not a duty until after the day appointed for the payment of the smaller sum. The difference in declaring upon the two instruments shows their different nature. On a bond, you only declare that he bound himself in the penalty ; and you take no notice of the condition. But on a bill penal, you declare that the defendant having failed to pay the smaller sum, an action has accrued to recover the penalty. To support these positions, he cited Esp. N. P. 307; Bull. N. P. 166 ; *Hancock* v. *Field*, Cro. Jac. 170; *Tyman* v. *Bridges*, Ibid. 300 ; *Porter* v. *Philips*, Ibid. 623 ; *Thorpe* v. *Thorpe*, 1 Ld. Raym. 662 ; and *Hoe* v. *Marshall*, Cro. Eliz. 579.

The plaintiffs having offered to perform their part of the agreement, are
*330] entitled to their action. Esp. N. P. *284 ; *Jones* v. *Barkley*, 2 Doug. 684 ; *Goodisson* v. *Nunn*, 4 T. R. 761.

As to the *protestando*, it is only an estoppel, or, as Lord Coke says, it is an exclusion of a conclusion. It does not put in issue the validity of the assignment ; but if it did, the objections are not well grounded. Whether the release ought to have been mentioned as part of the consideration, depends upon the question whether the defendant was bound to give such a release ; and the objection that the assignment is made to Colin Auld, and not to Colin Auld, as agent of Dunlop & Co., is not grounded in fact : for in the preamble of the assignment, he is named as agent for Dunlop & Co., and throughout the residue of the instrument, he is called the said Colin Auld, which refers back to the premises, to show in what capacity he was to take the assignment. In the premises, a complete interest is conveyed to Auld, as attorney in fact of Dunlop and Co., and the *habendum* cannot, in this case, control the premises. 2 Bl. Com. 298.

February 28th, 1803. The Chief Justice, after stating the case, delivered the opinion of the court.—To entitle themselves to the money for which this suit was instituted, it is incumbent on the plaintiffs, to show that they have performed the very act, on the performance of which the money became payable ; or that they are excused by the conduct of the defendant for its non-performance. The act itself has not been performed : but a ten-

der and refusal is equal to a performance; and it is contended, that there has been such a tender and refusal in this case.

The pleadings show that the tender was not unconditional; but the plaintiffs insist, that the condition, annexed to the tender, was such as they had a right to annex to it, and on their correctness in this opinion, depends the judgment now to be rendered. The plea does not contest the sufficiency of the deed of assignment and power of attorney, which were tendered; *and consequently, no question concerning their sufficiency can arise [*331 in the present case. The only cause relied on, as doing away the operation of the tender, is, that it was made on condition that a release of all the claims and demands of the said John Dunlop & Co., on the said Hepburn & Dundas, should first be signed, sealed and delivered to them by Colin Auld.

The only question in the case is, whether Hepburn & Dundas had a right to insist on this previous condition; and it is admitted, that this question depends entirely on the agreement of the 27th of September 1799. That an acquittance should be signed, sealed and delivered, before the act itself was performed, which entitled the party to such acquittance, is a mode of proceeding very unusual, and which certainly could only be rendered indispensable by express stipulation. There is in this case no such express stipulation. If the payment had been made in bills or money, the release of all the claims and demands of John Dunlop & Co. against them, was to have been given, not previous thereto, but upon receiving such payment. If, then, as has been argued, the deed of assignment and power of attorney are substituted for the payment in money, or in bills, and to be made on the same conditions on which payment in either of those articles was to have been made, yet there could exist no right to demand a delivery of the receipt, before the payment. If we inspect those covenants which relate to the deed of assignment of Graham's contract, we find no stipulation respecting a release of any sort. The agreement is, that he will receive the said deed of assignment at $21,112, towards the discharge of the award, but he does not engage to give any release whatever.

It is contended, that upon the general principles of justice and of law, Hepburn & Dundas had a right to the evidence of the payment they had made, without expressly contracting for such evidence; and this is true, so far *as to entitle them to a receipt for the deed and power delivered; [*332 but neither the general principles of justice, nor of law, give Hepburn & Dundas a right to insist upon any release as a previous condition.

The case has been argued at bar as if the condition of the tender of the deed of assignment and power of attorney had been a release of all claims and demands, to be given at one and the same time with the delivery of such deed and power, but this is not the case as presented in the pleadings. According to the plea, Hepburn & Dundas required the delivery of the release, as a condition precedent to their delivery of the deed of assignment. This demand seems not to have been countenanced by the contract; and of consequence, the tender was not such as it was incumbent on Hepburn & Dundas to have made, in order to entitle themselves to the money for which they have brought this suit.

Judgment affirmed, with costs.

Marine Insurance Company of Alexandria *v.* James Young.

Assumpsit.—Verdict.—Former recovery.

Assumpsit will not lie upon a policy of insurance, under the corporate seal, unless a new consideration be averred.[1]

Quære? Whether an aggregate corporation can make an express *assumpsit*, unless specially authorized by statute?

Whether an action on a policy will lie against this company, in their corporate name? Or whether the declaration must not be against the president alone?

A verdict will not cure a mistake in the nature of the action.

A judgment in *assumpsit* upon a policy, is a bar to a subsequent action of covenant on the same policy.

After verdict, every *assumpsit* in the declaration is to be taken as an express *assumpsit*.

This was an action brought in the Circuit Court of the district of Columbia, by James Young against the Marine Insurance Company of Alexandria, upon a policy of insurance on the brigantine Liberty, at and from Anacabessa, in Jamaica, to a port in the United States.

The declaration stated, that "James Young complained of the Marine Insurance Company of Alexandria in custody, &c., of a plea, for that whereas," &c., setting forth the policy in the usual form. "In witness whereof, the president and directors of the said Marine Insurance Company *333] of *Alexandria, by William Hartshorne, their president, subscribed the sum assured, and caused the common seal, and the attestation of their secretary, to be affixed to the said presents." It then alleged the property of the vessel to be in the plaintiff, and that it was of the value of $5000, the sum insured. That the said Marine Insurance Company, in consideration of the premium to be paid by the plaintiff, "did undertake and agree, by their policy aforesaid, subscribed by their president aforesaid, with the proper hand and name of the said president thereto affixed, to assure the said vessel, &c., at the said sum of $5000, against the risks specified in the said policy." That the plaintiff had paid the premium; and that the vessel was totally lost, of which loss the company had notice; "by means of which said premises, the said Marine Insurance Company of Alexandria became liable to pay to the said plaintiff the said sum of $5000, and being so liable, the said Marine Insurance Company, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, assumed upon themselves, and to the said plaintiff then and there faithfully promised," to pay him the said sum of money, when thereunto afterwards required.

There was another count, stating, generally, that in consideration that the plaintiff would pay the premium of four per cent. upon the value of the vessel, the insurance company "undertook and agreed" to insure, &c., at the sum of $5000, against sea risks only, at and from Anacabessa, in Jamaica, &c., to a port in the United States; that he had paid the premium, and that the vessel was stranded and lost, of which the insurance company had notice; by means of which said premises, the said company became liable, &c., and so being liable, assumed upon themselves, and promised to pay, &c. Nevertheless, the said defendants, not regarding their several promises and undertakings aforesaid, but contriving, &c., refused to pay, to the damage of the plaintiff $10,000. Plea *non assumpserunt*, and issue.

[1] See January *v.* Goodman, 1 Dall. 208, and notes to that case. Also, Fresh *v.* Gilson, 16 Pet. 327.

Verdict for plaintiff on the first count, and for defendant on the other count. Motion in arrest of judgment; "because the first count is in *assumpsit* upon a sealed instrument set forth in the said count, as containing the contract whereupon *the action aforesaid is brought." Judgment for the plaintiff; to reverse which judgment the insurance company obtained the present writ of error; and the errors assigned were, 1. That *assumpsit* is brought upon a sealed contract. 2. That the Marine Insurance Company of Alexandria, being an aggregate corporation, is sued upon *assumpsit* instead of upon covenant. 3. That the judgment upon the verdict aforesaid ought to have been arrested. 4. That according to the act of incorporation, the action aforesaid, if maintainable at all, should have been commenced and prosecuted against William Hartshorne, President of the Marine Insurance Company." [*334

E. J. Lee, and *C. Lee*, for the plaintiffs in error. *Simms* and *Swann*, for the defendant.

For the *plaintiffs* in error, it was said.—1st. That the declaration states the policy to be under the common seal, and the law is clear that *assumpsit* will not lie upon a sealed instrument: the action ought to have been covenant and not case. The difference is, that when the specialty is only inducement to the promise, and a new consideration intervenes, *assumpsit* will lie; but where the only contract, which is stated as the cause of liability of the defendant, is fully and entirely contained in the specialty, and no circumstance is added, but such as is provided for by the specialty, there it will not sustain a general *indebitatus assumpsit*, which is the present form of action.

The declaration states that the insurance company, by their policy, under the common seal, insured $5000 on the brig, and that the vessel was lost, whereby the company became liable, and, being so liable, assumed to pay. *This is the whole substance of the declaration. No new consideration is alleged. [*335

The whole ground of liability of the plaintiffs in error is their policy under their common seal: and in such a case, the action must be covenant or debt. Marshall on Insurance, 596; Park 396. "The act of parliament, 6 Geo. I., c. 18, by which the two insurance companies (of England) were erected, ordered that they should have a common seal, by affixing which all corporate bodies ratify and confirm their contracts. Hence, a policy made by either of those companies is a contract under seal; and if the contract is broken, the action must be debt or covenant."(*a*) *Foster* v. *Allanson*, 2 T. R. 479; and the cases there cited. In that case, there was a new cause of action, and a separate, independent consideration. *Brett* v. *Read*, Cro. Car. 343; 1 Bac. Abr. 164. In the case of *Baird and Briggs* v. *Blaigrove*, in the court of appeals of Virginia, 1 Wash. 170, there was a subsequent new consideration and parol agreement expressly proved, and upon that ground the court decided that *assumpsit* would lie. See *Taliaferro* v. *Robb*, 2 Call 258. The case of *Pelly* v. *Governor and Company of the Royal Exchange Assurance*, 1 Burr. 341, is an action of covenant upon a policy; so is the

(*a*) By the 11 Geo. I., c. 30, § 43, which recites the inconveniences resulting from the necessity of the policies of these two companies being under seal, by reason of their being corporate bodies, they are authorized to plead generally *nil debent*, and to give the special matter in evidence, &c.

case of *Worsley* v. *Wood*, 6 T. R. 710; and *Tarleton* v. *Staniforth*, 5 Ibid. 695. *Assumpsit* will not lie upon a specialty. 1 Esp. N. P. 95; *Walker* v. *Witter*, 1 Doug. 6; *Buckingham* v. *Costendine*, Cro. Jac. 213; *Bulstrode* v. *Gilburn*, 2 Str. 1027–8; *Bennus* v. *Guyldley*, Cro. Jac. 505; *Dartnal* v. *Morgan*, Ibid. 598; *Holme* v. *Lucas*, Cro. Car. 6; *Foster* v. *Smith*, Ibid. 31; *Reade* v. *Johnson*, Cro. Eliz. 242; 1 Roll. Abr. 8; *Green* v. *Harrington*, Hutt. 34; *Pyers* v. *Turner*, Cro. Eliz. 283.

If this action is sustainable in law, then the rule requiring a plaintiff to state in his declaration his cause of action will be useless. The reason of that rule is, to ascertain whether the contract is under seal or not. Bull. N. P. 128. And if the judgment of the court below is *correct, an ac- *336] tion of *assumpsit* may be maintained upon a bond, or any other sealed instrument. The notice stated in the declaration is what the plaintiff below was bound to give, because the company were not liable, by their covenant, to pay, until proof of the loss was produced, and adjustment thereof made. This is only one of the facts necessary to produce a liability, under the covenant itself, and not any new consideration, nor is it stated as such in the declaration. The declaration does not say, "in consideration whereof," but simply, "so being liable," assumed to pay: so that the *assumpsit* alleged, is nothing more than the very agreement contained in the policy.

2d. An action of *assumpsit* upon an express contract, will not lie against an aggregate corporation. They can do no valid act, but by their common seal, by which alone the union of the wills of the several members can be testified; and the affixing of the seal makes it a covenant. Perhaps, an exception to this rule might be made by the act which creates such an aggregate body politic; but here is no such exception made as will apply to the present case. Marshall on Insurance, 596.

3d. If any action is maintainable upon this policy, it ought to have been brought and prosecuted against the president of the company, and not against the body politic.(*a*) The words of the act, which incorporates the company (Acts of Assembly of Virginia, 1797, c. 20, §§ 9, 11) are "that all policies shall be signed by the president, or, in case of his inability to attend, by the president *pro tempore*, and countersigned by the secretary." § 11. "That in case any action shall be prosecuted upon any policy so subscribed, *337] the same shall be brought against *the president subscribing the same, or his successor in office; and all recoveries had in such action or actions shall be conclusive on the company, so far as to render the stock of the company liable, and no further."

Although the 6th section of the same act enables the company to sue and be sued by their corporate name, yet, as the subsequent sections prescribe the manner of making policies, and the mode of proceeding in actions upon them, the latter sections must be considered as so far restricting the general expressions of the former. General words in one clause of a statute may be

(*a*) The *capias ad resp.* in this case was against "William Hartshorne, President of the Marine Insurance Company of Alexandria." The declaration was against the company in their corporate name. This form of proceeding, by the better opinion, seemed to be correct. By the form of proceedings in Virginia, which are in some respects similar to those in the king's bench in England, the *capias* is not considered as any part of the record of the action, which is supposed to commence upon the filing of the bill, or declaration.

restrained by particular words in a subsequent clause of the same statute, and the whole ought to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant. 4 Bac. Abr. 645.

The declaration is bad, in stating the body politic to be in custody of the marshal. 1 Bac. Abr. 507.

4th. If it should be said, that this declaration is good, after verdict; the answer is, that the verdict will not cure a declaration which shows that the plaintiff is entitled only to an action of a different nature. The title is not defectively set forth, because every fact is stated, which shows that the plaintiff is entitled to an action of covenant. A mistake in the nature of the action, is not cured by the statute of *jeofails*. In all the cases before cited, the question as to the form of action came on, upon motion in arrest of judgment, and it is not even hinted, that the error was cured by verdict. *Foster* v. *Allanson*, 2 T. R. 479; *Baird* v. *Blaigrove*, 1 Wash. 170. No *assumpsit* can be presumed, after verdict, to have been proved on the trial, but that which is alleged in the declaration. *Spieres* v. *Parker*, 1 T. R. 141.

A verdict will not aid a case, where the gist of the action is omitted. *Avery* v. *Hoole*, Cowp. 825. Nor does the clause of the Virginia statute of *jeofails*, which states that a verdict shall cure the omission of the averment of any matter, without proving which the jury ought not to have given such a verdict, extend to a case where the declaration omits to state the ground of the *assumpsit*. * *Winston* v. *Francisco*, 2 Wash. 187; *Vass* v. [*338
Chichester, 1 Call 98, 101–2; 4 Burr. 2455; *Rushton* v. *Aspinal*, 2 Doug. 654 (679). A recovery in this action would be no bar to a recovery in an action of covenant for the same loss. *Vass* v. *Chichester*, 1 Call 102; 4 Bac. Abr. 14; *Holme* v. *Lucas*, Cro. Car. 6.

For the *defendant* in error, it was contended—1st. That this policy is not a specialty. 2d. If it is a specialty, yet there was a subsequent *assumpsit* upon a new consideration. 3d. That if it be a specialty, and no new promise sufficient to support an action of *assumpsit*, yet the declaration is a good declaration in covenant, especially, after verdict.

1st. The declaration does not declare on this policy, as upon a deed. It does not say, that the company covenanted by their deed; but only that Young did, by a policy of insurance, subscribed and attested as hereinafter mentioned, make insurance, and cause himself to be insured, lost or not lost, &c., upon the body, &c., of the brigantine Liberty, &c. And so they, the assurers, were contented, and did thereby promise and bind themselves to the assured, for the true performance of the premises, confessing themselves paid the consideration, &c. In witness whereof, the president and directors of the said Marine Insurance Company of Alexandria, by William Hartshorne, their president, subscribed the sum assured, and caused the common seal and the attestation of their secretary to be affixed to the said presents, in the town of Alexandria, on the said 17th day of December 1800. The plaintiff then avers, that in consideration of the premium, &c., they did undertake and agree, by their policy aforesaid, subscribed by their president aforesaid, with the proper hand and name of the said president thereto affixed, to assure the said vessel, at the sum of $5000, &c. There is no *profert* of the policy, as of a deed. In fact, it is not a deed. To make it a deed, it must be sealed with the intent to make a deed, which would be contrary to their

act of incorporation: the company had no power to make a policy under seal.

The act prescribes the mode by which they shall make policies; *339] *which is only by the signing of the president and countersigning by the secretary. Although there are not negative words, by which other modes are expressly prohibited, yet the saying that a thing shall be done in one manner, is an implied negative of all others. The president and three of the directors are empowered by the act to make insurance, but the policies must be certified in a certain manner: they have no right to bind the company by a policy under seal. They have no right to use the common seal for any purpose, unless particular'y empowered by the constitution or by-laws of the company. If the company have improperly put a seal to the instrument, which the act of incorporation intended should be a simple contract, and not a specialty, it is their own act, and they have no right to complain. But shall it be permitted for the Marine Insurance Company to say, that by their own act, contrary to law, they have deceived the plaintiff below, and therefore, he shall not recover in this form of action? After having defeated him in this action, and driven him to bring an action of covenant, what will prevent their turning round, and saying that this policy is not a specialty? The company had no power to make a policy under seal, or if they had, the seal has been affixed by persons having no authority from the company, or perhaps, by mistake.

The objection does not go to the merits of the cause. If there was an error, it was beneficial to the company, inasmuch as it was a relinquishment of strict right on the part of the plaintiff below, and enabled the company to make their defence with much less risk, as it enabled them to give in evidence, on the plea of *non assumpsit*, those facts which must have been specially pleaded to an action of covenant. The intention of the legislature in prescribing the mode of making policies evidently was, that they should not be specialties, but only simple contracts, so as to avoid the necessity of special pleading. If the principle be correct, that the company cannot make a policy but under seal, the consequence will be extremely mischievous to their interests. They will be always involved in the intricacies of special pleading, and the merits of the case will be often lost in the subtlety of legal distinctions.

Who has the power of using the common seal? Not the president alone, *340] nor any number of the directors, but *the company only. But the declaration does not state this to be the seal of the company, but the seal of the secretary; the words are, "have caused the common seal and attestation of the secretary to be affixed."

2d. But if the policy is a specialty, yet there is a sufficient *assumpsit* alleged in the declaration to support this action. The action does not depend only upon the facts set forth in the policy. The declaration states other facts, such as the notice to the company, the proof of the loss, and an express *assumpsit* to pay. These are considerations abundantly sufficient to support the action. If the plaintiff has two remedies, he may take which he pleases. A judgment in this case would be a bar to an action upon the covenant. (*a*)

(*a*) The court said, there could be no doubt of that, if the declaration sufficiently showed it to be the same cause of action.

It is a strange position, that *assumpsit* will not lie in any case, against an aggregate body politic, upon an express contract. Such a corporation cannot act in any case, but by the intervention of agents. But by those, it may contract debts by simple contract, as well as by specialty. The East India Company have their agents all over the world, and there never was a question, whether such agents could make promises binding on the company, pursuant to powers given by the company for that purpose. By what law, are the banks authorized to bind themselves by promissory notes? Yet the gentlemen will not say, that they are not liable upon their notes. *Rex* v. *Bigg*, 3 P. Wms. 319; s. c. 1 Str. 18; *Edie* v. *E. I. Company*, 2 Burr. 1216. Where the specialty is only inducement to the action, and upon facts growing out of the specialty an *assumpsit* is made, the action of *assumpsit* will lie. *Moravia* v. *Levy*, 2 T. R. 483. The declaration states the policy, the sailing of the vessel, the loss, notice to the insurers, and thereupon an express *assumpsit* to pay the sum of $5000. These new facts bring the case within the reason of the decision in the case of *Moravia* v. *Levy*. After *verdict, every *assumpsit* alleged in the declaration is to be taken as an express *assumpsit*. (*a*) [*341

3d. But if this policy is to be considered as a specialty, and there is no new consideration sufficient to support the *assumpsit*, yet this is a good declaration in covenant. It states the policy, and the facts which constitute a breach of the agreement and create a liability on the defendants below. That part which states an *assumpsit* may be rejected as surplusage, and the residue will make a good declaration in covenant. The want of *profert* is cured by the verdict. 2 Wils. 362. (*Quære?*) Nor will the issue of *non assumpsit* render the judgment erroneous. It has been held, that in an action of *assumpsit*, and not guilty pleaded, and issue, the judgment may be entered, for it is only mispleading, and the real merits may as well be tried on that issue as on any other. 4 Bac. Abr. 84.

It is not necessary that the action should be prosecuted against the president of the company. It could not be the intention of the legislature, that the private property of the president should be liable to satisfy a judgment upon a policy made on account of the company, and that he should be left to get his money back again from the company. By the act of incorporation, the joint stock only is liable. The expressions of the act warrant the practice in this case, of bringing the *capias* only against the president, and then declaring against the company: for it only says, that the action shall be brought against the president, and not that it shall be prosecuted against him to final judgment. The intention of the act could only be, to compel an appearance, and to give the president the power of entering an appearance in the name of the company. The act says that all such recoveries shall be conclusive on the company, so far as to render the joint stock liable, and no further.

The 6th section of the act renders the company liable to actions in their corporate name; and as the writ is no part of the record, and the company have appeared and pleaded, it is now too late for them to allege this for error. *They ought not to be permitted to take the chance of a trial, and when the merits have been found against them, come forward and [*342

(*a*) This was admitted by the Chief Justice.

say, they are not the proper persons against whom the suit ought to have been brought.

In *reply*, it was said, that the policy is in the usual form: a form which is generally used, whether the policy be under seal or not: and therefore, no argument can be drawn from the peculiar expressions of the instrument. The declaration states it to be under the common seal, which is a technical name for the seal of a corporation. The act which creates this company has no negative words, by which they are forbidden to make policies under seal, if they think proper. The clause which authorizes them to make a policy, by the signature of the president, without the common seal, was introduced for their benefit, so as to enable them to defend actions, without the necessity of that special pleading which often attends actions of covenant. The general maxim of law is, that every one may waive a provision introduced for his benefit. The act of incorporation says, that when any action shall be prosecuted upon such policy, the same shall be brought against the president who subscribed the same, or his successor in office, and all recoveries in such actions shall be conclusive on the company. Not only the *capias* must be against the president, but the declaration and judgment. How the judgment is to be satisfied, is not for us now to determine, nor is it important. The mode of recovery prescribed by the law must be pursued.

March 1st, 1803. THE COURT reversed the judgment, and ordered it to be arrested, because the action is a special action upon the case on the policy, and the declaration shows that the policy is a specialty.

The court seemed to be of opinion, that an action of covenant would lie upon it against the company, in their corporate name.

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*343] *ABERCROMBIE *v.* DUPUIS and another.

Averment of citizenship.

To give jurisdiction to the courts of the United States, the pleadings must expressly state the parties to be citizens of different states, or that one of them is an alien; it is not sufficient, to say that they reside in different states.

ERROR to a judgment of the Circuit Court for the district of Georgia. The plaintiffs below (or petitioners, as they are called in the record) "aver, that they do severally reside without the limits of the district of Georgia aforesaid, to wit, in the state of Kentucky, therefore, they have the right to commence their said action in this honorable court," &c.(*a*) The defendant is called Charles Abercrombie, of the district of Georgia, Esq.

It was assigned for error, that the circuit court had not jurisdiction of the cause, because it does not appear upon the record, that either of the parties is an alien, nor that the parties are citizens of different states. And for this error, the judgment was reversed, without argument.

THE COURT said, that the question had been decided, after full argument, in the case of *Bingham* v. *Cabot*, 3 Dall. 382, and they did not think proper to overrule that case.

(*a*) This averment followed immediately after the *ad damnum*, at the foot of the declaration.

The CHIEF JUSTICE said, he did not know how his opinion might be, if the question were a new one.

LINDO *v.* GARDNER.

Action of debt on promissory note.

Debt will not lie, in Maryland, upon a promissory note.
Quære? Whether the statute of limitations can be given in evidence, on *nil debet?*[1]

THIS was an action of debt brought by the administrators of Archibald Gardner against Abraham Lindo, upon a promissory note, in the Circuit Court of the district of Columbia, sitting in Washington. The act of congress respecting the district of Columbia had adopted the laws of Maryland as the law of this part of the district. In Maryland, the statute of 3 & 4 Anne, c. 9, respecting promissory notes, had been "introduced, used and practised by the courts of law," and thereby, and *by virtue of the declaration of rights, section 3d, it became the law of the land; and [*344 the courts of Maryland, in their construction of that statute, had always respected the adjudications of the English courts. In the court below, there was a verdict and judgment for the plaintiffs; to reverse which judgment, the defendant sued out the present writ of error.

The declaration was, "of a plea that he render to them $336.97, money of account of the United States of America, for that the defendant, on the 5th of October 1795, at, &c., by his certain note in writing, of that date, subscribed with his proper manuscription, and now here shown to the court, acknowledged himself to owe to Archibald Gardner the said sum of $336.97, which the said defendant promised to pay the said Gardner, and to the order of the said Gardner, at sixty days after the date of the said note in writing, it being in consideration of value received." It then averred the non-payment, &c., and made a *profert* of the letters of administration, which were averred to be "in due form."

The defendant in the court below pleaded *nil debet*; and after verdict against him, moved in arrest of judgment, because, 1. An action of debt cannot be maintained upon the promissory note set forth in the declaration. 2. It does not appear that the plaintiffs had obtained such letters of administration, as to entitle them to maintain an action upon the said note. 3. The declaration is in the *debet* and *detinet*, and ought to be in the *detinet* only.(*a*)

There was also a bill of exceptions stating the refusal of the court to suffer the defendant to give the statute of limitations in evidence on the plea of *nil debet*. The note was in these words:

(*a*) The *capias*, which, in Maryland, is considered as part of the record, was in the *detinet* only. The declaration was in neither the *debet* nor *detinet*, having omitted those words altogether.

[1] Every statute of limitation must be specially pleaded, unless it be otherwise provided. Heath *v.* Page, 48 Penn. St. 130.

"Philadelphia, October 5, 1796.

At sixty days, I promise to pay to the order *of Mr. Archibald, Gardner, three hundred and thirty-six dollars and ninety-seven cents value received. A. LINDO."

Peacock, for the plaintiff in error, was about to produce authorities on the first point, when he was stopped by CHASE, J., who said, that an action of debt will not lie, in Maryland, upon a promissory note.[1]

No opposition being made on the part of the defendant in error, judgment was afterwards reversed, without argument.(*a*)

HODGSON *v.* DEXTER.

Responsibility of public officer.

A public agent of the government, contracting for the use of government, is not personally liable, although the contract be under his seal.[1]

Quære? What shall be said to be the act of God; and what, inevitable casualty?

Hodgson *v.* Dexter, 1 Cr. C. C. 109, affirmed.

THIS was an action of covenant brought by Joseph Hodgson against Samuel Dexter, late secretary at war, for not keeping in good repair, and for not delivering up, in like good repair, at the end of the term, certain premises which had been leased by the plaintiff to the defendant, for the purpose of offices for the war department; the buildings having been destroyed by fire, during the term. The lease was in these words:

"This indenture, made the 14th day of August, in the year of our Lord one thousand eight hundred, between Joseph Hodgson, of the city of Washington, and territory of Columbia, of the one part, and Samuel Dexter, of the same place, secretary of war, of the other part, witnesseth, that the said Joseph Hodgson, for and in consideration of the sum of four hundred dollars, current money of the United States, to him in hand paid by the said Samuel Dexter, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath demised, granted and to farm let, and by these presents, doth demise, grant and to farm let, to the said Samuel Dexter, and his successors, all that the three story messuage or
*346] tenement, erected and built *on part of lot number 14, in square number 75, situate on the Pennsylvania Avenue, in the city of Wash-

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(*a*) See note (B) in the Appendix, p. 462.

[1] The action of debt lies, whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty, requiring no future valuation to settle its amount. Stockwell *v.* United States, 13 Wall. 531; Chaffee *v.* United States, 18 Id. 516; United States *v.* Foster, 2 Biss. 453; United States *v.* Ebner, Id. 117. It lies by the payee or indorsee of a bill, against the acceptor. Raborg *v.* Peyton, 2 Wheat. 385; Kirkman *v.* Hamilton, 6 Pet. 20. And by a remote indorsee against the drawer, on striking out the intermediate indorsements. Home *v.* Semple, 3 McLean 150. Also by the indorsee of a promissory note against the maker. Camp *v.* Bank of Owego, 10 Watts 130; Willmarth *v.* Crawford, 10 Wend. 341. Or by the indorsee against a remote indorser. Loose *v.* Loose, 36 Penn. St. 538; Onondaga County Bank *v.* Bates, 3 Hill 53. Whenever *indebitatus assumpsit* can be maintained, the action of debt lies; and *indebitatus assumpsit* will, undoubtedly, lie in the cases above stated. Ibid.

[2] Parks *v.* Ross, 11 How. 362; Cook *v.* Irvine, 5 S. & R. 492; Olney *v.* Wickes, 18 Johns. 122.

ington aforesaid, together with the back ground and improvements; running from the said messuage (fronting 26 feet) in parallel lines down to lot number 12, on said square, being the premises next adjoining the messuage or tenement now in the occupation of Mr. Jonathan Jackson, with the improvements and appurtenances thereto belonging or appertaining: to have and to hold the said demised premises unto him, the said Samuel Dexter, and his successors, from the day of the date hereof, for and during, and unto the full end and term of eight calendar months from thence next ensuing, and fully to be complete and ended. And the said Joseph Hodgson for himself, his heirs, executors, administrators and assigns, doth hereby covenant, promise and agree to and with the said Samuel Dexter, and his successors, that he, the said Samuel Dexter, and his successors, shall and may peaceably and quietly have, hold, use, occupy, possess and enjoy the above-demised premises for and during the term granted thereof, without the let, suit, trouble, molestation or eviction of him the said Joseph Hodgson, or his heirs or assigns, or of any other person or persons whatsoever, lawfully claiming, or to claim by, from, under, or in trust for him or them. And the said Samuel Dexter for himself, and his successors, doth hereby covenant, promise and agree to and with the said Joseph Hodgson, his heirs and assigns, that he the said Samuel Dexter, and his successors, shall and will, at all times during the said term, keep, or cause to be kept, in good and sufficient repair, the said demised premises, inevitable casualties and ordinary decay excepted; and the same, so well and sufficiently kept in repair, shall and will, at the end of the said term, yield and surrender up to him the said Joseph Hodgson, his heirs and assigns. In witness whereof, the said parties have hereunto interchangeably set their hands and seals, the day and year first above written. SAMUEL DEXTER, [Seal.]
JOSEPH HODGSON." [Seal.]

"Signed, sealed and delivered in the presence of
JOHN GOULDING,
S. LEWIS, jun."

*The declaration contained two counts. The first alleged the breach thus: "but hath broken the same in this, to wit, that during [*347 the said term of eight calendar months, he did not keep, or cause to be kept, the said demised premises in good and sufficient repair, inevitable casualties and ordinary decay excepted; and that he hath not, at the end of the said term, yielded and surrendered up to the plaintiff the same, so well and sufficiently kept in repair." The second count alleged that the defendant hath not observed and kept his covenant aforesaid, in this, to wit, "that he did not keep, or cause to be kept, the said demised premises in good and sufficient repair, inevitable casualties and ordinary decay excepted, but that the same, by an evitable casualty, to wit, by fire, were destroyed, consumed and burnt, during the said term of eight calendar months, to wit, on or about the eighth day of November 1800, and that the said fire, and evitable casualty, was occasioned and took place from negligence, and from the act or acts of one or more evil disposed persons." "And after the said fire, and after the expiration of the said term, the said defendant did not so yield and surrender up the said premises according to the tenor and effect of his said covenant." To the plaintiff's damage $10,000.

The defendant, after *oyer*, pleaded in bar, 1st. "That before the expiration of the said term of eight calendar months in the said writing mentioned, viz., on the 8th of November 1800, the said demised premises, against the will, and without the negligence, or other default of him the said Dexter, were burned and consumed by fire, happening from some cause to the said Dexter then and yet wholly unknown. And the said Dexter further saith, that saving and excepting only the damage occasioned by the same burning and consuming, he the said Dexter hath, at all times, during the said term of eight calendar months, kept and caused to be kept in good and sufficient repair the said demised premises; and that he hath, at the end of the said term, yielded and surrendered up to the plaintiff the said demised premises, so well and sufficiently kept in repair, saving and excepting only the damage occasioned by the burning and consuming aforesaid; and this the said Dex-
*348] ter is ready to verify," &c. *To this plea, there was a general demurrer, and joinder. To the second, third and fifth pleas, there were issues in fact.

The fourth plea was as follows: "That on the 15th of May 1800, the President of the United States, for the time then being, in pursuance of authority given to him by law, did order and direct the various offices belonging to the several executive departments of the United States, of which the department of war then was, and yet is, one, to be removed to the city of Washington, on the first day of June then next ensuing; and that in obedience to the same order and direction, the various offices of the department of war aforesaid were removed to the said city of Washington, on the said first day of June, and that thereby it became proper and necessary, that a suitable building should be hired, in which the said offices of the said department of war might be holden and kept, and for this purpose, and for no other purpose whatever, the building mentioned in the indenture aforesaid was, by the said indenture, leased to the said Dexter; and that, at the time of executing the writing aforesaid, he was secretary of the department of war, and in that capacity, did make and execute the same, and that, before the expiration of the said term of eight calendar months, viz., on the 1st day of January 1801, he, the said Dexter, at Washington aforesaid, resigned the office of secretary of the department of war, and from and after that time, ceased to hold the same office, and until this time, he hath never holden the same; and further, that on the 5th day of March, in the year last mentioned, Henry Dearborn, Esq., was there duly appointed and commissioned as secretary of the department of war, and then and there accepted of the same office, and hath ever since held the same; and he, the said Dearborn, now is, and ever since his acceptance of the said office of secretary of war as aforesaid, hath been, the lawful successor of him, the said Dexter, in the said office; and this the said Dexter is ready to verify," &c.

To which plea, the plaintiff replied, "protesting that the said Dexter did not, in his capacity of secretary of war, sign, seal, execute and deliver the indenture of lease aforesaid exhibited, yet, by way of replication, he
*349] *saith, that although the said Dexter ceased to be secretary of war, on the 1st day of January 1801, and that on the 5th day of March, in the same year, a certain Henry Dearborn became his successor, duly appointed secretary of the department of war, and still remains such, yet that the house and premises in the lease aforesaid mentioned, were burnt down

and consumed by fire arising from within the same, from the negligence or default, not of the said Dexter, but of some person unknown, during the term aforesaid, viz., on the 8th of November 1800, while the said Dexter was secretary of war, and whilst he had possession of the said premises, and before the appointment of the said Dearborn; and that neither the said Dexter, nor any other person, hath, during the continuance of the said lease, or at any time, built up and repaired the said premises; and this the said Hodgson is ready to verify," &c. To this replication, there was a general demurrer and joinder.

The sixth plea was, "that on the 15th day of May 1800, the President of the United States, for the time then being, in pursuance of authority given to him by law," ordered the executive offices to be removed to Washington, &c., as stated in the fourth plea, "and that it became proper and necessary that a suitable building should be hired, in which the several offices of the department of war aforesaid might be holden and kept, and that for these purposes, and for no other purpose whatever," the buildings, &c., "were, by the said indenture, leased to the said Dexter, by the said Hodgson; and that at the time when the said Dexter executed the indenture aforesaid, he was secretary of the said department of war; and this he is ready to verify," &c. To this, there was a general demurrer, and joinder.

Upon these demurrers, the judgment below was against the plaintiff, who thereupon, sued out the present writ of error.

Martin, attorney-general of Maryland, and *Key*, for plaintiff in error. *Dexter, and *Mason*, attorney of the United States for the district of Columbia, for defendant. [*350

Key made three points. 1st. That the defendant is individually and personally liable and bound to the performance of the covenant in the indenture contained, by him executed, and on which the suit is brought. 2d. That the defendant's first plea is bad in law, is argumentative, and does not put in issue matters competent to bar the plaintiff's action. 3d. That the defendant's first plea is bad in substance, is no bar, and wants form.

I. The sixth plea and demurrer are calculated to bring into view the question, whether the defendant has bound himself personally to the performance of the covenant. Although a public agent is not generally liable for contracts made by him in that capacity: still, he is capable of binding himself as well as his government, by using apt words for that purpose. This case is not of importance from any general principles which it will establish. The decision must depend upon the expressions and operation of the indenture of lease.

The defendant has used strong obligatory expressions, of plain unequivocal import. "And the said Samuel Dexter, for himself and his successors, doth hereby covenant, promise and agree to and with the said Joseph Hodgson, his heirs and assigns." To weaken the force of these expressions, it is said, that he only intended to bind himself in his official character, as secretary at war, 1st. Because he is styled in the premises secretary at war; 2d. Because the term "successors" is used throughout the instrument; 3d. Because the words "said Samuel Dexter," and "said parties have hereunto set their hands and seals," refer to Samuel Dexter, in the official character in which he is first named in the premises.

*1st. As to the styling him secretary at war, in the premises, it is only a description of the person, *designatio personæ*. It is the office of the premises to identify the contracting parties, and it is most common, to use any honorable title which they may enjoy. It is not in the preamble, that we are to look for the force of the expressions of the covenant, but in the covenant itself. It is a rule of construction, that when obligatory words, of plain unequivocal meaning, are used, you cannot resort to other parts of the instrument to contradict them; but when equivocal or doubtful words are used, you may. A party using expressions that legally bind him, is estopped to say, he did not intend to be bound in his individual capacity. The word "himself," is to be taken separately from the words "his successors," and each is to be applied to the obligatory words of the covenant; *reddenda singula singulis*. The said Samuel Dexter covenants, for himself, and for his successors. He covenants that he will surrender the premises in good repair; and if he does not so surrender them, he covenants that they, his successors, will. Words cannot be stronger than those which he has used.

2d. As to the word "successors," Mr. Dexter can have no successors in the legal sense of the word. It is true, that Mr. Dearborn filled the office posterior to Mr. Dexter, and hence, in point of time, succeeded him, and was, in that sense, his successor; but he is not his successor in any known legal sense of the word: there is no legal connection between them. Mr. Dexter was not competent to bind his successor in any manner. He was not a corporation sole; and there is no law of the United States which authorizes him to bind his successor. The word "successors," has no operation whatever. Mr. Dearborn was not obliged to occupy the house, nor would an action have been maintainable against him for the rent. If he had been disturbed in the possession, he could have had no action upon the covenant; if he had been ousted, he could not have supported an ejectment. Even if Mr. Dexter had been a corporation sole, his successors would not be bound. No chattel can be limited to the successors of a corporation sole; but it will go
*352] to the executor, and not to the successor. *If these observations are correct, then the word "successors," is surplusage, and the lease inured to Mr. Dexter in his individual capacity; but this point will be resumed.

3d. As to the words "said Samuel Dexter," and "said parties have hereunto set their hands and seals;" they can have no operation to let in Mr. Dexter's official character. Either he bound himself in his official capacity, or as an individual. Nothing can be inferred from the word "said," but that it related to him in one capacity or the other; and in which, is the very question before the court.

Let us now examine this instrument upon principle. 1st. With reference to the person executing it: 2d. As to the legal operation of its expressions.

All agents, acting as such, for avowed principals, only bind their principals; but it must be admitted, that they are competent to bind themselves, as well as their principals, if they use apt and adequate words. Government cannot carry on its operations but through agents, who are distinguished as its officers. I admit, that an officer of government, contracting as such, for government, is not personally liable. The law neither creates nor implies any liability on the officer; but he may make himself individually liable, by his express promise and contract. *Macbeath* v. *Haldimand*, 1 T. R. 181.

There is nothing, then, in the character of secretary of war, that prevents him from using words that will render him liable.

This leads to the second question, which is, whether he has used such words. This lease is for eight months; but if for eight years, the same law must govern its construction. I hold it an undeniable position, that Mr. Dexter was not competent to bind his successors in office. If he could not, then the lease must have some operation: it cannot be intended to be a void lease. If not void, then it inures to Mr. Dexter and his executors: if it inures to them, they *only are liable on the covenant, that is, he in his lifetime, and they after him. A much stronger case exists in the books. A bishop is a corporation sole; he has successors, technically speaking. Here, then, is a person who has a double capacity, competent to contract in either. So had Mr. Dexter. But, say the books, if a lease be made to a bishop and his successors, it inures to him and his executors. 1 Bac. Abr. 508, Corporation, E. 4; Co. Litt. 46 *b; Corven's Case*, 12 Co. 105. The word "bishop" in such a case is as much the description of his politic capacity, as the word secretary at war in the present case. A bishop has legal "successors;" and is not an *habendum* "to a bishop and his successors," as strong as the words "to the said Samuel Dexter and his successors?" If, in the case of the bishop, such a lease would inure to him in his individual capacity, *à fortiori*, in the case of Mr. Dexter, who has no legal successors. [*353

Again, the covenant to leave the demised premises in good repair, is a covenant real. 1 Bac. Abr. 534, 536. If it be a covenant real, and runs with the estate and interest, then, as the estate and interest passes to Mr. Dexter and his executors, he and they only can be bound. Suppose, the lease had been for five years, and a stranger had taken possession; who could support an ejectment? Not the lessor, because he had parted with his interest: not the successor of Mr. Dexter, because he is neither a party nor a privy. Mr. Dexter only could have maintained the action, the estate and interest being in him. It never was out of him, during the term. If the operation of law casts this lease upon Mr. Dexter, he who has the benefit must bear the burden; and he must be bound by this covenant to repair, which runs with the estate.

The defendant's ideas violate all the rules of construction. 1st. In a deed, when words of a precise import are used, you cannot resort to other expressions, for a supposed intent. The word "himself," in the covenant, is too plain to admit of doubt. 2d. No words shall be rejected, which can be made to operate. By their construction, the word "himself," *which has a definite meaning, must be rejected, and give way to the word "successors," which, in this instrument, can have no meaning. 3d. Such construction shall be given, *ut res magis valeat quam pereat.* [*354

According to our construction, the deed is operative; but according to theirs, it is mere waste paper. 1st. They say that Mr. Dexter is not bound. 2d. All must agree that his successor is not bound. 3d. *Ex consequenti*, nobody is bound.

The case of *Unwin* v. *Wolsely*, 1 T. R. 674, is clearly in our favor. In that case, the contract was by an officer of government who expressly contracted "on account of his majesty," and covenanted "on account of the king," that "government should be answerable." In our case, there are no

such words, nor anything except the styling himself secretary at war, and using the term successors, which can possibly indicate any intention to bind the government.

II. The first plea in bar is bad. The matter is insufficient to bar the plaintiff from his action. The substance of it is, that the house was burnt, without the negligence or other default of the defendant. This is no answer to an express covenant. Due care and diligence is nothing more than every bailee for hire, where there is no express agreement, is bound to use. The plea puts in issue the negligence or default of the defendant, and throws the *onus probandi* on the plaintiff to show actual negligence; whereas, the defendant ought to show such an inevitable casualty as to bring himself within the benefit of the exception. He states, that the fire happened without his default, from some cause to him unknown; but it does not thence follow, that the destruction of the house was inevitable. It is immaterial, whether it happened with his knowledge and will, or without. The plea does not
*355] *bring in issue the fact whether the destruction was inevitable, or not; but only whether it happened with his knowledge and by his default. Default or negligence means the want of ordinary care.

III. The merits of this plea have already been discussed in speaking of the word "successors," in the lease. The demurrer here is not by the plaintiff to the defendant's plea; but by the defendant to the plaintiff's replication; but if the replication is bad, yet, if the plea is bad, judgment must be for the plaintiff, unless the court should be of opinion, that the declaration also is bad, inasmuch as it is not supported by the indenture of which a *profert* is made, whereby it becomes part of the declaration. In that case, the fate of this demurrer must depend upon the question of personal liability of the defendant.

Dexter, contrà.—1st. It is admitted by Mr. Key, that the defendant had a right to make a public contract, and thereby to bind the government; and we admit, that he was also competent to bind himself. The question then is, whether this is a public contract; or whether the defendant has bound himself personally. In addition to the internal evidence of the deed itself, the plea states other material facts, which are admitted by the demurrer, and which tend to prove the intention and understanding of the parties at the time of contracting. These facts are, 1st. The order of the president, pursuant to law, to remove the offices to Washington; 2d. Their consequent removal; 3d. The necessity of providing a house in which they might be held; 4th. That for these purposes, and for no other purpose whatever, the buildings were, by the plaintiff, leased to the defendant; 5th. That the defendant was at that time secretary of the department of war. These facts show the authority which the defendant had to bind the government, and the purpose for which the contract was made. The contract, then, being made by a public officer of the government, having authority therefor, and
*356] for the use of the government, is *primâ *facie* a public, and not an individual, contract.

The question then is, whether the defendant has pledged his individual credit, in addition to that of his government. This depends upon the intention of the parties; for the intention of the parties in all cases constitutes the contract. This intention is to be known by the words they have used;

but if those words are doubtful, resort may be had to other facts, such as the subject-matter of the agreement, the purpose for which it was made, and the official character of the parties, or either of them. But in the present case, the words of the instrument itself seem to leave no room to doubt. In the premises, the defendant is styled secretary at war, and throughout the whole deed, when he is mentioned, he is called the said Samuel Dexter, referring to the official description contained in the premises; and in the conclusion, it is said, that the said parties have thereunto set their hands and seals. The word "successors" also is used, wherever the name of the defendant occurs in the instrument; and whether he was competent to bind his successors or not, yet it shows the intention of the parties, and the character in which the defendant meant to contract. It shows also, who was to occupy the premises, after the defendant should cease to be secretary at war. The plaintiff himself also has clearly shown what his understanding was, at the time, by covenanting on his part that the successors of the defendant should quietly occupy and enjoy the premises during the term. This shows that the plaintiff understood he was contracting with a public officer, for public purposes.

But great stress is laid upon the word "himself." The said Samuel Dexter, for himself, and his successors, covenants to keep the premises in repair. How does he covenant for himself? Clearly, for himself while in office, and as the representative of the government, his principal. The same arguments which show this to be a public contract, explain and limit the meaning of the word himself. Who is "himself"? The said Samuel Dexter. Who is the said Samuel Dexter? The premises say, Samuel Dexter, secretary at war.

The case of *Macbeath* v. *Haldimand*, 1 T. R. 172, is a much stronger case against the individual than the present, and yet the court had no hesitation in declaring it to be a public contract, and that the individual was *not liable. In that case, nothing was said expressly of contracting on account of the government, or for himself and his successors. In [*357 order to show that the defendant meant to pledge his individual credit, in addition to that of his government, the plaintiff ought to make out a very strong case, in express terms; for if public agents are to be made liable upon presumptions arising from equivocal expressions, no prudent man will undertake to conduct the public business, where, of necessity, contracts must be made to an immense amount. If a doubt exists, the construction ought certainly to be in favor of the agent.

The case of *Unwin* v. *Wolsely*, 1 T. R. 674, clearly shows that no difference, in the construction of the contract, can arise from the circumstance of its being under seal. The intention of the contract being to bind the government, it shall not, by reason of the seal, become the contract of the individual who did not mean to bind himself. The only operation of the seal is to raise the agreement from a simple contract to a specialty. The seal, therefore, does not make it the deed of the individual. It is immaterial whether the words "on account of his majesty," make the case of *Unwin* v. *Wolsely*, a stronger case in favor of that defendant than the present. The case is not cited to compare those facts with these, but to show that the seal makes no difference between that case and the case of *Macbeath* v. *Haldimand*.

2d Point. Inevitable casualty. The objections to this plea seem to be,

that it throws the *onus probandi* upon the plaintiff; and that the facts do not show an inevitable casualty. The plea has stated all that was possible to state; all that was within our knowledge; and if they do not show the case to be *primâ facie* within the exception of the covenant, the plea is bad. No form of plea which the defendant could have pleaded, as to this point, would have laid the *onus probandi* on him. The exception of inevitable casualties is in its nature a negative. One of the counts in the declaration avers the *destruction of the buildings to have been by an evitable casualty. Upon this averment, the defendant might have taken issue, and said, it was not by an evitable casualty, or, in the words of the lease, that it was by an inevitable casualty, which is equally a negative proposition; and in either case, the proof would lay on the plaintiff. So, if the defendant had pleaded, that the accident happened notwithstanding he had used the utmost care and diligence to prevent it, the plaintiff must have replied some act of negligence. For it cannot be supposed, that the defendant should show particular instances of his care for every moment of his occupation, during the whole term. Suppose, the defendant had pleaded, that the fire arose by accident in the adjoining house, and communicated to the house in question (this example is assumed under an impression that such was the fact), would that have been more satisfactory to the plaintiff than the present plea? He would still have to show that the defendant had not used reasonable means to avoid its effects. In the case of *Monk* v. *Cooper*, 2 Ld. Raym. 1477, the form of pleading is not more certain than the present; and is the form which has been ever since used in cases of destruction by fire.

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It is understood, that the learned gentleman who is to close this argument has given an opinion, and means to contend, that inevitable casualty means the act of God. But surely, it cannot mean an accident only evitable by the power of the supreme being. Death is usually termed the act of God; but death may be by human means, which may often be avoided; as in the case of murder. So, death may be the consequence of unskilfulness of the physician, and might have been avoided by employing a man of more skill. So, a man, by exposing himself to a storm, may take cold, and death may ensue; which might have been avoided, by not exposing himself to the storm. Yet in all these cases, the death is said to be the act of God. An inevitable casualty, therefore, is not always the act of God; but must mean, in the present case, a casualty inevitable by the defendant. It cannot mean, a casualty evitable only by the united exertions of the whole human race. A whirlwind is said to be the *act of God, yet its effects may be prevented, by building a wall of brass about the house of sufficient strength. So, the effects of lightning may be prevented by proper conductors; and the ravages of enemies may be impeded by a sufficient human force. These examples are cited, to show that the term inevitable casualty cannot be confined to those accidents which are usually termed the acts of God; nor to such as are inevitable, notwithstanding the united exertions of all the world. Where, then, is the line to be drawn? It is believed, that the true meaning of the expression is, such accidents as cannot be prevented by reasonable care and diligence.

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But even taking the expression to be confined only to those accidents which are called the act of God, yet there are not wanting old authorities

which expressly call a sudden fire the act of God, although more modern writers have very properly termed it an inevitable accident. 1 Roll. Abr 808, pl. 6, under the head of "what acts shall excuse an escape," says, "so if the prisoners escape by sudden fire, this shall excuse the escape, for this is the act of God." And in Dyer, 66 *b*, 15, it is said, "if he plead that the prison was broken by enemies of the king, or by sudden fire, which is the act of God, or by such force or vehement power that he could not resist, this is good matter.

The case of *Forward* v. *Pittard*, 1 T. R. 27, is a very strong one upon this point. There was a verdict for the plaintiff, subject to the opinion of the court upon the following case: That the defendant was a common carrier from London to Shaftesbury; that on Thursday, the 14th October 1784, the plaintiff delivered to him, on Weyhill, twelve pockets of hops to be carried by him to Andover, and to be by him forwarded to Shaftesbury, by his public road-wagon, which travels from London, through Andover, to Shaftesbury. That by the course of travelling, such wagon was not to leave Andover until the Saturday evening following. That in the night of the following day after the delivery of the hops, a fire broke out in a booth, at the distance of about 100 yards from the booth in which the defendant had deposited the hops, *which burnt for some time, with unextinguishable violence, and during that time, communicated itself to the said booth in which the defendant had deposited the hops, and entirely consumed them, without any actual negligence in the defendant. That the fire was not occasioned by lightning." The counsel for the plaintiff in that case contended, that a carrier is liable in all cases, except the loss be occasioned by the act of God or the king's enemies: and a distinction is taken between the act of God and inevitable accident. The counsel for the defendant insisted, that he was not liable for accidents happening without any default or negligence of the carrier. Lord MANSFIELD said, there was "a nice distinction between the act of God, and inevitable necessity. In these cases (of common carriers), actual negligence is not necessary to support the action." Afterwards, Lord MANSFIELD delivered the unanimous opinion of the court. "It is laid down, that a carrier is liable for every accident, except by the act of God, or the king's enemies. Now, what is the act of God? I consider it to mean something in opposition to the act of man: for everything is the act of God that happens by his permission; everything by his knowledge. But to prevent litigation, collusion and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning and tempests. If an armed force come to rob the carrier of the goods, he is liable; and the true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil. In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier, therefore, in this case is liable, inasmuch as he is liable for inevitable accident."[1]

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*The court in that case call a fire arising from the act of man, an inevitable accident, but decide, that the carrier is liable, inasmuch as

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[1] And see Merritt *v.* Earle, 29 N. Y. 115.

he is liable for inevitable accident; being considered as an insurer. There, the case shows that the fire arose from the act of man; but inasmuch as it was without any default of the carrier, the court called it an inevitable accident. In the present case, the plea states, that against the will, and without the negligence or other default of the defendant, the building was consumed by fire, arising from some cause then and yet wholly unknown to the defendant. The only difference in the two cases is, that in the case of the carrier, the fire appeared to have arisen from the act of man, but in the present case, the cause of the fire is wholly unknown. If the former was justly called an inevitable accident, *à fortiori*, the latter ought to be so called.

In Comyns' Rep. 631, destruction by fire is admitted by the counsel on both sides to be an unavoidable accident. In Jones on Bailments, a work remarkable for the correctness and precision of its language, p. 90, Amer. ed. (p. 49, English ed.), is this expression: "If they be destroyed by wreck, pillage, fire or other inevitable misfortune." In page 93 (51), he cites a paragraph from Puffendorf, "that the borrower ought to indemnify the lender, if the goods lent be destroyed by fire, shipwreck or other inevitable accident." In page 97 (53), he says, "there are other cases, in which a borrower is chargeable for inevitable mischance; for example, if the house of Caius be in flames, and he be able to secure one thing only," &c. And in p. 142 (78), "there is no obligation in the bailee to suggest wise precautions against inevitable accident, and he cannot, therefore, be obliged to advise insurance from fire." In page 146 (79, 80), he says, "although the act of God be an expression which too long custom has rendered familiar to us, yet, perhaps, on that very account, it might be more proper, as well as more decent, to substitute in its place inevitable accident." See also p. 135 (73), 146 (79, 80), 149 (81, 82), 32 (18), as to the peculiar law respecting innkeepers and common carriers, and as to the general principle, that the bailee is liable only for negligence, the degree of which is regulated by the nature of the bailment.

*362] *The authorities thus cited show that fire, in former times, was called the act of God, but in latter days, it is termed, in the very expressions of the lease, an inevitable accident, an inevitable casualty, an inevitable mischance, or an unavoidable accident, by lawyers, by judges, and by elementary writers. The presumption, therefore, is strong, that the case of fire was the very case of inevitable casualty, which the exception in the lease was intended to guard against.

3d. As to the third point. It is immaterial, whether this be considered as the contract of the officer in his official capacity, or of the government, and whether an action will or will not lie against the successor. That question can only be of importance, as it concerns the mode of the remedy, but does not affect the point of personal liability. It would be ruinous, not only to the agent, but to the government itself, if this doctrine of individual responsibility is to be established. Suppose, the defendant, or his successor, had been dispossessed by the plaintiff, during the term, who would have the right of action? If the defendant, after he was out of office, had the sole right to sue, the office must be at his mercy. He might release the contract. Suppose, a contract made by the secretary at war, for supplying the army, and advances, as usual, made to the contractor. Suppose, the sum advanced to be $50,000 (which in such cases is not a large sum), and the contractor pockets the money, and refuses to

make the supplies. The secretary becomes bankrupt, or refuses to bring suit, or dies, and his executors refuse to sue. How are the public to compel them? Is it consistent with the dignity of the United States, to ask their leave to bring suit? There is now existing a contract for the casting of cannon, made by the defendant while in office. Can the secretary, out of office, release this contract? Can he give a valid release of the contract for supplies to the army? These examples show that the ex-secretary is not the person contracting, and that the suit is brought against the wrong person.

Mason, on the same side, was stopped by the court, who said, they were satisfied with the argument on the *part of the defendant, upon the first point, and wished to hear the counsel in reply. Mr. *Martin* [*363 observed, that he did not suppose that anything he had to offer would shake the opinion which the court seemed to have formed, and should not insist upon replying.

March 2d, 1803. The CHIEF JUSTICE, after stating the terms of the lease, and the pleadings, delivered the unanimous opinion of the court.

The plaintiff in error has made two points. 1st. That under this contract, the defendant was bound in his private capacity. 2d. That the matter pleaded in his plea, did not show the casualty, by which the buildings were destroyed, to have been inevitable. This court give no opinion on the second point, being unanimous in favor of the defendant on the first.

It appears from the pleadings, that congress had passed a law authorizing and requiring the president to cause the public offices to be removed from Philadelphia to Washington; in pursuance of which law, instructions, by the president, were given, and the offices belonging to the department of war were removed; that it became necessary to provide a war-office, and that for this purpose, and no other, the agreement was entered into by the defendant, who was then at the head of this department. During the lease, the building was consumed by fire.

It is too clear to be controverted, that where a public agent acts in the line of his duty, and by legal authority, his contracts made on account of the government, are public and not personal. They inure to the benefit of, and are obligatory on, the government; not the officer. A contrary doctrine would be productive of the most injurious consequences to the public, as well as to individuals. The government is incapable of acting otherwise than by its agents, and no prudent man would consent to become *a [*364 public agent, if he should be made personally responsible for contracts on the public account. This subject was very fully discussed in the case of *Macbeath* v. *Haldimand*, cited from 1 Term Reports; and this court considers the principles laid down in that case as consonant to policy, justice and law.

The plaintiff has not controverted the general principle, but has insisted, that, in this case, the defendant has, by the terms of his contract, bound himself personally. It is admitted, that the house was taken on account of the public, in pursuance of the proper authority; and that the contract was made by the person at the head of the department, for the use of which it was taken; nor is there any allegation, nor is there any reason to believe, that the plaintiff preferred the private responsibility of the defendant to that of the government; or that he was unwilling to contract on the faith of gov-

ernment. Under these circumstances, the intent of the officer to bind himself personally must be very apparent indeed, to induce such a construction of the contract.

The court can perceive no such intent. On the contrary, the contract exhibits every appearance of being made with a view entirely to the government. The official character of the defendant is stated in the description of the parties. This, it has been said, might be occasioned by a willingness in the defendant to describe himself by the high and honorable office he then filled. This, unquestionably, is possible, but is not the fair construction to be placed on this part of the contract, because it is not usual for gentlemen, in their private concerns, to exhibit themselves in their official character. The tenement is to let to "the said Samuel Dexter, and his successors;" an expression plainly evidencing that it was not for himself, otherwise than as secretary of war; and that the lessor so understood the contract. It is also evincive of the correctness of the observation of the defendant, that the words "said Samuel Dexter" refer to him in his official character, as described in the premises. The *habendum* is, "to have and to hold the said
*365] demised *premises to him, the said Samuel Dexter, and his successors," &c., showing, that to the knowledge of the lessor, if Mr. Dexter should go out of office the next day, the successor to the war department would succeed also to the occupancy of the office.

The covenant for quiet enjoyment during the term is with the said Samuel Dexter, and his successors, and is, that they, as well as he, shall enjoy. The covenant on the part of Mr. Dexter, on which the suit is brought, is for himself, and his successors. The whole face of the agreement, then, manifests very clearly a contract made entirely on public account, without a view, on the part of either the lessor or lessee, to the private advantage or responsibility of Mr. Dexter.

The only circumstance which could excite a doubt was produced by the technical operation of the seal. This, in plain reason and common sense, can make no difference in designating the person to be responsible for the contract; and so it has been determined in the case cited from 1 T. R. 674 (*Unwin* v. *Wolsely*).

The court is unanimously and clearly of opinion, that this contract was entered into entirely on behalf of government, by a person properly authorized to make it, and that its obligation is on the government only, Whatever the claims of the plaintiff may be, it is to the government, and not to the defendant, he must resort to have them satisfied.

Judgment affirmed, with costs.

Lloyd *v.* Alexander *et al.*

A citation must accompany the writ of error.

The writ of error in this case was quashed, because it was not accompanied by a citation.

*366] *Marshall, Ch. J.—The law respecting the thirty days' notice on a writ of error, and the ten days allowed for filing it, was predicated upon the existing state of things, at the time of passing the act; at which time, there was no circuit court whose term would not be finished more than forty days before the sitting of the supreme court. The times of the session of the courts have been altered, but no alteration has been made in the law respecting the thirty days' notice, which makes it difficult to form a rule in the case.

At present, if the citation has not been served thirty days, the court will not take up the cause until the thirty days have expired, unless the defenddant in error shall appear. A citation not served is as no citation.

APPENDIX.

NOTE (A) to Mandeville *v.* Riddle, *ante*, p. 299.

DUNLOP *v.* SILVER.

THE question of liability of a remote indorser of a promissory note, in Virginia, came before the court below, about a year before their decision in the present case. It was in the case of *Dunlop* v. *Silver and others*, argued at July term 1801, in Alexandria. The court took the vacation to consider the case, and examine the law, and, at the succeeding term, judgment was rendered for the plaintiff by KILTY, Chief Judge, and CRANCH, Assistant Judge, contrary to the opinion of Judge MARSHALL.

The case was this. James Cavan made a promissory note, by which he promised to pay to Silver *et al.*, or order, sixty days after date, $600 for value received, negotiable at the bank of Alexandria. Silver *et al.* indorsed the note to Downing & Dowell, in these words, "pay the contents to Downing & Dowell," who indorsed, "pay the contents to John Dunlop, or order." Dunlop had obtained judgment on the note against Cavan, the maker, who was taken upon the execution, and took the oath of an insolvent debtor.

The declaration had two counts. 1st. A special count, stating the making and indorsing the note, the suit, judgment, execution and insolvency of Cavan, by reason whereof, the defendant became liable, &c. 2d. *Indebitatus assumpsit* for money had and received. The plea was *non assumpsit*, and a verdict was taken for the plaintiff subject to the opinion of the court, upon the point, whether the holder could maintain an action against the remote indorser of a promissory note.

The statute 3 & 4 Ann. c. 9, respecting promissory notes, is not in force in Virginia; but there is an act of assembly, 1786, c. 29, by which it is enacted, that "an action of debt may be maintained upon a note or writing, by which the person signing the same shall promise or oblige himself to pay a sum of money, or quantity of tobacco, to *another;" and that "assignments of bonds, bills and promissory notes, and other writings obligatory, for payment of money or tobacco, shall be valid; [*368 and an assignee of any such may, thereupon, maintain an action of debt in his own name; but shall allow all just discounts, not only against himself, but against the assignor, before notice of the assignment was given to the defendant."

It will be observed, that this act gives no action against the indorser or assignor, nor does it make any distinction between notes payable to order, and those payable only to the payee. Hence, perhaps, it may be inferred, that it left such instruments as the parties themselves, by the original contract, had made (or intended to make) negotiable, to be governed by such principles of law as may be applicable to those instruments. At any rate, it seemed to be admitted, that the act did not affect the present case.

The principal question, then, is, whether this action could have been supported in England, before the statute of Anne.

I. In order to ascertain how the law stood before that statute, it may be necessary to examine how far the custom of merchants, or the *lex mercatoria*, was recognised by the courts of justice, and by what means the common-law forms of judicial proceedings were adapted to its principles.

A distinction seems to have been made, very early, between the contracts of merchants (especially of foreign merchants), and those of other people. Nearly six hundred years ago, we find their "old and rightful customs" protected by the great charter of English liberties. (Magna Charta, c. 30.) Peculiar privileges were also granted them, more than 500 years ago, by the statute of Acton Burnel, de mercatoribus, 11 Edw. I., and the statute of merchants, 13 Edw. I. And in the reign of Edw. III., many statutes were made for their encouragement, in some of which, particularly 27 Edw. III., c. 19 & 20, the law-merchant is expressly recognised. In the 13 Edw. VI., 9, 10 (cited by Molloy, book 3, c. 7, § 15), it is said, that "a merchant stranger made suit before the king's privy council, for certain bales of silk, feloniously taken from him, wherein it was moved that this matter should be determined at common law; but the lord chancellor answered, that this suit is brought by a merchant, who is not bound to sue according to the law of the land, nor to tarry the trial of twelve men."

The custom of merchants is mentioned in 34 Hen. VIII., cited in Bro. Abr., tit. Cus
*369] toms, pl. 59, where it was pleaded, as a custom between merchants *throughout the whole realm, and the plea was adjudged bad, because a custom throughout the whole realm was the common law. And for a long time, it was thought necessary to plead it as a custom between merchants of particular places, viz., as a custom among merchants residing in London and merchants in Hamburg, &c. By degrees, however, the courts began to consider it as a general custom. Co. Litt. 182; 2 Inst. 404. And in the time of James I., Ch. J. Hobart, in the case of *Vanheath* v. *Turner*, Winch 24, said, that "the custom of merchants is part of the common law, of which the judges ought to take notice." It was still, however, deemed necessary to set forth the custom specially; and in that form, the precedents continued, for some time after. Indeed, the pleadings continued in that form, long after the courts had decided it to be unnecessary. Lord Coke, in his Commentary on Littleton (first published in 1628), folio 182 *a*, speaking of the *lex mercatoria*, says, "which, as hath been said, is part of the laws of this realm." See also 2 Inst. 404.

But after this, in the year 1640, in *Eaglechild's Case*, reported in Hetly 167, and Litt. 363, 6 Car. I. (it was said to have been ruled in B. R.), "that upon a bill of exchange between party and party, who were not merchants, there cannot be a declaration upon the law-merchant; but there may be a declaration upon *assumpsit*, and give the acceptance of the bill in evidence." This decision seemed to confine the operation of the law-merchant, not to contracts of a certain description, but to the persons of merchants: whereas, the custom of merchants is nothing more than a rule of construction of certain contracts. Jac. Law Dict. (Toml. edit.) tit. Custom of Merchants. *Eaglechild's Case*, however, was overruled in the 18 Car. II., B. R. (1666), in the case of *Woodward* v. *Rowe*, 2 Keb. 105, 132, which was an action by the indorsee against the drawer of a bill of exchange. "The plaintiff counted on the custom and law of the realm, that if any man writes a bill to another, then if he to whom the bill is directed, do not pay for the value received by the maker, the maker of such bill should pay." "It was moved in arrest of judgment, that this count is ill, the general custom being the law; and it doth not appear to the court, that there is any such law. *Sed curia*, contrà, that by the common law, a man may resort to him that received the money, if he to whom the bill was directed, refuse." It was afterwards moved again, that this "is only a particular custom among merchants, and not common law; but, *per curiam*, the law of merchants is the law of the land; and the custom is good enough, generally, for any man, without naming him merchant; judgment *pro* plaintiff, *per totam curiam*, and they will intend that he, of whom the value is said to be received by the defendant, was the plaintiff's servant."

*370] *The same principle was, two years afterwards, recognised in an *Anonymous* case (but believed to be *Milton's Case*, *vide* 1 Mod. 286), in the exchequer, reported

in Hardres 485, Mich. 20 Car. II. (1668), where the plaintiff declared on the custom of England, and after verdict, Offley moved in arrest of judgment, because the "plaintiff had declared that *per consuetudinem Angliæ*, &c., which he said was naught, because the custom of England is the law of England, and what the judges are bound to take notice of; and that, therefore, the *consuetudo Angliæ* ought to have been omitted." But the Chief Baron said, "but for the plaintiff's inserting the custom of the realm into his declaration here, I hold that to be mere surplusage and redundancy, which does not vitiate the declaration." And again he says, "it were worth while to inquire, what the course has been amongst merchants; or to direct an issue for trial of the custom among merchants in this case; for although we must, in general, take notice of the law of merchants; yet, all their customs we cannot know, but by information." Afterwards, in declaring their opinions, the court said "that this course of accepting bills being a general custom amongst all traders, both within and without the realm, and having everywhere that effect to make the acceptor subject to pay the contents, the court must take notice of that custom."

Notwithstanding these decisions, the question was again made, about twenty years afterwards, in the case of *Carter* v. *Downish* (1 W. & M., Anno 1688), 1 Show. 127, in the exchequer, on a writ of error from the king's bench. The defendant had covenanted to pay all bills which should be drawn on him, in favor of the plaintiff, on account of 1000 kentals of fish, and the breach assigned was, the non-payment of a certain bill. The defendants pleaded, that the plaintiff by indorsement on the bill, according to the custom of merchants, appointed the payment to Herbert Aylwin, or his order, who indorsed it to Tassel, to whom the defendant paid it. To this plea, there was a demurrer, and joinder. One of the errors assigned was, that the defendant had not set forth a particular custom, to warrant the indorsement. To which it was answered, "that the law and custom of merchants warrant the indorsement of foreign bills of exchange, and for that, all the book cases on foreign bills are a proof; and that such indorsement doth really transfer the property of the money, or contents, in such bills to the indorsee, and that all this law of merchants is part of the law of the land, and the judges are obliged to take notice of that as well as of any other law." And the following cases were cited: 1 Inst. 182 *a*; 2 Inst. 58, 204; F. N. B. 117, Reg. 135; 13 Edw. IV., 9; *Holland's Case*, 4 Co. 76; Fitz. Abr. tit. Account, 127. *Lord Chief Justice Pollexfen.—"As to that of the law of merchants, I think, we are bound to take notice of it, as we do of that of survivorship and account, and this is as well known." Ventris concurred, and they all inclined to reverse the judgment; but upon Tremayne's importunity, *adjornatur*. [*371

Three years after this, however, the point was again made, in the case of *Mogadara* v. *Holt* (3 W. & M.), 1 Show. 318, and 12 Mod. 15, 16 (Anno 1699), where it was held by Holt, Chief Justice, and the whole court, "that the law of merchants is *jus gentium*, and part of common law, and *ergo*, we ought to take notice of it, when set forth in pleading." And "though the plaintiff hath alleged a custom contrary to fact, yet that is but surplusage; and he needed not to have alleged a custom." *Jud. pro quer.*

Not satisfied with these adjudications, the question was again agitated, two years afterwards, in the exchequer, on a writ of error from the king's bench, in the case of *Williams* v. *Williams*, Carth. 269 (Pasch., 5 W. & M., Anno 1693), where "the only error insisted on was, that the plaintiff had not declared on the custom of merchants in London, or any other particular place (as the usual way is) but had declared on a custom through all England, and if so, 'tis the common law, and then it ought not to be set out by way of custom; and if it is a custom, then it ought to be laid in some particular place from whence a venue might arise to try it. To which it was answered, that this custom of merchants, concerning bills of exchange, is part of the common law, of which the judges will take notice *ex officio*, as it was resolved in the case of *Carter* v. *Downish*; and therefore, it is needless to set forth the custom specially in the declaration, for it is sufficient to say, that such a person, *secundum usum et consuetudinem mercatorum*, drew the bill; therefore, all the matter in the declaration concerning the special custom was merely surplusage, and the declaration good without it. The judg-

ment was affirmed." Similar doctrine was also held by Lord HOLT, in the same term, in the case of *Hodges* v. *Steward*, 12 Mod. 37 (Pasch., 5 W. & M., Anno 1693).

Again, in Hilary term (B. R., 8 & 9 Wm. III., Anno 1697), *Pinkney* v. *Hall*, 1 Ld. Raym. 175, the exception was taken, "that the declaration being *per consuetudinem Angliæ*, &c., was ill, because the custom of England is the law of England, of which the judges ought to take notice, without pleading. *Sed non allocatur.* For though, *372] heretofore, *this has been allowed, yet, of late time, it has always been overruled." And another exception was "that though *lex mercatoria* is part of the law of England, yet it is but a particular custom among merchants; and, therefore, it ought to be shown, in London, or some other particular place. *Sed non allocatur.* For the custom is not restrained to any particular place."

The same principles were, in the same term, in the common pleas, held, in the case of *Bromwich* v. *Loyd* (Hilary term, 8 Wm. III.), 2 Lutw. 1585, where TREBY, Chief Justice, said, "That bills of exchange, at first, were extended only to merchant strangers, and afterwards to inland bills between merchants trading one with another here in England; and after that, to all traders and dealers, and of late, to all persons trading or not; and there was no occasion to allege any custom: and that was not denied by any of the other justices."

In 10 Wm. III., Anno 1698, B. R., *Hawkins* v. *Cardy*, 1 Ld. Raym., 360, an action was brought on a promissory note, made by the defendant, and indorsed by the payee to the plaintiff for part only, who declared on the custom of merchants for such an indorsement. But on demurrer, it was adjudged ill. "For a man cannot apportion such personal contract, for he cannot make a man liable to two actions, where by contract he is liable but to one." And HOLT, Chief Justice, said, "This is not a particular local custom, but the custom of merchants, of which the law takes notice; and therefore the court cannot take the custom to be so." Judgment for defendant.

Four years after this, in the case of *Buller* v. *Crips*, 6 Mod. 29 (B. R., 2 Ann., Anno 1702), Lord HOLT said, "I remember when actions upon inland bills of exchange did first begin; and there they laid a particular custom between London and Bristol, and it was an action against the acceptor. The defendant's counsel would put them to prove the custom; at which, HALE, who tried it, laughed, and said, 'they had a hopeful case on't.' And in my Lord NORTH's time, it was said, that the custom in that case was part of the common law of England, and the actions since became frequent, as the trade of the nation did increase; and all the difference between foreign and inland bills is, that foreign bills must be protested before a public notary, before the drawer may be charged; but inland bills need no protest."

In the year 1760 (1 Geo. III.), in the case of *Edie* v. *The East India Company*, *373] 2 Burr. 1226, Mr. Justice FOSTER said, "Much has been said about the *custom of merchants; but the custom of merchants, or law of merchants, is the law of the kingdom, and is part of the common law. People do not sufficiently distinguish between customs of different sorts. The true distinction is, between general customs (which are part of the common law) and local customs (which are not so). This custom of merchants is the general law of the kingdom, part of the common law, and, therefore, ought not to have been left to the jury, after it has been already settled by judicial determinations." And in the same case, p. 1228, Mr. Justice WILMOT says, "The custom of merchants is part of the law of England; and courts of law must take notice of it as such. There may, indeed, be some questions, depending upon customs among merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon; yet, that is only where the law remains doubtful. And even there, the custom must be proved by facts, not by opinion only; and it must also be subject to the control of law." In the case of *Pillans & Rose* v. *Van Mierop & Hopkins*, 3 Burr. 1669, Lord MANSFIELD says, "the law of merchants and the law of the land is the same; a witness cannot be admitted to prove the law of merchants; we must consider it as a point of law."

Sir MATTHEW HALE, in his History of the Common Law of England, first published in 1713 (3d edit.), p. 24, 25, speaking of the common law, as it is taken in its

proper and usual acceptation, says, "And besides these more common and ordinary matters to which the common law extends, it likewise includes the laws applicable to divers matters of very great moment; and though by reason of that application, the said common law assumes diverse denominations, yet they are but branches and parts of it; like as the same ocean, though it many times receives a different name from the province, shire, island or country to which it is contiguous, yet these are but parts of the same ocean. Thus the common law includes *lex prerogativa*, as it is applied with certain rules to that great business the king's prerogative; so it is called *lex forestæ*, as it is applied, under its special and proper rules, to the business of forests; so it is called *lex mercatoria*, as it is applied, under its proper rules, to the business of trade and commerce."

To these authorities will be added only that of CHRISTIAN, in his note to 1 Bl. Com. 75. "The *lex mercatoria*, or custom of merchants, like the *lex et consuetudo parliamenti*, describes only a great division of the law of England. The laws relating to bills of exchange, insurance, *and all mercantile contracts are as much the general laws of the land as the laws relating to marriage, or murder." [*374

This chronological list of authorities tends to elucidate the manner in which the custom of merchants gained an establishment in the courts of law, as part of the common or general law of the land; and shows that it ought not to be considered as a system contrary to the common law, but as an essential constituent part of it, and that it always was of co-equal authority so far as subjects existed for it to act upon. The reason why it was not recognised by the courts, and reduced to a regular system, as soon as the laws relating to real estate, and the pleas of the crown, seems to be, that in ancient times, the questions of a mercantile nature, in the courts of justice, bore no proportion to those relating to the former subjects. Before the time of James I., we have scarcely a mercantile case in the books; and yet, long before that time, the laws respecting real estates, and the criminal code, were nearly as well understood as they are at this day. Hence, it cannot be a matter of great surprise, that the principles of commercial law, which have been developed by the exigencies of modern times, should have been, by some, considered as exceptions from the general principles of the common law. The truth seems to be, that the principles of the common law have not been changed, nor innovated upon, by the introduction of those commercial principles, but that these principles have existed from the earliest times, even from the rudest state of commerce, and the only reason why we do not find them in the ancient books, is, that the circumstances had never occurred which rendered it necessary to draw them forth into judicial decision.

Another reason, perhaps, why we see so much tardiness in the courts in admitting the principles of commercial law in practice, has been the obstinacy of judicial forms of process, and the difficulty of adapting them to those principles which were not judicially established, until after those forms had acquired a kind of sanctity from their long use. Much of the stability of the English jurisprudence is certainly to be attributed to the permanency of those forms; and although it is right, that established forms should be respected, yet it must be acknowledged, that they have, in some measure, obstructed that gradual amelioration of the jurisprudence of the country, which the progressive improvement of the state of civil society demanded. It required the transcendent talents, and the confidence in those talents, which were possessed by Lord MANSFIELD to remove those obstructions. When he ascended the bench, he found justice fettered in the forms of law. It was his task to burst those fetters, and to transform the chains into instruments of substantial justice. *From that time, a new æra commenced in the history of English jurispru- [*375 dence. His sagacity discovered those intermediate terms, those minor propositions, which seemed wanting to connect the newly-developed principles of commercial law with the ancient doctrines of the common law, and to adapt the accustomed forms to the great and important purposes of substantial justice, in mercantile transactions.

II. Forms of pleading often tend to elucidate the law. By observing the forms of declarations, which have, from time to time, been adapted, in actions upon bills of ex-

change, we may, perhaps, discover the steps by which the courts allowed actions to be brought upon them, as substantive causes of action, without alleging any consideration for the making or accepting them. The first forms which were used, take no notice of the custom of merchants, as creating a liability distinct from that which arises at common law; but by making use of several fictions, bring the case within the general principles of actions of *assumpsit*. The oldest form which is recollected, is to be found in Rastell's Entries, fol. 10,(*a*) under the head "Action on the Case upon promise to pay money." Rastell finished his book, as appears by his preface, on the 28th of March 1564, and gathered his forms from four old books of precedents, then existing. This declaration sets forth that A. complains of B. &c., for that whereas, the said A., by a certain I. C., his sufficient attorney, factor and deputy in this behalf, on such a day and year, at L., at the special instance and request of the said B., had delivered to the said B., by the hand of the said I. C., to the proper use of the said B., 110*l.* 8*s.* 4*d.* lawful money of England; for which said 110*l.* 8*s.* 4*d.*, so to the said B. delivered, he, the said B., then and there, to the said I. C. (then being the sufficient attorney, factor and deputy of the said A. in this behalf) faithfully promised and undertook, that a certain John of G. well and faithfully would content and pay to Reginald S. (on such a day and year, and always afterwards, hitherto the sufficient deputy, factor and attorney of the said A. in this behalf), 443 2-3 ducats, on a certain day in the declaration mentioned. And if the aforesaid John of G. should not pay and content the said Reginald S. the said 443 2-3 ducats, at the time above limited, that then the said B. would well and faithfully pay and content the said A. 110*l.* 8*s.* 4*d.*, lawful money of England, with all damages and interest thereof, whenever he should be thereunto by the said A. requested. It then avers, that the said 443 2-3 ducats were of the value of 110*l.* 8*s.* 4*d.*, lawful money of England, that John of G. had not paid the ducats to Reginald S., and that if he had paid them "to the said R., I. B., and associates, or to either of them, then the said 443 2-3 ducats would have come to the benefit and profit of the said A. Yet the said B., contriving, the aforesaid A., of the said 110*l.* 8*s.* 4*d.* and of *the damages and interest thereof, falsely and subtly to deceive and defraud, the same, or any part thereof, to the said A., although often thereunto required, according to his promise and undertaking aforesaid, had not paid, or in any manner contented, whereby the said A., not only the profit and gain which he, the said A., with the said 110*l.* 8*s.* 4*d.*, in lawfully bargaining and carrying on commerce might have acquired, hath lost; but also the said A., in his credit towards diverse subjects of our lord the king (especially towards R. H. and I. A., to whom the said A. was indebted in the sum of 110*l.* 8*s.* 4*d.*, and to whom the said A. had promised to pay the same 110*l.* 8*s.* 4*d.*, at a day now past, in the hope of a faithful performance of the promise and undertaking aforesaid), is much injured, to his damage," &c.

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This declaration seems to have been by the indorsee of a bill of exchange, against the drawer. For although nothing is said of a bill of exchange, or of the custom of merchants, yet the facts stated will apply to no other transaction. It appears, that ducats were to be given for pounds sterling; this was in fact an exchange. Again, the defendant promised to repay the original money advanced, with all damages and interest; this is the precise obligation of the drawer of a bill of exchange, according to the law-merchant. Besides, the transaction, if literally true, as set forth in the declaration, was, at least, a very uncommon one. A. is supposed to make I. C. his attorney, for the purpose of paying 110*l.* to B., and to receive a promise from B., that John of G. should pay to Reginald S. 443 ducats. And A. is also supposed to have made Reginald S. his attorney, for the purpose of receiving the ducats. Such a transaction must certainly be very rare, especially, as it was so much easier to have done the same thing in substance, by a simple bill of exchange.

In the oldest books extant in the English language on the subject of the law-merchant, viz., Malynes' Lex Mercatoria, written in 1622, and Marius's Advice, which appeared in 1651, it is said, that regularly there are four persons concerned in the negotiating a bill of exchange. A., a merchant in Hamburg, wanting to remit money to D., in England, pays his money to B., a banker in Hamburg, who draws a bill on C.,

his correspondent or factor in England, payable to D., in England, for value received of A. But in the declaration above recited, there are five persons concerned; and if, as is supposed, that transaction was upon a bill of exchange, the fifth person must have been an indorsee, or assignee of the bill. Another reason for supposing this to be the case, is, that Rastell has no other form of a declaration by an indorsee, although he has two by the payee, viz., one against an acceptor and one against a drawer.

*In the declaration of payee *v.* acceptor, fol. 338 a, the foreign merchant who paid the 1400 crowns to the drawer of the bill, in France, to be remitted to the plaintiff (the payee), in England, is stated to be the plaintiff's factor; and the drawer of the bill is stated to be the factor of the defendant (the acceptor), so that the plaintiff, by his factor, is supposed to pay to the defendant, through the medium of the defendant's factor, the 1400 crowns, in consideration of which it is averred that the defendant, in England, promised the plaintiff to pay him 414*l.* 3*s.* 4*d.*, lawful money of England. [*377

This declaration sets forth, that whereas, the plaintiff, on the 10th of June, 37 Eliz., at Rochelle, in France, in parts beyond seas, by the hands of a certain T. S., then the factor of the plaintiff, at the request of a certain R. W., then the factor of the defendant, delivered and paid to the said R. W., then factor of the defendant, to the use of the defendant, as much ready money as amounted to 1400 French crowns, of the money of France, in parts beyond sea, at the rate of 5*s.* 11*d.*, lawful money of England, for each French crown: And thereupon, the said R. W., at Rochelle aforesaid, then delivered to the said T. S., three bills of exchange, viz., first, second and third. In the first of which bills of exchange, the said R. W. requested the defendant to pay to the plaintiff, at L., 414*l.* 3*s.* 4*d.*, lawful money of England, at the end of thirty days next after sight of that bill of exchange (the second and third bills of exchange to the plaintiff not paid). It then sets forth the tenor of the second and third bills, and then avers, that the defendant, on the day and year first aforesaid, at the city of E., in the county of the said city, in consideration thereof, undertook, and to the plaintiff then and there and faithfully promised, that he, the defendant, well and faithfully would pay to the plaintiff, to the plaintiff's use, at the city of E. aforesaid, in the county of the said city, by way of exchange, according to the usage of merchants, the aforesaid 414*l.* 3*s.* 4*d.*, lawful money of England, at the end of thirty days next after sight of any of the bills of exchange aforesaid; and the plaintiff in fact saith, that afterwards, viz., on the 1st of September, in the year aforesaid, at, &c., the first of the said bills came to the sight of, and was then and there shown to, the defendant, yet the defendant, not regarding, &c., but contriving, &c., did not pay the said 414*l.* 3*s.* 4*d.*, &c., at the end of the said thirty days, &c. Whereby, the defendant lost the benefit of trading with the said 414*l.* 3*s.* 4*d.*, &c., to his damage 600*l.*

In this declaration, it will be perceived, that the custom of merchants is not alleged as the foundation of the action, or the cause of liability of the defendant; nor is it stated, that the defendant accepted the bill. But the plaintiff grounds his action upon the defendant's promise to *pay the amount mentioned in the bill, in consideration of 1400 crowns paid to his use, in France; and in consideration that his factor had drawn and delivered the bills to the plaintiff's factor. This idea of factorage is probably a fiction, introduced for the purpose of adapting the custom of merchants to the common-law forms, and to show a sufficient consideration for the *assumpsit* The question of factorage was not traversable; as the facts of drawing the bill, and the drawee's acceptance, were sufficient evidence of the drawer's being the acceptor's factor *quoad hoc.* This fiction might, perhaps, be considered as part of the custom of merchants; but at any rate, it seems to have been considered necessary, in order to create that degree of privity between the payee and the acceptor which, at that time, was supposed necessary to support the action of *assumpsit.* *378

Both this and the former are declarations at common law; that is, neither of them is aided by the custom of merchants, unless the custom may be considered as supporting the fiction of factorage. They show also, that if privity of contract was necessary at common law, to support the action of *assumpsit*, the law would presume a

privity, or, at least, would presume facts which constituted a privity, between the payee and acceptor, or between an indorsee and a drawer of a bill of exchange. As in the latter declaration, the original advancer of the money to the drawer, in France, is presumed to be the factor of the payee (the plaintiff), so, in the former, Reginald S., (the payee) and I. C., the original advancer of the money, are presumed to be the factors of the plaintiff (the indorsee).

In 1 Brownlow's Declarations, printed in 1652, p. 267, is a declaration by the payee against the acceptor, in which the acceptor is alleged to be the factor of the drawer, but the original advancer of the money is not stated to be the factor of the plaintiff, as in the declarations in Rastell; although it is averred, that the original advancer of the money paid it to the drawer, with intent that it should be paid in England, by the drawer's factor (the drawee) to the plaintiff (the payee), which is the same thing; for if he paid with that intent, it was paid for the benefit of the payee. In the same volume, p. 269, is a declaration by payee *v.* drawer, in which the advancer of the money is expressly stated to be the factor of the plaintiff; but the drawee is not alleged to be the factor of the drawer. In both cases, the custom is stated to be between English merchants and foreigners, and their factors or servants. *Probably, at this time, it began to be considered as unnecessary to allege the intermediate parties on the bill to be the factors of the parties to the action, inasmuch as it was a mere fiction, the want of which was considered as supplied by an allegation of the custom.

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But in his second volume, printed in 1654, p. 58, there is another declaration by the payee v. acceptor of a bill of exchange, in which the payee is called the factor of the advancer of the money, and the drawee the factor of the drawer. There is also an averment of the custom. This declaration refers to Hilary term, 4 Jac. (Rot. 155), from whence it was probably taken.

In Browne's Vade Mecum (2d edit. 1695), p. 12, is a declaration by payee *v.* acceptor, alleging that the plaintiff himself paid the money to the drawer, who was the defendant's factor. It also sets forth the custom. In p. 16, is another, by payee against acceptor, like that in Rastell, fol. 338 a, alleging that the plaintiff's factor beyond sea, paid the money to the defendant's factor, who drew a bill on the defendant (his master), payable to the plaintiff, who showed and delivered it to the defendant, who, in consideration thereof, promised to pay, &c. This is a declaration at common law, and not on the custom. The date of the bill mentioned in the declaration is Sept. 10th, 1584 (26th of Eliz.), one year before the date of that in Rastell.

In p. 18, is another declaration at common law, by payee *v.* acceptor of a foreign bill, in the case of *Williamson* v. *Holiday* (Trin., 9 Jac., Rot. 712), in which it is alleged, that the plaintiff, by his factor, paid the money to the defendant's factor, for which he drew on the defendant, payable to the plaintiff, who showed it to the defendant, who accepted it, and in consideration of the premises, promised to pay, &c.

In p. 19, is a declaration by payee *v.* drawer, in which the plaintiff declares that he paid the defendant 45*l.*, for which the defendant drew and delivered to the plaintiff a bill of exchange on a certain Thomas Cole, at Venice, requiring him to pay to the plaintiff, for the defendant, 200 ducats, at two days sight; and in consideration of the premises, undertook and promised that he would, by the hands of the said Thomas Cole, in Venice, pay to the plaintiff the said 200 ducats. He then avers, that he showed the bill to Cole, who refused to pay, yet the defendant had not, by the hands of the said Cole, nor in any other manner, paid the ducats, &c.

*In p. 21, is a declaration at common law, by the original advancer of the money, to whose use the money was to be paid by way of exchange, against the drawer. It alleges, that the plaintiff paid the defendant, at his request, 100*l.* lawful money of England, for which the defendant drew a bill on I. W., at Middleburgh, requiring him to pay at usance, to one George Chandler, or bearer, to the use of the plaintiff, 174*l.* 11*s.* Flemish; and that in consideration of the premises, the defendant undertook, &c., that if the said I. W. should not accept the bill, nor pay the 174*l.* 11*s.* Flemish, according to the tenor of the bill, then the defendant would pay the plaintiff the original sum advanced, viz., 100*l.* lawful money of England. It then avers, that I. W. did not

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accept nor pay; and a protest for non-acceptance, and notice to defendant; yet he has not paid the 100*l.* &c.

These are the greater part of the precedents of declarations on bills of exchange, to be found in the printed books, before the statute of Anne; and in all of them, those facts are stated which bring the case within the principles which were considered as necessary to support the action of *assumpsit*, in general cases, at common law. In the more modern forms, the liability of the defendant, under the custom, is considered as a sufficient consideration to raise an *assumpsit*, without averring those intermediate steps which may be considered as the links of the chain of privity which connects the plaintiff with the defendant. The reason of this change of form was, probably, the consideration that those intermediate links were only fictions, or presumptions of law, which were never necessary to be stated.

These authorities tend to show that, in mercantile transactions, privity is not necessary to the foundation of an action; or that, if it is, the law will presume a privity. It will be seen, in the course of these observations, that privity is not necessary to support the action for money had and received, in any case.

III. Having thus seen how the law-merchant was understood, at the time of the statute of Anne, and the manner in which it was applied to the forms of judicial process, it will now be necessary to inquire, at what time the law-merchant was considered as applicable to inland bills, and what was the law respecting such bills and promissory notes, prior to the statutes of 9 & 10 Wm. III., c. 17, and 3 & 4 Ann., c. 9.

It is not ascertained exactly at what time inland bills first came into use in England, or at what period they were first considered as entitled to the privileges of bills of exchange, under the law-merchant. But there was a time, when the law-merchant was considered as "confined *to cases where one of the parties [*381
was a merchant stranger," 3 Woodeson, 109; and when those bills of exchange only were entitled to its privileges, one of the parties to which was a foreign merchant. This seems to have been the case, at the time when Malynes wrote his Lex Mercatoria, in the 4th page of which, he says, "He that continually dealeth in buying and selling of commodities, or by way of permutation of wares, both at home and abroad in foreign parts, is a merchant." It may be observed also, that Malynes takes no notice of inland bills; hence, we may presume, that they were not in use in his time. He dates his preface to the Lex Mercatoria, on the 25th of November 1622, and speaks of his book (p. 5) as the fruit of fifty years' experience. Marius (p. 2) says, that "Mr. John Trenchant, in his book of arithmetic, printed at Lyons, in Anno 1608, observes, that an exchange made in the same realm is not real." In the case of *Bromwich* v. *Loyd*, 2 Lutw. 1585 (Hil., 8 Wm. III., C. B.) Chief Justice Treby said, "that bills of exchange at first were extended only to merchant stranges, trading with English merchants; and afterwards, to inland bills between merchants trading one with another here in England; and after that, to all traders and dealers, and of late, to all persons, trading or not." And in *Buller* v. *Crips*, 6 Mod. 29 (2 Ann.), Lord Chief Justice Holt said, he remembered "when actions upon inland bills of exchange first began."

Perhaps Lord Holt might have been correct as to the time when actions upon inland bills first began, or rather when the first notice was taken of a difference between inland and foreign bills; but it appears probable, that inland bills were in use much before Lord Holt's remembrance. Marius first published his Advice concerning Bills of Exchange, in 1651, half a century before Lord Holt sat in the case of *Buller* v. *Crips*, as appears by Marius's preface to his second edition; and he there says, he has been twenty-four years a notary-public, and in the practice of protesting "inland instruments and outland instruments." In p. 2, speaking of a bill between merchants in England, he says, it is "in all things as effectual and binding as any bill of exchange made beyond seas, and payable here in England, which we used to call an outland bill, and the other an inland bill." If we go back twenty-four years from 1651, the time when Marius first published his Advice, it will bring us to the year 1627; but if we go back twenty-four years from 1670, the probable date of his 2d edition (which was probably his meaning), it will give us the year 1646, as the earliest date to which we

can trace them. As Malynes, in his Lex Mercatoria, of 1622, does not notice them, and as Marius mentions them as existing in 1646, it seems probable, that they began to be in use between those two periods. Kyd, in his Treatise on Bills, p. 13 (Dublin edition, 1791), speaking of promissory *notes, says, "the period of their introduction appears to have been about thirty years before the reign of Queen Anne;" *382] but the only authority he cites is 6 Mod. 30 (2 Ann.), the case of *Buller* v. *Crips*, above mentioned, in which Lord Holt says, he had consulted two of the most famous merchants in London, who informed him, that "it was very frequent with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years." This expression, it will be observed, does not restrict the period to that limit, and it is probable, that thirty years was a loose expression, and as far back perhaps as those merchants could carry their recollection of any mercantile transaction. It is certain, that promissory notes were in use upon the continent, in those commercial cities and towns with which England carried on the greatest trade, long before that period; and were negotiable under the custom of merchants, in the countries from whence England adopted the greater part of her commercial law. They were called bills obligatory, or bills of debt, and are described with great accuracy by Malynes, in his Lex Mercatoria, p. 71, 72, &c., where he gives the form of such a bill, which is copied by Molloy, in p. 447 (7th edition, London, 1722), and will be found in substance exactly like a modern promissory note. "I, A. B., merchant of Amsterdam, do, by these presents, acknowledge to be indebted to the honest C. D., English merchant, dwelling at Middleborough, in the sum of 500*l.* current money, for merchandise, which is for commodities received of him to my content; which sum of 500*l.* as aforesaid, I do hereby promise to pay unto the said C. D. (or the bringer hereof), within six months after the date of these presents. In witness whereof, I have subscribed the same, at Amsterdam, this ——— day of July, ———." This is nothing more than a verbose promissory note, which, stripped of its redundancies, is simply this: For value received, I promise to pay to C. D., or bearer, 500*l.* in six months after date.

In p. 72, speaking of these bills obligatory, he says, "The sincerity of plain dealing hath been hitherto inviolable, in the making of the said bills, which every man of credit and reputation giveth of his own handwriting, or made by his servant, and subscribed by him, without any seal or witness thereto; and is made payable to such a merchant or person, or to the bearer of the bill, at such times of payment as is agreed."

As Malynes says nothing of inland bills, and yet is so very particular respecting promissory notes, the probability is, that the antiquity *of the latter is greater *383] than that of the former, and that they were more certainly within the custom of merchants. Indeed, there is a case prior to any in the books upon inland bills, which is believed to have brought upon such a promissory note, or bill obligatory, as is described by Malynes. It is in Godbolt 49 (Mich., 28 & 29 Eliz., Anno 1586), "An action of debt was brought upon a *concessit solvere*, according to the law-merchant, and the custom of the city of Bristow, and an exception was taken, because the plaintiff did not make mention in the declaration of the custom; but because in the end of his plea he said '*protestando, se sequi querelam secundum consuetudinem civitatis Bristow*,' the same was awarded to be good; and the exception disallowed."

Lord Ch. Baron Comyns, in his Digest, tit. Merchant, F. 1, F. 2, in abridging the substance of what Malynes had said upon the subject of bills of debt, or bills obligatory, does not hesitate to state the law to be, that "payment by a merchant shall be made in money or by bill. Payment by bill, is by bill of debt, bill of credit or bill of exchange. A bill of debt, or bill obligatory is, when a merchant by his writing acknowledges himself in debt to another in such a sum, to be paid at such a day, and subscribes it, at a day and place certain. Sometimes, a seal is put to it. But such bill binds by the custom of merchants, without seal, witness or delivery. So it may be made payable to bearer, and upon demand. So, it is sufficient, if it be made and subscribed by the merchant's servant. So, a bill of debt may be assigned to another

toties quoties. And now by the stat. 3 & 4 Anne, c. 9, all notes in writing, made and signed by any person, or the servant or agent," &c. (reciting the terms of the statute). By thus arranging his quotations from Malynes under the same head with the statute of Anne respecting promissory notes, it is to be inferred, that he considered the custom of merchants, respecting bills of debt, as stated by Malynes, to be the cause or origin of the statute respecting promissory notes; and by connecting the former with the latter by the conjunction "and," it seems to be strongly implied, that he considered the statute only as a confirmation of what was law before. That he was correct in this opinion, and that the foreign custom of merchants respecting promissory notes, mentioned by Malynes, was gradually and imperceptibly engrafted into the English law-merchant, at the same time, and under the same sanction with inland bills, and that that custom was acknowledged repeatedly by solemn legal adjudications in the English courts, before the statute of Anne, will probably be admitted when the authorities are examined, which will be presented in the following pages. A greater degree of weight will be attached to the opinion of Comyns, when it is recollected, that he was either at the bar or on the bench, during the reigns of *King William III., Queen Anne, Geo. I. and Geo. II., and must, therefore, have known how the law stood before the [*384 statute, what motives produced it, and what was the true intent of the parliament in passing it.

Anderson, in his History of Commerce, relates a number of facts which may throw some light upon this subject. In vol. 1, p. 171, speaking of the great antiquity of bills of exchange, he mentions a charter granted by the emperor Barbarossa to the city of Hamburg, Anno 1189, in which one of their rights is "to negotiate money by exchange." He observes also, that bills of exchange were very new, at this time, in Europe, and were then in use only in the most considerable commercial cities. In p. 204, he says, that re-exchange, by way of damages, was first invented by the Ghibelines, when driven out of Italy by the Guelphs; and in p. 274, bills of exchange were known in England, Anno 1307, about the last year of the reign of Edw. I., and are alluded to in the statutes of 5 Ric. II., c. 3, Anno 1381; and 14 Ric. II., c. 2, Anno 1390. They are also mentioned Anno 1406, and are called *literæ Cambii.* Hence, it appears, that for a period of nearly 350 years, the custom of merchants respecting bills of exchange was considered as confined to foreign bills, and it is now upwards of 150 years since it has been allowed to extend to inland bills.

The time when inland bills and promissory notes began to be in general use in England, was probably about the year 1645 or 1646; and their general use at that time may be accounted for by the facts stated in Anderson's Hist. of Commerce, vol. 1, p. 386, 402, 484, 492, 493, 519 and 520. In the year 1638 or 1640, King Charles forcibly borrowed 200,000*l.* of the merchants of London, "who had lodged their money in the king's mint, in the tower, which place, before banking with goldsmiths came into use, in London, was made a kind of bank or repository for merchants therein safely to lodge their money; but which, after this compulsory loan, was never trusted in that way any more. Afterwards, they generally trusted their cash with their servants, until the civil war broke out, when it was very customary for their apprentices and clerks to leave their masters, and go into the army. Whereupon, the merchants began, about the year 1645, to lodge their cash in goldsmiths' hands, both to receive and pay for them; until which time, the whole and proper business of London goldsmiths was, to buy and sell plate and foreign coins of gold and silver," &c.

* "This account, says Anderson, "we have from a scarce and most curious [*385 small pamphlet, printed in 1676, entitled 'The mystery of the new-fashioned goldsmiths or bankers discovered, in eight quarto pages,' from which he extracts the following passage: 'Such merchants' servants as still kept their masters' running cash, had fallen into a way of clandestinely lending it to the goldsmiths at four pence per cent. per diem; who, by these and such like means, were enabled to lend out great quantities of cash to necessitous merchants and others, weekly or monthly, at high interest; and also began to discount the merchants' bills, at the like or a higher rate of interest. That much about this time, they (the goldsmiths or new-fashioned bank-

ers) began to receive the rents of gentlemen's estates remitted to town, and to allow them and others, who put cash into their hands, some interest for it, if it remained a single month in their hands, or even a lesser time. This was a great allurement for people to put their money into their hands, which would bear interest until the day they wanted it; and they could also draw it out by 100*l.* or 50*l.* &c., at a time, as they wanted it, with infinitely less trouble than if they had lent it out on either real or personal security. The consequence was, that it quickly brought a great quantity of cash into their hands; so that the chief or greater part of them were now enabled to supply Cromwell with money, in advance on the revenues, as his occasions required, upon great advantage to themselves."

"After the restoration, King Charles being in want of money, they took ten per cent. of him barefacedly; and by private contract on many bills, orders, tallies and debts of that king, they got twenty, sometimes thirty per cent. to the great dishonor of the government. This great gain induced the goldsmiths to become more and more lenders to the king; to anticipate all the revenue; to take every grant of parliament into pawn, as soon as it was given; also to outvie each other in buying and taking to pawn, bills, orders and tallies; so that in effect all the revenue passed through their hands. And so they went on, till the fatal shutting of the exchequer, in the year 1672."

"The banking trade was in its greatest height in 1667, when the Dutch burnt some ships at Chatham. But that disaster causing a run on the bankers, it in some measure lessened their future credit, which was entirely ruined by the shutting up of the exchequer, five years after; by which they were prevented from drawing out the money weekly, as it came in, so as to answer the demands upon them. The consequence was, their failure for nearly a million and a half sterling, which sum they were in advance to the king; and the ruin or injury of 10,000 families."

*386] *This short history of the goldsmiths will account for the sudden increase of paper credit, after the year 1645, and renders it extremely probable, that inland bills and promissory notes were in very general use and circulation. Indeed, we know that to be the fact, from the cases in the books; upon examining which, we shall find, that there was no distinction made between inland bills of exchange and promissory notes; they were both called bills; they were both called notes; sometimes, they were called "bills or notes." Neither the word "inland," nor the word "promissory," was at this time in use, as applied to distinguish the one species of paper from the other. The term "promissory note" does not seem to have obtained a general use, until after the statute. There was no distinction made, either by the bench, by the bar, or by merchants, between a promissory note and an inland bill, and this is the cause of that obscurity in the reports of mercantile cases during the reigns of Charles II., James II., and King William, of which Lord Mansfield complained so much in the case of *Grant* v. *Vaughan*, 3 Burr. 1525, and 1 W. Bl. 488; where he says, that in all the cases in King William's time "there is great confusion; for without searching the record, one cannot tell whether they arose upon promissory notes, or inland bills of exchange. For the reporters do not express themselves with sufficient precision, but use the words 'note' and 'bill' promiscuously." This want of precision is apparent enough to us, who now (since the decision of Lord Holt in the case of *Clerk* v. *Martin*) read the cases decided by him before that time; but at the time of reporting them, there was no want of precision in the reporter, for there was not, in fact, and never had been suggested, a difference in law between a promissory note and an inland bill. They both came into use at the same time, were of equal benefit to commerce, depended upon the same principles, and were supported by the same law.

IV. The case of *Edgar* v. *Chut*, or *Chat* v. *Edgar*, reported in 1 Keb. 592, 636 (Mich. 15 Car. II., Anno 1663), seems to be the first in the books which appears clearly to be upon an inland bill of exchange. Without doubt, many had preceded it, and passed *sub silentio*. The case was this: A butcher had bought cattle of a grazier, but not having the money to pay for them, and knowing that the parson of the parish had money in London, he obtained (by promising to pay for it) the parson's order or bill on his cor-

respondent, a merchant in London, in favor of the grazier. The parson having doubts of the credit of the butcher, wrote secretly to his correspondent, not to pay the money to the grazier, until the butcher had paid the parson. In consequence of which, the London merchant did not pay the draft, and the grazier brought his suit against the parson, and declared on the *custom of merchants. It was moved in arrest of judgment, that neither the drawer nor the payee was a merchant; but it was held to be sufficient, that the drawee was a merchant. [*387

Next came the case of *Woodward* v. *Row* (Mich., 18 Car. II., Anno 1666), 2 Keb. 105, 132, in which the court said, that "the law of merchants is the law of the land, and the custom is good enough generally for any man, without naming him merchant; and they will intend that he of whom the value is said to be received by the defendant, was the plaintiff's servant."

The next is *Milton's Case* (Mich., 20 Car. II.), Hardr. 485, of which it may be necessary to take notice, as it has been considered as a leading case, and as having established some principles upon which a number of subsequent cases have been decided. It was an action of debt, in the exchequer, upon a bill of exchange accepted. The plaintiff declared, that by the custom of England, if a merchant send a bill of exchange to another merchant, to pay money to another person, and the bill be accepted, that he who accepts the bill does thereby become chargeable with the sum therein contained; and that a certain merchant drew a bill of exchange upon the defendant, payable to the plaintiff, which bill the defendant accepted; *per quod actio accrevit.* Upon *nil debet* pleaded, the verdict was for the plaintiff. A motion was made in arrest of judgment, and one of the reasons assigned was, that there was "no privity between the plaintiff and defendant," "nor any contract in deed or in law."

The Chief Baron, among other things, said, that "without doubt, if the common law, or the custom of the place, create a duty, debt lies for it; as in the case of a toll due by custom (20 Hen. VII., and so in cases of a certain sum due by custom, for pound breach to the lord of the manor, or to a jailer for bar fees, 21 Hen. VII.). But the great question here is, whether or no a debt or duty be hereby raised: for if it be no more than a collateral engagement, order or promise, debt lies not, as in the case that has been cited, of goods delivered by A. to B., at the request of C., which C. promiseth to pay for, if the other does not; for in that case a debt or duty does not arise betwixt A. and C., but a collateral obligation only. In our case, the acceptance of the bill amounts clearly to a promise to pay the money; but it may be a question whether it amounts to a debt or not."

Precedents were ordered to be searched; but none being found, the court, afterwards, in Hilary term, 20 & 21 Car. II., declared their opinions, "that an action of debt would not lie upon a bill of exchange *accepted, against the acceptor; but that a special action upon the case must be brought against him. For the acceptance does not create a duty, no more than a promise made by a stranger to pay, &c., if the creditor will forbear his debt. And he that drew the bill continues debtor, notwithstanding the acceptance, which makes the acceptor liable to pay it. And this course of accepting bills, being a general custom among all traders, both within and without the realm, and having everywhere that effect as to make the acceptor liable to pay the contents, the court must take notice of that custom; but the custom does not extend so far as to create a debt; it only makes the acceptor *onerabilis* to pay the money. Though custom may give an action of debt, as in the case of toll; and so in case of a fine for a copyhold. Wherefore, and because no precedent could be produced that an action of debt had been brought upon an accepted bill of exchange, judgment was arrested." [*388

The ground of this judgment seems to be, that the drawer is the original debtor, and that the undertaking of the acceptor is only to pay the drawer's debt; and therefore, is a collateral and not an original engagement. If the court were mistaken in this position, the case is not law; or, at least, the reason of the case fails. It may be true, that the drawer is the original debtor, until the bill is accepted; but after the bill is accepted, the acceptor is the original debtor, and the undertaking of the drawer is col-

lateral, viz., to pay in case the acceptor does not. The question in the case of *Heylin* v. *Adamson*, 2 Burr. 674, was, who was the original debtor in a bill of exchange. Lord MANSFIELD said, "a bill of exchange is an order or command to the drawee, who has, or is supposed to have, effects of the drawer in his hands, to pay. When the drawee has accepted, he is the original debtor." If so, a duty is certainly created by the acceptance, and according to the Chief Baron's own admission, "debt lies for it." In the same case of *Heylin* v. *Adamson*, Lord MANSFIELD states the law to be the same respecting the maker of a promissory note, as the acceptor of a bill of exchange; yet it has been held, in the cases of *Rumbald* v. *Ball*, 10 Mod. 38; *Rudder* v. *Price*, 1 H. Bl. 547, and *Bishop* v. *Young*, 2 Bos. & Pul. 78, that debt lies against the maker of a promissory note. See also Chitty on Bills, 220, where the authority of the case in Hardres 485, is doubted.

The next case is that of *Brown* v. *London*, reported in 1 Vent. 152; 1 Lev. 298; 1 Mod. 285; and 2 Keb. 695, 713, 726, 758, 822 (Mich., 22 Car. II., Anno 1670), in which
*389] it was decided, upon the authority of *Milton's Case*, Hardr. 485, that *indebitatus assumpsit* would not lie upon *the acceptance of a bill of exchange. This case was not decided on the ground of want of privity, because it is said by the court, that "if A. delivers money to B. to pay to C., and gives C. a bill of exchange drawn on B., and B. accepts the bill, and doth not pay it, C. may bring an *indebitatus assumpsit* against B., as having received money to his use: but then he must not declare only on a bill of exchange accepted, as the case at bar is." And in the case of *Rables* v. *Sikes*, at the same term, 2 Keb. 711, such a declaration of *indebitatus assumpsit* for money had and received, in case of a bill of exchange, was adjudged good, upon demurrer.

The case of *Baker* v. *Hill* (Pasch., 28 Car. II.), 3 Keb. 627, is the next which occurs in the books. This is said by the reporter to be "Debt on inland bill by custom of merchants." This appears to be the first case in which the term "inland bill" is used, but it furnishes no evidence that the case was not upon a promissory note; for it will be observed by any one who will take the trouble to examine the cases prior to the judgment in the case of *Clerk* v. *Martin* (1 Anne), that the term promissory note was not in use, nor had they any technical name by which to distinguish a promissory note from an inland bill of exchange, unless it was by calling the former an inland bill, and the latter an inland bill of exchange. In the case of *Baker* v. *Hill*, the circumstance of its being an action of debt, induces a suspicion that it was a promissory note, because we have already seen that in the case of a bill of exchange, it had been decided in Hardr. 485, that an action of debt would not lie.

In the next case, which is "against *Elborough*" (Pasch., 28 Car. II.), 3 Keb. 765, it seems doubtful, whether it was a promissory note, or an inland bill of exchange. It is a short note of a case, in these words: "In action upon the case, on custom of London, that any merchant or other inhabitant there, subscribing a note for payment of money to any other, not said where inhabiting; on default of payment by him on whom the bill is drawn, should pay, &c. Thompson excepted, in arrest of judgment, that no action lieth, as between merchants it doeth; *sed non allocatur*, for, *per curiam*, there is as much reason for inland bills, as for bills of exchange, and this is no more, and being averred that the defendant is an inhabitant in L. &c., judgment for the plaintiff."

The case of *Shelden* v. *Hentley*, 2 Show. 161 (33 Car. II., B. R., Anno 1680), was "upon a note under seal, whereby the defendant promised to pay to the bearer thereof, upon delivery of the note, 100*l.*, and avers that it was delivered to him (meaning the
*390] defendant), by the bearer thereof, and that he (the plaintiff) was so." *It was objected, that this was no deed, because there was no person named in the deed to take by it. But it was answered, that it was not a deed until delivered, and then it was a deed to the plaintiff. COURT.—The person seems sufficiently described, at the time that 'tis made a deed, which is at its delivery: and suppose, a bond were now made to the Lord Mayor of London, and the party seals it, and after this man's mayoralty is out, he delivers the bond to the subsequent mayor, this is good; *et traditio facit chartam loqui.* And by the delivery, he expounds the person before meant; as when a merchant promises to pay to the bearer of the note, anyone that brings the note shall

be paid. But Mr. Justice JONES said, it was the custom of merchants that made that good. Here, it will be observed, that the court, in order to elucidate the subject before them, refer to principles of law more certain and better known, viz., that a promissory note payable to bearer is good, and that promissory notes were within the custom of merchants.

Then followed the case of *Norfolk* v. *Howard* (Trin., 34 Car. II., B. R., Anno 1681), 2 Show. 235, which was "case upon special promise, on a note, wherein the defendant promised to pay unto the plaintiff 50*l.*, at any time during the joint lives of plaintiff and defendant, within three months after the plaintiff should demand the same; and no demand *modo et forma* pleaded." The demand proved was by plaintiff's attorney, who delivered a demand in writing, at the defendant's house, to his maid, by whom it was sent up to the defendant, being sick and not to be spoken with; the maid brought down word, she had delivered it to her master — held, no good evidence to maintain the action, for the demand ought to be personal. No objection was made to the form of the action; it was only to the sufficiency of the demand.

The next case is *Hinton's* (Mich., 34 Car. II., Anno 1681), 2 Show. 235, which is said to be, "Case on a bill of exchange against the drawer. Bill not being paid, and payable to I. S., or to the bearer, the plaintiff brings the action as bearer; and upon evidence, ruled by the Lord PEMBERTON, that he must entitle himself to it, on a valuable consideration, though among bankers, they never make indorsements in such case; for if he come to be bearer by casualty or knavery, he shall not have the benefit of it." It does not appear, that this is not an action on a promissory note. It seems to have been either a banker's promissory note, or a check drawn on a banker, and at this time, no difference was supposed to exist as to the law in those cases. But it expresses a clear opinion, that the bearer of such a note or bill *may maintain an action in his own name, if he came fairly by the bill. And although this principle was denied [*391 in the subsequent cases of *Horton* v. *Coggs*, *Hodges* v. *Steward*, and *Nicholson* v. *Sedgwick*, yet these again were expressly overruled and denied to be law by Lord MANSFIELD and the rest of the judges, in the case of *Grant* v. *Vaughan*, 3 Burr. 1516, in which case, the reasoning of the court applies as strongly to the case of a promissory note, as to that of an inland bill of exchange.

In the case of *Claxton* v. *Swift*, in the exchequer, on a writ of error (Hil., 36 & 37 Car. II., Anno 1684), 1 Lutw. 878, it was decided, upon an inland bill, "that the first drawer of the bill and every indorser is liable to the payment of a sum certain to the last indorsee." No difference was then taken between an inland bill and a promissory note; both were considered as being within the custom. So that what is stated to be law as to one, may be considered to be law as to the other.

In the cases of *Cramlington* v. *Evans* (Trin., 3 Jac. II.), 2 Vent. 296, and *Ewers* v. *Benchkin* (Mich., 4 Jac. II.), 1 Lutw. 231, the pleadings are set forth at large, and show the manner of declaring upon the custom as to inland bills.

The case of *Darrach* v. *Savage* (Pasch., 2 W. & M., Anno 1689), 1 Show. 155, was "*indebitatus assumpsit* for 40*l.* received to the plaintiff's use; *non assumpsit* pleaded; and upon the trial, the evidence was a bill of exchange, or note under the defendant's hand, dated the 22d February 1687, directed to a merchant in London, 'pray pay to Mr. Darrach, or his order, the sum of 40*l.*, and place it to my account, value received, witness my hand.'" This case shows that a bill or note was good evidence in an action for money had and received; and that no distinction was made between a bill and a note.

Horton v. *Coggs* (Mich., 2 W. & M., C. B., Anno 1689), 3 Lev. 299, was clearly upon a promissory note, yet in the margin it is called "*assumpsit sur bill de exchange.*" The plaintiff "declared upon a custom in London, that if any merchant, or other person merchandising in London, make a note in writing, under his hand, and thereby promise to pay any sum of money therein contained, to a person therein named or bearer; and if the person in the note named, to whom by the note it was promised to be paid, assign or deliver it to any other person, to receive it to his own use, and he bring it to the drawer *of the note, and request him to pay it to him who brings the note, then the person who made the note was chargeable to pay it to the bearer. And that [*392

the defendant, being a goldsmith, made such a note, thereby promising to pay 100*l.* to William Barlow, or the bearer; and that Barlow delivered the note to the plaintiff, to receive the money to his own use, in satisfaction of 100*l.* due to him by Barlow; and that the plaintiff brought and showed this to the defendant, and requested him to pay the 100*l.*, which he had not done, whereby, by the custom, he became chargeable, and so being chargeable, assumed to pay. After verdict for the plaintiff, it was moved in arrest, &c., that this custom to pay to bearer was too general; for perhaps, the goldsmith, before notice by the bearer, had paid this to Barlow himself. (And this was at bar now alleged to be the truth of the case.) And of such opinion, after divers motions in Hilary term, and this term, were POLLEXFEN, POWELL, and ROKEBY; VENTRIS being dead in the last vacation. Although, upon the trial of the cause, before POLLEXFEN, at Guildhall, he then held, that the action well lay, this matter being objected at the trial. Levinz, of counsel for the plaintiff." In this case, the only objection was, that a custom to pay to bearer was too general. It seems to be admitted, that Barlow himself might have brought an action upon the custom; and that a custom to pay to order, or to indorsee, would have been good. It is a sufficient answer to this case, that in the case of *Grant* v. *Vaughan*, 3 Burr. 1516, it was declared not to have been law, so far as it decided that an action could not be maintained by the bearer of such a note, in his own name.

The case of *Dehers* v. *Harriot* (Trin., 2 W. & M.), 1 Show. 163, was this: "A. draws a first and second bill of exchange, payable by himself, in Dublin, to B. or order," who indorsed to the plaintiff. No question was made as to this being a bill of exchange; and yet it differs in nothing but in form from a promissory note.

The next case is *Hodges* v. *Steward* (Pasch., 5 W. & M.), reported in Comb. 204; 1 Salk. 125; 12 Mod. 36; and Holt 115. The case is thus shortly stated by Comberbach: "Case, upon a bill of exchange: custom was laid in London, that where a bill is payable to A. or bearer, it must be paid to the indorsee. HOLT, Chief Justice, said, it was repugnant; for another person, and not the indorsee, might be the bearer." This seems to be the true ground of the decision, although the reasons are variously stated by the different reporters. They all call it a bill of exchange, but in 12 Mod. 36, we are informed what kind of a bill of exchange it was, viz., a bill drawn by the *defendant on himself, payable to another or bearer. The payee indorsed it and the indorsee, as such, and not as bearer, brought the action, which was held not to lie; because no authority was given to the payee to indorse, or to transfer it by indorsement. And in 1 Salk. 125, it appears, that in the same case, a difference was taken between a bill payable to bearer, and to order; for a bill payable to "I. S., or bearer, is not assignable by the contract, so as to enable the indorsee to bring an action; because there is no such authority given to the party by the first contract." "But when the bill is payable to I. S., or order, there an express power is given to the party to assign, and the indorsee may maintain an action." It was also said, that although such an indorsement is not a good assignment of the bill, so as to charge the drawer; yet it is a good bill betwen the indorser and indorsee; and the indorser is not liable to an action for the money, "for the indorsement is in nature of a new bill." It was also held (as it had been before adjudged in *Milton's Case*, Hardr. 485, and in *Brown and London's Case*, 1 Vent. 152), that a general *indebitatus assumpsit* would not lie on a bill of exchange, but that the action must be either a general *indebitatus assumpsit* for money had and received, or a special action upon the case, grounded on the custom. Upon this case, it may be remarked, that a bill drawn by a man on himself is precisely a promissory note in effect; and Lovelass, in his treatise on Bills and Notes, p. 22, expressly says, "that the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing." Marius, also, in his Advice, p. 3, says, "a bill may be by two persons, as where the drawer makes the bill payable to himself or order," so where a man draws a bill on himself. The same is said by Kyd on Bills, p. 2, and Chitty, 22, 48, says, "a bill will be valid, where there is only one party to it, for a man may draw on himself, payable to his own order; but in

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such case, it is said, that the instrument is more in the nature of a promissory note than a bill of exchange."

The next case is that of *Hill et al.* v. *Lewis* (Hil., 5 W. & M., B. R.), 1 Salk. 132. This was an action by the holder against the indorser of two notes subscribed by one Moore, a goldsmith, payable to the defendant, and by him indorsed in blank, and delivered to one Zouch, to whom he was indebted. Zouch delivered them, so indorsed, to the plaintiffs, and received from the plaintiffs therefor, other bills and some cash. One of the notes was payable to the defendant or order, the other was payable to the defendant, without the words "or order." Moore broke and ran away; the plaintiff declared, 1st. Upon two bills of exchange against the indorser; 2d. Upon a *mutuatus;* 3d. Upon *an *indebitatus assumpsit* for money laid out for the use [*394 of the defendant. And the principal question was, whether the plaintiffs had used due dilligence in applying to Moore for the money. Holt, Chief Justice, held, "That goldsmiths' bills were governed by the same laws and customs as other bills of exchange; and every indorsement is a new bill: and so long as a bill is in agitation (circulation), and such indorsements are made, all the indorsers, and every of them, are liable as a new drawer. That by the law, generally, every indorser is liable as the first drawer, and cannot be discharged, without an actual payment; and is not discharged by the acceptance (receipt) of the bill by the indorsee; but by the custom this is restrained, viz., the acceptance (receipt) is intended to be upon this agreement, sct., that the indorsee will receive it of the first drawer, if he can, and if he cannot, then that the indorser will answer it; as, if the first drawer be insolvent, at the time of the indorsement, or upon demand, refuses to pay it, or cannot be found. And the indorser is not discharged, without actual payment, until there be some neglect or default in the indorsee, as if he does not endeavor to receive it, in convenient time, and then the first drawer becomes insolvent." "He left it to the jury to consider, whether the time in this case were convenient time or not; and if the plaintiff had convenient time to receive his money, then to find for the defendant, otherwise, for the plaintiff. And they, upon consideration, found for the plaintiff; upon which the plaintiff prayed to take the verdict upon the *indebitatus assumpsit. Et per* Chief Justice.—You cannot take the verdict upon any part of the declaration but that to which evidence was given, and here it will be good, if found upon the bills of exchange; but if the evidence be applicable to any other part of the declaration, you may take it upon any such part to which the evidence is applicable. And because Zouch had sworn, that he received the benefit of, and had been satisfied with, the bill he took of the plaintiff, by which the defendant was discharged against Zouch, the verdict was taken upon the *indebitatus assumpsit* for money laid out for the defendant's use; and it seemeth, the indorsement by the defendant to the plaintiff was good evidence of a request to pay the said money to Zouch. Now, exception was taken that one bill was payable to the defendant only, without the words 'or his order,' and, therefore, not assignable by the indorsement; and the chief justice did agree that the indorsement of this bill did not make him that drew the bill chargeable to the indorsee; for the words 'or to his order,' give authority to the plaintiff to assign it by indorsement; and 'tis an agreement by the first drawer that he would answer it to the assignee; but the indorsement of the bill which has not the words 'or to his order' is good, or of the same effect between the indorser and the indorsee, to make the indorser chargeable to the indorsee." This case *certainly [*395 ought to have been considered as settling the law upon promissory notes. Lord Holt here admits that promissory notes are "governed by the same laws and customs as other bills of exchange;" and that if the verdict had been taken upon the count which declared upon the notes, as bills of exchange, it would have been good. His reasons why a note to order is assignable, viz., "that the words 'or to his order,' give authority to the plaintiff to assign it by indorsement; and that 'tis an agreement by the first drawer that he would answer it to the assignee," are certainly good; and are the same which were used in several modern cases which will be noticed hereafter. The observation is also important "that the indorsement by the defendant to the plaintiff was good evidence of a request to pay the money to Zouch." We shall have occa-

sion to refer to this case again, when we come to consider the cases of *Clerk* v. *Martin*, and *Buller* v. *Crips*, decided about nine years afterwards.

The case of *Pearson* v. *Garret* occurred in the next term (Anno 1693), and is reported in Comb. 227; and 4 Mod. 242. "The action was brought upon a note for the payment of sixty guineas, when the defendant should marry such a person, &c., in which the plaintiff declared as upon a bill of exchange setting forth the custom of merchants," &c. This note appears by the declaration, which is stated at length, 4 Mod. 242, to be dated 21st October, 4 W. & M., by which the defendant "promised to pay to the plaintiff, or his assigns, sixty guineas, in two months after the defendant should be lawfully married to one Elizabeth Pretty." It was objected, that this was "only an agreement founded upon a brokage, and, therefore, not within the custom of merchants; neither were there ever yet any precedents to pay money upon such a collateral contingency." The judgment was for the defendant; and it was said, that, "if the note had been given by way of commerce, it had been good; but to pay money upon such a contingency, cannot be called trading, and therefore, not within the custom of merchants."

If any doubt could remain, that the case of *Hill* v. *Lewis* had fully settled the law, that promissory notes were within the custom of merchants, that doubt must have been completely removed by the case of *Williams* v. *Williams*, decided at the next term in the same year, in the king's bench (viz., Pasch., 5 W. & M., Anno 1692), Carth. 269. "The plaintiff, Thomas Williams, being a goldsmith in Lombard street, brought an action on the case against Joseph Williams, the projector of the diving engine, and declared upon a note drawn by one *John Pullin, by which he promised to pay
*396] 12*l.* 10*s.* to the said Joseph Williams, on a day certain; and he indorsed the note to one Daniel Foe, who indorsed it to the plaintiff, for like value received. And now, the plaintiff, as second indorsee, declared in this manner, viz., "that the city of London is an ancient city, and that there is, and from the time to the contrary whereof the memory of man doth not exist, there hath been, a certain ancient and laudable custom among merchants, and other persons residing and exercising commerce, within this realm of England, used and approved, viz., &c. So sets forth the custom of merchants concerning notes so drawn and indorsed *ut supra*, by which the first indorser is made liable, as well as the second, upon failure of the drawer, and then sets forth the fact thus, viz.: And whereas also, a certain John Pullin, who had commerce by way of merchandising, &c., on such a day, at London aforesaid, to wit, in the parish of St. Mary le Bow, in the ward of Cheap, according to the usage and custom of merchants, made a certain bill or note in writing, subscribed with his name, bearing date, &c., and by the said bill or note, promised to pay, &c., setting forth the note; and further, that it was indorsed by the defendant to Foe, and by Foe to the plaintiff, according to the usage and custom of merchants; and that the drawer having notice thereof, refused to pay the money, whereby the defendant, according to the usage and custom of merchants, became liable to the plaintiff, and in consideration thereof, promised to pay it, &c., alleging that they were all persons who traded by way of merchandise, &c.

"To this, the defendant pleaded a frivolous plea, and the plaintiff demurred; and upon the first opening of the matter, had judgment in B. R. And now, the defendant brought a writ of error in the exchequer chamber, and the only error insisted on was, that the plaintiff had not declared on the custom of merchants in London, or any other particular place (as the usual way is), but had declared on a custom through all England, and if so, it is the common law, and then it ought not to be set out by way of custom; and if it is a custom, then it ought to be laid in some particular place, from whence a venue might arise to try it. To which it was answered, that this custom of merchants concerning bills of exchange is part of the common law, of which the judges will take notice *ex officio*, as it was resolved in the case of *Carter* v. *Downish*, and therefore, it is needless to set forth the custom specially in the declaration, for it is sufficient to say, that such a person, according to the usage and custom of merchants,
drew the bill; therefore, all the matter in the declaration concerning the special
*397] *custom was merely surplusage, and the declaration good without it. The judgment was affirmed."

There cannot be a stronger case than this. On demurrer, judgment was rendered for the plaintiff in the king's bench, which judgment was affirmed, upon argument, upon a writ of error in the exchequer chamber, on the very point of the custom; so that here was the unanimous concurrence of all the judges of England. This case, it is believed, has never been denied to be law, either before or since the statute of Anne. A short note of this case is to be found in 3 Salk. 68, by the name of *Williams* v. *Field*, in these words, "Ruled, that where a bill is drawn payable to W. R., or order, and he indorses it to B., who indorses it to C., and he indorses it to D., the last indorsee may bring an action against any of the indorsers, because every indorsement is a new bill, and implies a warranty by the indorser, that the money shall be paid."

The next case upon a promissory note is that of *Bromwich* v. *Lloyd* (Hil., 8 W. III., C. B., Anno 1696), 2 Lutw. 1582, where the pleadings are set forth at full length, in which the plaintiff declares, that "at London aforesaid, viz., in the parish, &c., there is a custom, that if any merchant or other person residing and trading at London, make any note, with his proper hand subscribed, and thereby promise to pay to any other person dwelling at London, any sum in such note specified, then such person who subscribed such note, by reason thereof, and by the said custom, is liable to pay the money, &c. That the defendant, 8th June 1696, residing and dealing at London, made a note, &c., and thereby promised to pay to the plaintiff, at London aforesaid, in the parish and ward aforesaid residing, 26*l.* 10*s.* 9*d.*, on demand, by reason whereof, &c. To this, the defendant pleaded, that at the time of making the said note, he was resident at Brentford, &c., *absque hoc*, that he was resident at London. To which plea, the plaintiff demurred, for that the defendant had traversed matter not traversable, and because it tended to the general issue," &c.

It was urged, for the defendant, that the custom was laid in St. Mary le Bow, but in fact, is extended to London, and was therefore contradictory. *Sed non allocatur*, "for, *per curiam*, the parish is mentioned *but in respect of the venue, and that [*398 it was matter of necessity to allege it so." And it was further said, for the defendant, "that there were three things necessary to maintain the action, viz.: 1. Commorancy; 2. The making of the note; 3. Commerce between the parties; but there is no place mentioned in the declaration, where the note was made: *sed non allocatur*, for it shall be intended at the parish of St. Mary le Bow; for it is said, that the defendant, at London aforesaid, in the parish and ward aforesaid, residing and using commerce, made a note; and therefore, the whole is to be intended at the same place. It was also objected, that the custom was unreasonable, because it took away the proof how the money became due; but the court were of opinion, that the custom was good, notwithstanding this objection.

"Treby, Chief Justice, said, in this case, that bills of exchange, at first, were extended only to merchant strangers, trading with English merchants, and afterwards to inland bills between merchants trading one with another here in England; and after that, to all traders and dealers, and of late, to all persons, trading or not; and that there was no occasion to allege any custom; and that was not denied by any of the other justices. And the chief justice also said, that bills of exchange were of such general use and benefit, that on an *indebitatus assumpsit*, a bill of exchange may be given in evidence to maintain the action; and Powell, Justice, said, that on a general *indebitatus assumpsit* for money received to the use of the plaintiff, such bills may be left to the jury to determine whether it was for value received, or not. In Hil., 9 & 10 Wm. III., the plaintiff had judgment, by the opinions of the whole court." This case is in perfect conformity to those of *Hill* v. *Lewis*, and *Williams* v. *Williams*.

The case of *Pinckney* v. *Hall* (Hil., 8 & 9 Wm. III., Anno 1697, B. R.), 1 Ld. Raym. 175, was by the indorsee of a promissory note, made by the defendant, for himself and partner, as joint merchants, to Hutchins, or order, and by him indorsed to the plaintiff. The declaration was on the custom of England, to which the defendant demurred. 1st. "Because the declaration being *per consuetudinem Angliæ*, &c., was ill, for the custom of England is the law of England, of which the judges ought to take notice, without pleading. *Sed non allocatur.* For though heretofore this has been al-

lowed, yet, of late time, it has always been overruled, and in an action against a carrier, it is always laid *per consuetudinem Angliæ*. 2. Though *lex mercatoria* is part of the *399] *law of England, yet it is but a particular custom among merchants, and therefore, it ought to be shown in London, or some other particular place. *Sed non allocatur;* for the custom is not restrained to any particular place." Two other exceptions were taken, which are not material to the present question; but judgment was given for the plaintiff.

At the next term (Easter, 9 Wm. III.), 1 Ld. Raym. 180, occurred the case of *Nicholson* v. *Sedgwick*, reported also in 3 Salk. 67, where it is stated to be upon a bill. "The defendant Sedgwick, being a goldsmith, made a note in writing, by which he promised to pay to one Mason, or to the bearer thereof, 100*l*. Mason delivered the note to the plaintiff for 100*l*. in value received," who brought the action as bearer, and declared upon the "custom of merchants and others trading within this realm." Upon *non assumpsit* pleaded, and verdict for the plaintiff, "it was moved in arrest of judgment, that this action could not be brought in the name of the bearer, but it ought to be brought in the name of him to whom it was made payable. *Quod fuit concessum per curiam;* for the difference is, where the note is made payable to the party or bearer, and where it is payable to the party or order; in the latter case, the indorsee has been allowed to bring the action in his own name." The principal point of this case, viz., that the bearer could not maintain an action in his own name, was expressly declared not to be law in the case of *Grant* v. *Vaughan*, 3 Burr. 1516.

In the same year, in the case of *Boulton* v. *Hillesden*, Comb. 450, it was decided, that a master may be bound by a promissory note made by his servant. Another case, in the same year, is cited in 1 Com. Dig. 190, 191, by the name of *Cromwell* v. *Floyd*, in C. B., which does not seem to have been reported, unless it be the same case with that reported in 2 Lutw. 1582, by the name of *Bromwich* v. *Lloyd;* which is not impossible.

In Mich. term of the same year, in the case of *Woolvil* v. *Young et al.*, 5 Mod. 367, it was held, that a declaration upon a promissory note, founded on the custom of England, was bad, because it did not allege that the defendants were *commercium habentes;* but it seems to admit, that it would have been good, if those words had been used.

In an anonymous case, in chancery, in the same year, reported by Ch. Baron *400] Comyns, p. 43, it is said, that the "indorsee for a valuable *consideration, recovered in *indebitatus assumpsit* on this bill of exchange against the drawer. The drawer filed a bill in chancery to be relieved against this judgment at law, alleging that he received no value; and that the indorsee might resort to the indorser for his original claim. It was answered, that the drawer might be relieved against the payee, or any claiming as servant or factor of, or to the use of the payee: but the chancellor held, that the indorsee being an honest creditor, and coming by this bill fairly, for the satisfaction of a just debt, he would not relieve against him, because it would tend to destroy trade, which is carried on everywhere by bills of exchange, and he would not lessen an honest creditor's security." It may be doubted, whether this was really a bill of exchange or a promissory note; and perhaps, it is immaterial which it was, as the law had been clearly settled to be the same upon both. Yet, if it had been a bill of exchange, it seems probable, that something would have been said of the drawee; by which it should appear, that the plaintiff had a right of action against the drawer; such as that the bill had been presented for acceptance and refused; or that being accepted by the drawee, he had refused to pay, &c.

The case of *The Bank of England* v. *Newman*, 12 Mod. 241; B. R., 1 Ld. Raym. 442, and Comyns 57, was upon a promissory note, drawn by one Bellamy, payable to Newman, or bearer, who discounted is at the bank, without indorsing it. Upon Bellamy's failure, the bank brought suit against Newman. But the court held him not to be liable, "for the law is, that if a bill or note be payable to one, or bearer, and he negotiates the bill, and delivers it for ready money paid to him, without any indorsement on the bill, this is a plain buying of the bill; as of tallies, bank-bills, &c., but if it be indorsed, there is a remedy against the indorser."

Hawkins v. *Cardy*, in the next year (Mich., 10 Wm. III., B. R.), 1 Ld. Raym. 360; 1 Salk. 65; Carth. 466, was also upon a promissory note. "The plaintiff brought an action on the case, upon a bill of exchange" (says the reporter), "against the defendant, and declared upon the custom of merchants, which he showed to be thus: that if any merchant subscribes a bill, by which he promises to pay a sum of money to another man, or his order, and afterwards, the person to whom the bill was made payable, indorses the said bill, for the payment of the whole sum therein contained, or any part thereof, to another man, the first drawer is obliged to pay the sum so indorsed to the person to whom it is indorsed payable; and then the plaintiff shows that the defendant being a merchant, subscribed a bill of *46*l.* 19*s.* payable to Blackman, or order; that Blackman indorsed 43*l.* 4*s.* of it, payable to the plaintiff," &c. On demurrer, [*401 the declaration was adjudged ill; "for a man cannot apportion such personal contract; for he cannot make a man liable to two actions, where by the contract he is liable but to one." "But if the plaintiff had acknowledged the receipt of the 3*l.* 15*s.* the declaration had been good." And Holt, Chief Justice, said, "that this is not a particular local custom, but the common custom of merchants, of which the law takes notice." Salkeld, in reporting this case, begins thus: "A. having a bill of exchange upon B., indorses part of it to I. S., who brings an action for his part," &c. This, compared with Lord Raymond's report of the case, shows what has been already so often mentioned, that no difference had yet been discovered between the law respecting promissory notes, and that concerning inland bills of exchange. Even Lord Raymond states it first to be a bill of exchange, and immediately shows it to have been a promissory note. So glaring a contradiction could not have passed uncorrected, if a promissory note and an inland bill of exchange had not been considered as the same thing. In this case, it will be remarked, that upon demurrer, the court said, that this declaration, upon the custom of merchants, on a promissory note, by the indorsee against the maker, would have been good, if the receipt of the 3*l.* 15*s.* had been acknowledged.

The next year produced the case of *Lambert* v. *Oakes* (Pasch., 11 Wm. III., B. R.), reported in 1 Ld. Raym. 443; 1 Salk. 127, by the name of *Lambert* v. *Pack; Anon.*, 1 Salk. 126, case 6; 12 Mod. 244, and Holt 118. This case was clearly upon a promissory note, although four out of the five reports of the case call it a bill of exchange. This circumstance shows that no difference was understood to exist at that time between a promissory note and an inland bill of exchange; for upon this supposition only, can we account for the extreme inaccuracy of so many reporters upon that point. The fact of its being called a bill of exchange, induces also a strong presumption of another fact, which does not expressly appear in Lord Raymond's report of the case, and that is, that the plaintiff grounded his action on the custom of merchants; which was, at that time, the only known and established form of declaring upon a promissory note. This was, then, an action by the indorsee against the indorser of a promissory note, payable [*402 *to defendant or order, grounded on the custom of merchants, in which it was decided, that the plaintiff must demand the money of the drawer of the note, before he could resort to the indorser; and is another strong case to show that promissory notes and inland bills of exchange, before the statute of Anne, were precisely on the same footing.

The case of *Starke* v. *Cheeseman*, in the same year, Carth. 509, was upon a bill of exchange, drawn by the defendant in Virginia, upon himself in London, which, as has been before observed, is in effect a promissory note. The plaintiff had judgment, although he had not alleged in the declaration, that the defendant promised to pay the money after protest, or even that he had notice of the protest, for "the law did raise the promise, upon the custom of merchants, and therefore, it was not necessary to lay an actual promise."

In the next year (Pasch., 12 Wm. III., Anno 1700, B. R.), we find the case of *Carter* v. *Palmer*, reported in 12 Mod. 380. "Palmer had given a note under his hand in this form: "I promise to pay the bearer so much money on demand." Plaintiff brings his action, grounding it upon the custom of merchants, as if it were a bill of exchange; and avers no consideration. After verdict, upon motion in arrest of judgment, Holt,

Chief Justice, "We will take such a note *primâ facie* for evidence of money lent; and though they have declared on the custom, yet we must take care that, by such a drift, the law of England be not changed, by making all notes bills of exchange." "But all seemed to agree, if it were made payable to him or order, the defendant, by that form, had made it negotiable, and by consequence, he would be liable to the action of assignee in his own name; for if a man, who is no merchant, will draw a bill of exchange, he is suable upon it, according to the custom of merchants, for he makes himself a merchant *pro tanto*. And inland bills were not known until trade grew to a great height; and when they obtained, they received the same law with outlandish bills; and he said, he remembered, that at a trial upon an inland bill, before HALE, the defendant's counsel would put the plaintiff to prove the custom; but Hale said they had a hopeful point of it. *Et adjorn.*" It does not appear that this case was finally decided, but the principal point, viz., that a bill or note payable to bearer was not a bill of exchange, had been before decided in the cases of *Horton* v. *Coggs*, *Hodges* v. *Steward*, and *Nicholson* v. *Sedgwick* (before cited). But *these cases, as before observed, were expressly denied to have been law, by Lord MANSFIELD and the other judges, in the case of *Grant* v. *Vaughan*, 3 Burr. 1516.

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The other point of the case, viz., that if the note had been made payable to him, or order, the defendant, by that form, had made it negotiable, and the assignee might have sued in his own name, is in strict analogy with the whole current of authorities, from the time of the first introduction of promissory notes: and the reason given is the same with that used in the case of *Grant* v. *Vaughan*, viz., that the defendant, by the original contract, had made it negotiable, and had made himself expressly liable to the action of the assignee. The further reason given by the court shows most clearly, that a promissory note, payable to order, was an inland bill of exchange; "for, say the court, if a man, who is no merchant, will draw a bill of exchange, he is suable upon it, according to the custom of merchants, for he makes himself a merchant *pro tanto*."

There was another similar case at the same term, between *Jordan* and *Barloe*, 3 Salk. 67, where it is said to be "ruled, that where a bill is drawn, payable to W. R. or order, 'tis within the custom of merchants; and such a bill may be negotiated and assigned by custom, and the contract of the parties; and an action may be grounded on it, though 'tis no specialty; but if 'tis made payable to W. R., or bearer, 'tis not within the custom of merchants: and therefore, when, upon such a bill, the plaintiff declared that the defendant being a merchant, had drawn a bill according to the custom of merchants, but had not paid the money, this declaration was held ill."

Although the instrument in this case is not expressly stated to be a promissory note, yet it seems strongly implied, from the expressions used. For it may be remarked, 1st. That it appears by all the reports of the time, that the words bill and note were synonymous; that the term promissory note was not in use, and that, generally, whenever the term bill is used alone, it meant a promissory note. 2d. It is said, that "a bill payable to W. R., or order, was within the custom of merchants." It was surely not necessary, at that time, to have decided solemnly that a bill of exchange was within the custom of merchants. 3d. It is said, that "such a bill may be negotiated and assigned by custom, and the contract of the parties, and an action may be *grounded on it, though 'tis no specialty;" which last expression seems more applicable to a promissory note than to a regular bill of exchange. 4th. It is said, that "the defendant drew a bill, but had not paid the money;" without naming any drawee, or a non-acceptance or non-payment by the drawee, or any other circumstance to show that the drawer was liable to pay the money. 5th. The points decided are precisely those mentioned in the preceding case of *Carter* v. *Palmer*.

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In the case of *Crawley* v. *Crowther*, 2 Freem. 257 (Trin., 1702), in chancery, it was said, that "it is now likewise held, and the practice is so, that if a man gives a note for money payably on demand, he need not prove any consideration."

Lawson v. *Lamb* (Hil., 12 Wm. III., C. B., Anno 1700), 1 Lutw. 274, was another case upon a promissory note by assignee of payee, a bankrupt, against the maker of the note. The pleadings are set forth at large, and it appears that the plaintiff declared

upon the custom of merchants, within the realm of England, upon a note payable to the bankrupt or order. "The objection to the declaration was, that all the proceedings of the commissioners of bankrupt ought to be alleged at large; but by reason of divers precedents, according to the declaration here, judgment *per tot. cur.* was given for the plaintiff."

In Trin. term of the same year, it is said by Comyns, in his Digest, p. 191, of vol. 1, that in the case of *Butcher* v. *Swift*, in B. R., it was doubted, whether a promissory note to A., or order, was within the custom of merchants, and whether the assignee could bring an action upon it in his own name. This case, it is believed, has not been reported.

In 1 Salk. 283, *Ford* v. *Hopkins* (Hil., 12 Wm. III.), Lord Holt is reported to have said at *nisi prius*, "that goldsmith's notes to pay money, or tickets, are evidence of the receipt of money." As he had before said, that every indorsement makes a new bill, it seems to follow, that an indorsement is also evidence of the receipt of money.

We have now examined all the reported cases upon promissory notes, from the time of the first introduction of inland bills, to the time of Lord Holt's decision in the case of *Clerke* v. *Martin*. At least, if any *others are to be found, they have escaped a diligent search. They form a series of decisions for a period of more than [*405 thirty years, in which we discover an uncommon degree of unanimity as well as of uniformity. We find the law clearly established to be the same upon promissory notes as upon inland bills; and we find no evidence that the latter were in use before the former. There is not a contradictory case, or even *dictum*, unless we consider as such the doubt expressed in the case of *Butcher* v. *Swift*, cited by Comyns; but that case is not reported, and therefore, it is impossible to say, upon what ground the doubt was suggested. The cases upon promissory notes and inland bills go to establish not only their likeness in every respect, but even their identity; for the former are almost uniformly called inland bills.

V. Upon examining the printed books of precedents, during the above period, we shall find that the common usage was, to declare upon a promissory note, as upon an inland bill of exchange.

The first precedent of a declaration upon a promissory note is that in Brownlow, Latine Redivivum, p. 74, which is prior to any of the declarations upon inland bills of exchange. It is, in substance, as follows, that there is, and was, from time immemorial, a custom among merchants at the city of Exeter, and merchants at Crozict, that if any merchant at Crczict should make any bill of exchange, and by the said bill should acknowledge himself to be indebted to another merchant, in any sum of money, to be paid to such other merchant, or his order, and such merchant to whom the same should be payable, should order such sum to be paid to another merchant, and such merchant to whom the same was payable, should request the merchant who acknowledged himself so as aforesaid to be indebted, to pay such sum to such other merchant to whom he had ordered the money to be paid; and if, upon such request, the merchant who acknowledged himself to be indebted in the sum in such bill and indorsement mentioned, should accept thereof, then he would become chargeable to pay the said sum to the person to whom it was by the said bill and indorsement directed to be paid, at the time in the said bill mentioned, according to the tenor thereof. It then avers, that on the 8th May 1678, the defendant, according to the custom aforesaid, acknowledged himself to be indebted to one M. M. in 52*s*., which he obliged himself and his assigns (this is probably misprinted) to pay to the said M. M., who, by indorsement on the same bill of exchange, on ——, at ——, ordered the money to be paid to the plaintiff, which bill of exchange afterwards, to wit, on ——, at ——, the defendant saw and accepted, by which acceptance, and by the usage aforesaid, the *defendant became liable, &c., and in [*406 consideration thereof, promised to pay, &c. There is, in the same book, p. 77, a declaration upon a bill of exchange at double usance, which is probably upon an inland bill, as the custom is alleged, generally, among merchants, but does not say at what place.

The next declaration on a promissory note is in the case of *Horton* v. *Coggs*, 3 Lev.

296. The note is dated 1st October, 4 Jac. II. The custom is alleged to be in London, that if any merchant or goldsmith, in London, should make a bill or note in writing, with his name subscribed, and thereby promise to pay to any person or bearer, &c.

In Clift's Entries 918, is a declaration upon an inland bill of exchange, calling it a note, and the word bill is not mentioned in the whole count. This shows that the words bill and note were considered as synonymous. In the same book, p. 899, *Turner* v. *Toft*, is a declaration by the indorsee *vs.* the maker of a promissory note, dated 6th November 1684. It states that within this realm of England, viz., at the city of Bristol, there is, and from time immemorial has been, a custom among merchants, &c., used and approved, viz., that if any merchant or other person using commerce, &c., make any note, under his proper hand, and thereby promise to pay to any other merchant, &c., in the same note mentioned, or to his order, any sum of money, at any time in such note specified; and such merchant, &c., to whom or to whose order the same is payable, &c., by indorsement of the said note, appoint such sum of money in the note mentioned to be paid to any other merchant, &c., in the said indorsement mentioned, or to his order, then such person who subscribed such note, having notice of such indorsement, is chargeable, and for the whole time aforesaid, hath been accustomed to be chargeable, to pay the sum of money in such note mentioned, to the person in such indorsement mentioned, at the time in such note limited for the payment thereof, according to the tenor of such note. It then sets forth the facts to bring the case within the custom, by reason of which, and of the custom aforesaid, the defendant became liable, &c., and so being liable, in consideration thereof promised to pay, &c.

The next precedent is in the case of *Sheppard and Bragg* v. *Flemyng* (Mich., 5 W. & M.), Clift. Ent. 929; indorsees *v.* maker. "Whereas, the said Flemyng, on 28th October 1692, at, &c., according to the custom of merchants in that case used and approved, made his certain bill in writing, and the same bill, with his proper hand subscribed, and by the said bill, promised to pay to one George Mason or order, the *sum of 40*l.*, upon the 28th day of November then next following, for value received; and whereas, the said George Mason, afterwards, viz., on ——, at ——, by indorsement with his proper hand subscribed upon the said bill, according to the usage and custom of merchants aforesaid in that case used and approved, appointed the contents of the said bill to be paid to the said William Sheppard and Joseph Bragg, by the name of William Sheppard and Company, in the said indorsement named, whereof the said Flemyng then and there had notice, by reason of which premises, and by the custom of merchants in that behalf used and approved, he was liable, &c., and being so liable, in consideration of the premises, promised to pay," &c.

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In Clift. Ent. 916, in the case of *Gibbs's Adm'x* v. *Fowle and Wooton*, is a declaration upon the custom of merchants, by administratrix of the payee against the maker, upon a promissory note made by his servant, dated 29th May 1693. See also 1 Wentworth's System of Pleading, 346. In p. 914, in the case of *Dymes* v. *Smith* (Mich., 8 Wm. III.), is a declaration on the custom, by the payee against the maker, upon a like note made by the servant, 7th May 1696. And in p. 913, in the case of *Wiseman* v. *Conyers*, is another, upon the custom, by the indorsee against the maker of a promissory note, dated 4th May 1686.

In 2 Mod. Intr. 126, is another declaration upon the custom, by the indorsee against the maker of three promissory notes, dated in 1697. This declaration is precisely like a modern declaration upon a promissory note, excepting that the note is called a bill, and is said to be made and indorsed "according to the custom of merchants," "whereby, according to the custom of merchants," the defendant became liable, and so being liable, &c. In p. 122, is another by payee *v.* the maker of a promissory note, calling it a "bill or note," and setting forth the custom specially. In every case upon a promissory note, the declaration is grounded on the custom of merchants.

Upon a review of this list of authorities and precedents, we are at a loss to imagine from what motive, and upon what grounds, Lord Holt could at once undertake to overrule all these cases, and totally change the law as to promissory notes: and why he

should admit inland bills of exchange to be within the custom of merchants, and deny that privilege to promissory notes; when the same evidence *which proved the former to be within the custom, equally proved that it extended to the latter. [*408 By examining the books, it will be found, that most of the points which have been decided respecting inland bills of exchange, have been decided upon cases on promissory notes. If he considered promissory notes as a new invention, when compared with inland bills of exchange, he seems to have mistaken the fact; for the probability is, that the former are the most ancient, or, to say the least, are of equal antiquity.

VI. But let us proceed to examine the case of *Clerke* v. *Martin* (Pasch., 1 Anne, B. R., 2 Ld. Raym. 757; 1 Salk. 129), upon which alone is founded the assertion in modern books "that before the statute of Anne, promissory notes were not assignable or indorsable over, within the custom of merchants, so as to enable the indorsee to bring an action in his own name against the maker." The case is thus reported by Lord Raymond:

"The plaintiff brought an action upon the case, against the defendant, upon several promises; one count was upon a general *indebitatus assumpsit* for money lent to the defendant; another was upon the custom of merchants, as upon a bill of exchange; and showed that the defendant gave a note subscribed by himself, by which he promised to pay ———— to the plaintiff, or his order, &c. Upon *non assumpsit*, a verdict was given for the plaintiff, and entire damages. And it was moved in arrest of judgment, that this note was not a bill of exchange, within the custom of merchants, and therefore, the plaintiff, having declared upon it as such, was wrong; but that the proper way, in such cases, is to declare upon a general *indebitatus assumpsit* for money lent, and the note would be good evidence of it.

"But it was argued by Sir Bartholomew Shower, the last Michaelmas term, for the plaintiff, that this note being payable to the plaintiff or his order, was a bill of exchange, inasmuch as, by its nature, it was negotiable; and that distinguishes it from a note payable to I. S., or bearer, which he admitted was not a bill of exchange, because it is not assignable nor indorsable by the intent of the subscriber, and consequently, not negotiable, and therefore, it cannot be a bill of exchange, because it is incident to the nature of a bill of exchange to be negotiable; but here this bill is negotiable, for if it had been indorsed payable to I. N., I. N. might have brought his action upon it, as upon a bill of exchange, and might have declared upon the custom of merchants. Why, then, should it not be, before such indorsement, a bill of exchange to the plaintiff himself, since the defendant, by his subscription, has shown his intent to be liable to the payment of this *money to the plaintiff or his order; and since he hath thereby [*409 agreed that it shall be assignable over, which is, by consequence, that it shall be a bill of exchange. That there is no difference in reason, between a note which saith, 'I promise to pay to I. S., or order,' &c., and a note which saith, 'I pray you to pay to I. S., or order,' &c., they are both equally negotiable, and to make such a note a bill of exchange can be no wrong to the defendant, because he, by the signing of the note, has made himself to that purpose a merchant (2 Vent. 292, *Sarsfield* v. *Witherly*), and has given his consent that his note shall be negotiated, and thereby has subjected himself to the law of merchants."

"But Holt, Chief Justice, was *totis viribus* against the action; and said that this could not be a bill of exchange. That the maintaining of these actions upon such notes, were innovations upon the rules of the common law; and that it amounted to a new sort of specialty, unknown to the common law, and invented in Lombard street, which attempted, in these matters of bills of exchange, to give laws to Westminster Hall. That the continuing to declare upon these notes, upon the custom of merchants, proceeded upon obstinacy and opinionativeness, since he had always expressed his opinion against them, and since there was so easy a method as to declare upon a general *indebitatus assumpsit* for money lent, &c. As to the case of *Sarsfield* v. *Witherly*, he said, he was not satisfied with the judgment of the king's bench, and that he advised the bringing a writ of error.

"Gould, Justice, said, that he did not remember it had ever been adjudged, that a

note in which the subscriber promised to pay, &c., to I. S., or bearer, was not a bill of exchange. That the bearer could not sue an action upon such a note in his own name, is without doubt; and so it was resolved between *Horton* and *Coggs*, now printed in 3 Lev. 299, but that it was never resolved, that the party himself (to whom such note was payable) could not have an action upon the custom of merchants, upon such a bill. But HOLT, Chief Justice, answered, that it was held in the said case of *Horton* v. *Coggs*, that such a note was not a bill of exchange, within the custom of merchants. And afterwards, in this Easter term, it was moved again, and the court continued to be of opinion against the action. And then Mr. Branthwaite, for the plaintiff, urged, that if this note was not a bill of exchange within the custom of merchants, then the promise founded upon it was void; and then it could not be intended that any damage was given by the jury for the breach of it, but all the damages must be intended to have been given upon the general *indebitatus assumpsit.* HOLT, Chief Justice, said, that would be true, if it had been void by reason of its being insensible; but this matter is
*410] sensible enough, though not sufficient in law to raise a promise; *and therefore, one cannot intend but that damages were given for it; and consequently, that judgment must be arrested. And judgment was given *quod querens nil capiat per billam*, &c., by the opinion of the whole court."

As four other cases are reported upon this subject, prior to the statute of Anne, all of which were dependent upon this of *Clerke* v. *Martin*, it may be proper to notice what fell from the court in each, before any comments are made on that case.

At the same term, the case of *Potter* v. *Pearson* (1 Ld Raym. 759) was upon a writ of error from C. B., in which the court said, "It is a void custom, since it binds a man to pay money, without any consideration; for the rule is, *ex nudo pacto non oritur actio.* And therefore, the judgment was reversed." In the case of *Burton* v. *Souter*, at the next term (2 Ld. Raym. 774), it was moved in arrest of judgment, "that such a note is not within the custom of merchants, but they ought to declare upon a *mutuatus*, and give the note in evidence, as it was settled last term between *Clerke* and *Martin.* And of that opinion was the whole court." The case of *Williams* v. *Cutting*, at the next term (2 Ld. Raym. 825; Farr. 154), was another writ of error from the C. B. There were two counts: 1. On the custom of merchants, declaring upon a note given by the defendant to the plaintiff, promising to pay him so much money; 2. Upon an *indebitatus assumpsit.* There were several damages, but only one judgment; and it was assigned for error, that the count upon the custom of merchants was void; and therefore, there being one entire judgment, all was void, and judgment ought to be reversed in toto. And the case of *Clerke* v. *Martin* was quoted as an authority in point. The court were all of opinion, that, "if one of the declarations was such on which no damages ought to be recovered, it would be bad." And, *per* HOLT, as to that point, he had "proposed it to all the judges, and that they were all of opinion, that a declaration upon the custom of merchants upon a note subscribed by the defendant to the plaintiff, for so much money, or promising so much money, was void; for it tended to make a note amount to a specialty. And judgment, thereupon, was reversed in toto."
*411] Lord Raymond does not mention this last observation of Lord HOLT, but says, "Note; all the judges held clearly that the first count was ill *(according to the case of *Clerke* v. *Martin*), except POWELL, Justice, who doubted.

The next and last case in the books, before the statute of Anne, is that of *Buller* v. *Crips* (Mich., 2 Anne, Anno 1703), 6 Mod. 29. "A note was in this form; 'I promise to pay to I. S., or order, the sum of 100*l.*, on account of wine had of him.' I. S. indorses this note to another; the indorsee brings the action against him that drew the note, and declares upon the custom of merchants, as upon a bill of exchange; and a motion was in arrest of judgment, upon the authority of Clerke and Martin's Case. But Brotherick would distinguish this case from that; for there the party to whom the note was originally made, brought the action, but here it is by indorsee; and he that gave this note, did, by the tenor thereof, make it assignable or negotiable by the words 'or order,' which amounts to a promise or undertaking to pay to any whom he should appoint, and the indorsement is an appointment to the plaintiff."

Chief Justice HOLT.—I remember when actions upon inland bills of exchange did first begin; and there they laid a particular custom between London and Bristol, and it was an action against the acceptor. The defendant's counsel would have put them to prove the custom; at which HALE, who tried it, laughed, and said, 'They had a hopeful case on't.' And in my Lord NORTH's time, it was said, that the custom in that case was part of the common law of England, and the actions since became frequent as the trade of the nation did increase; and all the difference between foreign and inland bills is, that foreign bills must be protested before a public-notary, before the drawer may be charged; but inland bills need no protest. And the notes in question are only an invention of the goldsmiths in Lombard street, who had a mind to make a law to bind all those that did deal with them. And sure, to allow such note to carry any lien with it, were to turn a piece of paper, which is in law but evidence of a parol contract, into a specialty, and besides, to empower one to assign that to another, which he could not have himself; for since he to whom this note was made could not have this action, how can his assignee have it? And these notes are not in the nature of a bill of exchange; for the reason of the custom of bills of exchange is for the expedition of trade, and its safety; and likewise, it hinders the exportation of money out of the realm.

"He said, if indorsee had brought this action against indorser, it might peradventure lie, for the indorsement may be said to be tantamount to drawing a new bill for so much money as the note is for, upon the *person that gave the note; or he may sue the first drawer, in the name of the indorser, and convert the money, when [*412
recovered, to his own use; for the indorsement amounts at least to an agreement that the indorsee should sue for the money in the name of the indorser, and receive it to his own use. And besides, it is a good authority to the original drawer, to pay the money to indorsee. And POWELL, Justice, cited one case where a plaintiff had judgment upon a declaration of this kind, in the common pleas; and that my Lord TREBY was very earnest for it, as a mighty convenience for trade; but that when they had considered well the reasons why it was doubted here, they began to doubt too; and the whole court seemed clear for staying the judgment. And at another day, the chief justice declared, that he had desired to speak with two of the most famous merchants in London, to be informed of the mighty ill consequences that was pretended would ensue by obstructing this course; and that they had told him, it was very frequent with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years; and that not only notes, but bonds for money, were transferred frequently, and indorsed as bills of exchange. Indeed, I agree, a bill of exchange may be made between two persons without a third; and if there be such a necessity of dealing that way, why do not dealers use that way which is legal? and may be this; as if A. has money to lodge in B.'s hands, and would have a negotiable note for it, it's only saying thus: 'Mr. B. pay me, or order, so much money, value to yourself;' and signing this, and B. accepting it; or he may take the common note, and say thus: 'for value to yourself, pay indorsee so much; and good.' And the court at last took the vacation to consider of it;" but what became of the case afterwards does not appear.

These five cases, viz., *Clerke* v. *Martin*, *Potter* v. *Pearson*, *Burton* v. *Souter*, *Cutting* v. *Williams*, and *Buller* v. *Crips*, are the only reported cases in which the former decisions were overruled, and it may be observed, that the four last were decided upon the authority of the first, which is to be considered as the leading case; and it is, in that case, therefore, that we are to look for the grounds upon which so great a change of the established law was founded. We shall, however, consider the reasons that are scattered among the whole, as having concurred in the formation of Lord HOLT's opinion. In the first place, we find an assertion of his lordship, in *Clerke* v. *Martin*, "that this note could not be a bill of exchange," but he seems to have been too much irritated, at that time, to give a reason for the assertion, or to recollect that in the case of *Hill* v. *Lewis*, upon promissory notes, he had said, "that goldsmiths' bills were governed by the same laws and customs as *other bills of exchange," and that the verdict in that case would be good, "if found upon the bills of exchange." His [*413

next assertion is, "that the maintaining these actions upon such notes, were innovations upon the rules of the common law." But if, as we have shown, the custom of merchants is a part of the common law; if promissory notes had always, from the time of their first introduction, been adjudged to be as much within the custom of merchants as inland bills of exchange, then an action on a promissory note, founded on the custom, was not more an innovation than a like action upon an inland bill of exchange. Besides, that could hardly deserve the name of innovation, which had been sanctioned by all the judges of England, on a demurrer, as was the case in *Williams* v. *Williams*.

His next assertion is, "that it amounted to the setting up a new sort of specialty, unknown to the common law, and invented in Lombard Street." To this, it may be answered, that it did not amount to the setting up a specialty, because the consideration of a specialty is not examinable at law; but between immediate parties to a bill of exchange, or a promissory note, the defendant might always have availed himself of the want of consideration. It only amounted, at most, to the setting up a promissory note as a bill of exchange. The assertion that promissory notes were invented in Lombard street, is certainly not correct, for Malynes mentions them as in use in foreign countries, and as being assignable by the custom of merchants, long before they appear to have been introduced into England. The other assertions of his lordship only tend to show a degree of irritation which derogates from the respect which the decision might otherwise deserve. The mildness of Mr. Justice Gould forms a contrast with the precipitation of the chief justice. He said, "he did not remember that it had ever been adjudged, that a note, in which the subscriber promised to pay, &c., to I. S., or bearer, was not a bill of exchange; and that it was never resolved, that the party himself, to whom such note was payable, could not have an action upon the custom of merchants, upon such a bill."

In the case of *Potter* v. *Pearson*, it was said, that "it is a void custom, since it binds a man to pay money, without consideration." This reason equally applies to inland bills, and is no reason why a distinction should be taken between them and promissory notes payable to order. The one is as much a mercantile transaction as the other; *and "a *nudum pactum* does not exist in the usage and law of merchants," nor is "the want of consideration an objection in commercial cases." (3 Burr. 1669; 1 Powell on Cont. 341.) The case of *Burton* v. *Souter* furnishes no new reason, but relies entirely upon the case of *Clerke* v. *Martin*.

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The case of *Williams* v. *Cutting*, as reported by Ld. Raym. 825, shows only that Mr. Justice Powell doubted upon the case of *Clerke* v. *Martin*. But in Farr. 155, it appears, that Holt said, "he had proposed it to all the judges, and that they were all of opinion, that a declaration upon the custom of merchants, upon a note, was void; for it tended to make a note amount to a specialty." It has been before shown, that this reason was not founded in fact; and it may be further remarked, that if true in point of fact, yet it would equally apply to inland bills, and therefore, is no ground for a discrimination. But it appears by Lord Raymond, that all the judges did not agree, for Powell doubted.

The case of *Buller* v. *Crips* differed from the others in this, that the action was brought by the first indorsee, and not by the payee of the note. Lord Holt again declares that "the notes in question are only an invention of the goldsmiths in Lombard street," in which he was certainly mistaken. He repeats, that "to allow such a note to carry any lien with it were to turn a piece of paper, which is in law but evidence of a parol contract, into a specialty;" and the reason which he gives why this case ought not to be distinguished from that of *Clerke* v. *Martin*, is, that a man cannot assign that which he has not himself. But it is not as assignee that the indorsee was entitled to his action, but as the payee of a bill of exchange; for an indorsed note is a bill drawn by the payee of the note, upon the maker, in favor of the indorsee; and the maker accepts the bill when he signs the note, for it is no objection to the acceptance of a bill, that the acceptance is made before the bill. However, if the judgment in *Clerke* v. *Martin* was against law, the foundation of Lord Holt's opinion in this case must fail. His lordship again asserts, that "these notes are not in the nature of a bill of ex-

change;" and he now condescends to give his reasons why they are not; "for the reason of the custom of bills of exchange is for the expedition of trade, and its safety; and likewise, it hinders exportation of money out of the realm;" in each of which reasons he is equally unfortunate, for the expedition of trade is not more promoted, nor is its safety more secured, by inland bills than by promissory notes, nor is the exportation of money more prevented by the former than by the latter. Indeed, it is, in modern times, *fully admitted, that payment by bills on a foreign country has no effect, either by increasing or diminishing the current coin of a nation. [*415 For payment of a sum by exchange prevents the importation of exactly the same sum of money.

But Lord HOLT himself admitted, that "if the indorsee had brought this action against the indorser, it might, peradventure, lie; for the indorsement may be said to be tantamount to the drawing a new bill, for so much as the note is for, upon the person that gave the note; or he may sue the first drawer, in the name of the indorser, and convert the money, when recovered, to his own use; for the indorsement amounts at least to an agreement that the indorsee should sue for the money in the name of the indorser, and receive it to his own use; and besides, it is a good authority to the original drawer to pay the money to the indorsee."

If this indorsement makes it a bill of exchange for one purpose, the reason is not easily perceived, why it should not be a bill of exchange for other purposes. The express promise of the maker to pay the money to the indorsee, seems to be at least equal to an acceptance of the bill; and as it has been before observed, a bill may be accepted before it is in fact drawn. 3 Burr. 1663; Doug. 284; 1 Atk. 715 (611); Kyd. 48. A bill drawn by a man on himself "is payable by him at all events," and such a bill "is tantamount to an acceptance." 1 Went. System of Pleading, 225.

Lord HOLT admits also, that the indorsement will authorize the indorsee to sue in the name of the indorser; hence it appears, that the whole dispute was merely about the form of the action; and this renders it the more astonishing, that he should have contended, "*totis viribus*," as Lord Raymond says he did, for an exception so clearly contrary to the justice of the case, especially, as the point had been before so solemnly settled in the case of *Williams* v. *Williams*. Indeed, his lordship seems, by the latter part of the report of *Buller* v. *Crips*, to have relented a little, after his conversation with the merchants, for he agreed, "that a bill of exchange may be made between two persons, without a third," by saying thus, "Mr. B. pay me, or order, so much money, value to yourself; and signing this, and B. accepting it. Or, he may take the common note, and say thus: for value to yourself, pay indorsee so much; and good." This last example seems to have been precisely the case before the court; and as the court adjourned, without giving judgment, it seems *to be doubtful how they [*416 would have decided, notwithstanding what had been said before.

Hence, then, we find, from an examination of all the cases before the statute of Anne, that it never was adjudged, that a promissory note for money, payable to order, and indorsed, was not an inland bill of exchange. But we find, that the contrary principle had been recognised, in all the cases, from the time of the first introduction of inland bills and promissory notes, to the first year of Queen Anne, and that in one of them, it had been expressly adjudged, upon demurrer, in the king's bench, and the judgment affirmed, upon argument, in the exchequer chamber, before all the judges of the common pleas and barons of the exchequer, so that it may truly be said to have been solemnly adjudged by all the judges of England. Principles of law so established, are not to be shaken by the breath of a single judge, however great may be his learning, his talents or his virtues. That Lord HOLT possessed these in an eminent degree will never be denied; but he was not exempt from human infirmity. The report itself, in the case of *Clerke* v. *Martin*, shows that, from some cause or other, he was extremely irritated with the goldsmiths of Lombard street, and that his mind was not in a proper state for calm deliberation and sound judgment. The same observation applies to the case of *Buller* v. *Crips*, and is further confirmed, by that of *Ward* v. *Evans*, 2 Ld. Raym. 930, in which his lordship said, "But then I am of opinion, and always was

(notwithstanding the noise and cry, that it is the use of Lombard street, as if the contrary opinion would blow up Lombard street), that the acceptance of such a note is not actual payment.

This circumstance has also been noticed by judges and others, in some of the more modern reports. In the case of *Grant* v. *Vaughan*, 3 Burr. 1520, Sir Fletcher Norton and Mr. Dunning observe, that "Lord Holt was peevish," in the case of *Clerke* v. *Martin*, and Lord Mansfield remarked, that "Lord Holt got into a dispute with the city about it." In 1 W. Bl. 487, Lord Mansfield said, "The first struggle of the merchants (which made Holt so angry with them), to make inland bills in the nature of specialties, and to declare upon them as such, was certainly wrong on their parts; as it was admitted, they might declare on general *indebitatus assumpsit*, and give these bills in evidence. But the reasons given by the judges why no action can be brought by the holder of such a bill, payable to bearer, are equally ill-founded." And in the case of *Brown* v. *Harraden*, 4 T. R. 151, Lord Kenyon said, it is not necessary now to consider whether or not Lord Holt were right in so pertinaciously adhering to his opinion, before the statute of Anne, that no action could be maintained on promissory notes, as instruments, but that they were only to be considered as evidence of the *debt: *417] that question exercised the judgments of the ablest men at that time; but the authority which his opinion had in Westminster Hall, made others yield to him; and it was thought necessary to resort to the legislature to apply a remedy." And in the same case, p. 154, Buller, Justice, said, "The cases cited by the defendant's counsel are extremely material; for though they do not directly decide the question, they show that the courts of Westminster have thought the analogy between bills of exchange and promissory notes so strong, that the rules established with respect to the one ought also to prevail as to the other. Such is the general tendency of the cases since Lord Mansfield's time. Many of the cases alluded to by the plaintiff's counsel happened before the statute of Anne: they only show the strong disposition which Lord Holt manifested on all occasions to discourage promissory notes. It appears from them, that Lord Holt and the merchants were perpetually disputing whether or not they should be put upon the same footing with bills of exchange. The merchants did not contend that they might recover on notes in particular cases only, but that they should be universally considered in the same light as bills of exchange. Upon that ground, they applied to the legislature for relief, and their conduct is very strong, to show what construction the statute of Anne ought to receive."

Lord Kenyon said, "it has been argued, that there is an essential difference between bills of exchange and promissory notes; and that there are reasons why the acceptor of the one should be allowed more time than the maker of the other; but I confess, I see no difference whatever; they both make engagements of the same nature, and when the acceptor has accepted a bill, he is equally bound to be prepared to pay on the day appointed, as the maker of a promissory note." Lord Hardwicke, in the case of *Walmsley* v. *Child* (Anno 1749), 1 Ves. 346, says, "The reason of making the statute 3 & 4 Anne, arose from some determinations, in the beginning of her reign, by Holt, Chief Justice, that no action could be maintained on a promissory note, nor declaration thereupon, viz., *Clerke* v. *Martin*, and *Potter* v. *Pearson*, 1 Salk. 129, which cases produced the act, as the act itself recites; but that act of parliament did not alter, but that still an *indebitatus assumpsit* may be brought, and the note given in evidence, or proved, if lost." From this concurrent testimony, it is apparent, that the case of *Clerke* v. *Martin* was a hasty, intemperate decision of Lord Holt, which was acquiesced in by the other judges, in consequence of his overbearing authority, "which made others yield to him;" and that he so "pertinaciously" adhered to his opinion, as to render it necessary to apply to parliament to overrule him.

*418] *This, it is believed, is the true origin of the statute of Anne, which did not enact a new law, but simply confirmed the old; the authority of which had been shaken by the late decision of Lord Holt. This idea is confirmed by the words of the preamble of the statute, which are, "Whereas, it hath been held," that notes in writing, &c., payable to order, "were not assignable or indorsable over, within the custom of

merchants," and that the payee could "not maintain an action, by the custom of merchants," against the maker; and that the indorsee "could not, within the said custom of merchants, maintain an action upon such note" against the maker; "therefore, to the intent to encourage trade and commerce," &c., be it enacted, &c., that all notes in writing made and signed by any person, &c., whereby such person, &c., shall promise to pay to any other person, &c., or his order, or unto bearer, any sum of money, &c., "shall be taken and construed to be, by virtue thereof, due and payable to any such person, &c., to whom the same is made payable;" "and also every such note, payable to any person," &c., "or his order, shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants," and that the payee may maintain an action for the same, in such manner as he might do upon any inland bill of exchange, made or drawn according to the custom of merchants, against the person, &c., who signed the same." And that the indorsee "may maintain his action," for such sum of money, either against the maker or any of the indorsers, "in like manner as in cases of inland bills of exchange." Here, it may be observed, that by using the words, "it hath been held," the legislature clearly allude to certain opinions, which they carefully avoid to recognise as law. And in the enacting clause, they say, that such notes "shall be taken and construed to be due and payable," &c., expressing thereby a command to certain persons, without saying expressly that the notes shall be due and payable, &c., for this being the law before, it was not necessary to enact the thing itself, but to instruct the judges how they should construe it. The mischief to be remedied was the opinion which had 'been held," not any defect in the law itself. By comparing this act with the cases decided prior to *Clerke* v. *Martin*, it will be found to contain no principles but such as had been fully recognised by the courts of law. It follows, therefore, that it was passed simply to restore the old order of things, which had been disturbed by Lord Holt.

The only real effect of the statute was to alter a few words in the declaration. The old forms allege that the defendant became liable by reason of the custom of merchants, the new say, that he became liable by force of the statute. Even Lord Holt himself always admitted, that an *indebitatus assumpsit* for money had and received, or money lent, *would lie, and the note would be good evidence of it. [*419
His objections were only to the form of the action, and not to the liability of the parties.

A promissory note was always as much a mercantile instrument as an inland bill of exchange, and there certainly seems to be more evidence that the former is within the custom of merchants than the latter, and that it was so, at an earlier period, on the continent of Europe, from whence it was introduced into England; and when introduced, it came attended with all the obligations annexed, which the custom had attached to it.

We, sometimes, in modern books, meet with an assertion that a promissory note was not negotiable at common law; this may be true, because a promissory note was not known at common law, if from the term common law we exclude the idea of the custom of merchants. It was a mercantile instrument, introduced under the custom of merchants. But if the custom of merchants is considered, as it really is, a part of the common law, then the assertion that a promissory note was not negotiable at the common law, is not correct.

VIII. In the present case of *Dunlop* v. *Silver*, it is not necessary to inquire, whether a promissory note, while it is confined to the original parties, can be considered as a bill of exchange, within the custom of merchants, although the authorities already cited show it to have been so adjudged; but it is sufficient, if it become so by being indorsed. It has already been observed, that it has never been decided, that an indorsed promissory note is not a bill of exchange, or a negotiable instrument, under the custom of merchants, but that the contrary has been solemnly adjudged; and has been settled law for more than a century.

One of the counts in the present case is for money had and received; and the evidence produced is a promissory note made by Cavan, payable to the defendants, or order, by them indorsed to Downing & Dowell, and by them to the plaintiff. The

note was in due time protested, as an inland bill of exchange, for non-payment, and due notice given to the defendants. So that every step was taken which would have been necessary to charge the defendants as drawers or indorsers of an inland bill.

The indorsement of the defendants is evidence of money received by them from the intermediate indorsers, and the only question is, whether the money, so received, *420] is for the use of the plaintiff. The *solution of this question depends upon the nature of the contract which the defendants entered into by their indorsement. Lord Holt himself always admitted, that every indorsement was the drawing of a new bill; and even in the case of *Buller* v. *Crips*, he admits that the indorsement of a promissory note is the drawing of a bill on the maker in favor of the indorsee, and that the indorsee may maintain an action against the indorser upon the custom of merchants. This principle, which, so far from being denied, has always been recognised in the subsequent cases (Chitty 121; 4 T. R. 149), decides the nature of the engagement which the defendants entered into by their indorsement. It was that of the drawer of an inland bill of exchange, whose obligation as such is well ascertained by the custom of merchants. The plaintiff does not claim as assignee at common law, but as indorsee under the law-merchant; by which law, the defendants are clearly liable, as drawers of the bill, to pay the money to any indorsee, holder of the bill; and where the plaintiff has either an equitable or legal right to money received by the defendant, he may recover in an action for money had and received. The defendants, then, having received money (which they are clearly not entitled to hold, for it is admitted that the intermediate indorser would be entitled to recover it against them), and being, by the terms of their contract, as construed by the custom of merchants, liable to the plaintiff, are answerable in an action for money had and received. We have seen, that in the old declarations upon bills of exchange, the custom of merchants is not alleged, and yet the courts presumed that the advancer of the money was the factor of the plaintiff, through whom the plaintiff is supposed to pay the money to the defendant. In the case of *Woodward* v. *Row*, before cited, the court said expressly, that they would "intend that he, of whom the value is said to be received by the defendant, was the plaintiff's servant." Upon the same principle, the intermediate indorser is to be presumed to be the servant of the plaintiff, in the present case.

The indorser of a promissory note, or bill of exchange, when he receives the money from the indorsee, holds it in trust to be repaid to the holder of the bill or note, if he shall fail to obtain it from the acceptor or maker, after using due diligence, and giving proper notice. When this contingency has happened, the trust becomes absolute, and it is against conscience, if the indorser refuses to pay the money to him to whom of right it belongs.

The argument on the part of the defendants in this action is, that as a promissory note is not an instrument negotiable by the custom of merchants; as the statute of Anne is not in force in Virginia, and as *the act of assembly of Virginia does not *421] give an action against the indorser, his engagement is only such as arises at common law; which is only an implied contract to refund money which has been paid in contemplation of a consideration that has failed. That this contract exists only between the indorser and his immediate indorsee, and is such a chose in action as by the common law is not assignable. That it arises only in consequence of the money paid, and is raised in favor of that person only from whom the money was received. That the payment of the money by the plaintiff to the intermediate indorser raises no contract between the defendant and the plaintiff. That there is no privity between the plaintiff and defendant, whereby the plaintiff can derive any benefit from the contract made by the defendant with the intermediate indorser; and that no action of *indebitatus assumpsit* will lie, without such privity. That even supposing the contract of the defendant was express, to pay the money to the intermediate indorser, or to his order, yet that contract would not be negotiable or assignable, so as to enable the plaintiff to recover in his own name, because no consideration moved from him, and no promise is made to him; and if the promise were in fact made to him, yet it would be as to him *nudum pactum.*

This argument, so far as it is necessary to consider it, may be reduced to these five propositions: 1. That promissory notes are not negotiable, within the custom of merchants. 2. That the contract of the indorser is only an implied contract, grounded on the receipt of money upon a consideration that has failed. 3. That this contract is a chose in action not assignable. 4. That no action of *indebitatus assumpsit* will lie, without privity. 5. That a promise in writing, without consideration expressed, is *nudum pactum*.

The first proposition, viz., that promissory notes are not negotiable within the custom of merchants, has been fully considered, and seems not to be maintainable. It might, therefore, be deemed unnecessary to examine the argument further; but as some of the other points are questionable, it may be worth while to notice them.

The second proposition is, that the contract of the indorser is only an implied contract, grounded upon the receipt of money upon a consideration which has failed. If this were true, it would equally apply to the case where a man receives a note with a blank indorsement, and passes it away, for a valuable consideration, without indorsing it himself. But in such a case, no man has ever been held liable, unless there was an antecedent debt, or, from particular circumstances, a guarantee of the note could be presumed, or unless he knew the note to be a bad one at the time. (*Fenn* v. *Harrison*, 3 T. R. 759, 761.) This point was early decided in the case of *The Bank of England* v. *Newman*, in 1 Ld. Raym. 442. It is true, that this was a note payable to the defendant or bearer, but it has been held in the case of *Peacock* v. *Rhodes*, Doug. 636 (614), and *Ancher* v. *Bank of England*, Ibid. 639 (617), that a note with a blank indorsement is exactly like a note payable to bearer. The reason is, that the receiver of such a note takes it upon the credit of the parties named upon it, and gives no personal credit to the man who merely pays it away, without indorsement. The obligation of the indorser, then, does not arise from the receipt of money only, but in consequence of his having written his name upon the instrument. But the simple writing of his name upon the instrument can create no obligation, unless it be the sign of a certain contract. Words are but representatives of ideas, and evidence of the intention of the contracting parties. Any other mode of conveying those ideas, and testifying that intention, if equally certain, is equally capable of being the evidence of an express contract. The act of writing one's name upon the back of an instrument of a certain description, is as strong evidence of an express contract, as if it had been written in a thousand words. What the nature of that contract is, depends upon the nature of the instrument indorsed; but still it is not an implied, but an express contract. The terms of that contract are known by a reference to the usual mode of transacting buesness, the nature of the instrument, and the incidents which have been attached to it, either by positive law, by common acceptation, or by judicial authority. The purpose for which a man puts his name on the back of a promissory note is well known, and cannot be mistaken; it is to give credit to the note; but to answer that purpose, it must be the sign of a contract to pay the money to the holder, if the maker does not. Such is the common acceptation and understanding of the country. The signature of the defendants is as much evidence of such a contract, as it is of the receipt of the money, or of an order to pay the money to the indorsee. But it is said—

*3d. That such a contract, being made with the immediate indorsee, is not negotiable, because it is a chose in action, which by common law cannot be assigned. To this it may be answered, that the antiquated doctrine that a chose in action is not assignable, was introduced in early times, before negotiable instruments were in use, when trade was carried on in its simplest form, and when the principal, if not the only purpose intended to be answered by the rule, was to prevent maintenance in controversies respecting titles to land. It was to prevent the poor man from being oppressed by a powerful antagonist, to whom his competitor might assign his title, and who, by his wealth, his influence, or his power, might pervert justice. At what time, or by what means, it was first applied to personal rights, is not ascertained; but it seems clear, that in its original adoption, it was never intended to apply to those instruments which, by their nature and the original contract of the [*422

parties, were made negotiable. Every man has a natural right to make such contracts as he pleases, provided they are not repugnant to any positive law, nor injurious to others; and all contracts entered into without fraud or force, are legally and morally obligatory, according to their spirit and intent. The reason of the rule was to prevent maintenance. (Co. Litt. 214.) But no man could be oppressed by maintenance who had expressly agreed to pay his debt to such person as his creditor should appoint. The reason of the rule failing, the rule itself cannot apply. Blackstone (2 Com. 442) calls it the strict rule of the ancient common law; and the reason given is, "because it was thought to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law." But it was a rule introduced for the benefit of the debtor, and every man may waive the benefit of a law introduced for his advantage. Blackstone says, "this nicety is now disregarded; though, in compliance with the ancient principle, the form of assigning a chose in action is in the nature of a declaration of trust," &c.

Woodeson says (in vol. 2, p. 387), "It is a maxim of the common law, that no chose in action can be granted or assigned. The policy whereof was to avoid a multiplicity of suits, by preventing those who would not prosecute their right themselves, from transferring it to others of a more litigious disposition; and particularly, to prevent the granting of pretended titles to great men, 'whereby,' saith Sir Edward Coke (1 Inst. 214 *a;* 266 *a*), 'Justice might be trodden down.' Perhaps, the rule was more general, than the mischief apprehended; and having relation originally to landed es-
*423] tates, was afterwards unnecessarily transferred to personal property. The doctrine, *however, always was, that a chose in action was assignable in equity, for a valuable consideration. Bills of exchange and promissory notes are regularly assignable by indorsement; and if bonds, policies of insurance, and even judgments, are in like manner assigned for valuable consideration, the assignee may sue in the name of the original claimant, and the latter will not now be permitted, even in the courts of common law, to undo his own transfer, or unconscientiously to obstruct the plaintiff's suit. Where one of the captors of a maritime prize, before condemnation thereof, transferred his proportionate share of the property taken, it was held, that the assignee might maintain an action for the same, against the capturing ship's agent, as for money received by him to the plaintiff's use." (*Morrough* v. *Comyns*, 1 Wils. 211.) Upon which case, it may be observed, that the sailor's right to a share of the prize-money was as clearly a chose in action as a right to any other property not in possession; and the assignment of such right was as clearly within the old rule that a chose in action is not assignable; it is, therefore, a much stronger case than that of a debt which, by the original contract itself, the parties have made negotiable.

The cases on this subject are collected in a very able argument of Judge Buller, in the case of *Master* v. *Miller*, 4 T. R. 340, and although the judgment in that case was contrary to his opinion, yet it was not given upon the point mentioned in that part of his argument which we shall cite. Evans on Bills, 106, speaking of this argument, says, "it furnishes a greater share of professional instruction, and a more admirable specimen of judicial reasoning, than can often be found in an equal compass." "It is laid down," says the judge, "in our old books, that for avoiding maintenance, a chose in action cannot be assigned or granted over to another. Co. Litt. 214 *a;* 266 *a;* 2 Roll. 45, *l.* 40. The good sense of that rule seems to me to be very questionable; and in early as well as modern times, it has been so explained away, that it remains, at most, only an objection to the form of the action, in any case. In 2 Roll. Abr. 45, 46, it is admitted, that an obligation, or other deed, may be granted, so that the writing passes; but it is said, that the grantee cannot sue for it in his own name. If a third person be permitted to acquire the interest in a thing, whether he is to bring the action in his own name, or in that of the grantor, does not seem to me to affect the question of maintenance. It is curious, and not altogether useless, to see how the doctrine of maintenance has, from time to time, been received in Westminster Hall. At one time, not only he who laid out money to assist another in his cause, but he that by his

friendship or interest saved him an *expense which he would otherwise be put to, was held guilty of maintenance, Bro., tit. Maintenance, 7, 14, 17, &c. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a *subpœna*, or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart, should be soon laid aside, must be expected. Accordingly, a variety of exceptions were soon made; and amongst others, it was held, that if a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action on it. 2 Roll. Abr. 115. But in the midst of all these doctrines on maintenance, there was one case in which the courts of law allowed of an assignment of a chose in action; and that was in the case of the crown; for the courts did not feel themselves bold enough to tie up the property of the crown, or to prevent that from being transferred. 3 Leon. 198; 2 Cro. 180. Courts of equity, from the earliest times thought the doctrine too absurd for them to adopt; and therefore, they always acted in direct contradiction to it. And we shall soon see, that courts of law also altered their language very much. In 12 Mod. 554, the court speak of an assignment of an apprentice, or an assignment of a bond, as things which are good between the parties; and to which they must give their sanction, and act upon. So, an assignment of a chose in action has always been held a good consideration for a promise. It was so, in 1 Roll. Abr. 29; 1 Sid. 212; and T. Jones, 222; and lastly, by all the judges of England, in *Moulsdale* v. *Birchall*, 2 W. Black. 820, though the debt assigned was uncertain. After these cases, we may venture to say, that the maxim was a bad one, and that it proceeded upon a foundation which fails.

"But still it must be admitted, that though the courts of law have gone the length of taking notice of assignments of choses in action, and of acting upon them, yet, in many cases, they have adhered to the formal objection, that the action shall be brought in the name of the assignor, and not in the name of the assignee. I see no use or convenience in preserving the shadow, when the substance is gone; and that it is merely a shadow, is apparent from the latter cases, in which the courts have taken care that it shall never work injustice. In *Bottomly* v. *Brooke* (C. B., Mich., 22 Geo. III.), 1 T. R. 621, which was debt on bond, the defendant pleaded that the bond was given for securing 100*l.*, lent to the defendant by E. Chancellor; and was given by her direction, in trust for her, and E. Chancellor was indebted to the defendant in more money. To this plea there was a demurrer, which was withdrawn by the advice of the court. In *Rudge* v. *Birch* (K. B., Mich., 25 Geo. III.), 1 T. R. 622, on the same pleadings, there was judgment for the defendant. And in *Winch* v. *Keely* (K. B., Hil., 27 Geo. III.), 1 T. R. 619, where the obligee assigned over a bond, and afterwards became *bankrupt, the court held that he might, notwithstanding, maintain the action. [*425 Mr. J. Ashhurst said, 'It is true, that formerly courts of law did not take notice of an equity or a trust; but of late years, as it has been found productive of great expense to send the parties to the other side of the hall, wherever this court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then, if this court will take notice of a trust, why should they not of an equity. It is certainly true, that a chose in action cannot strictly be assigned, but this court will take notice of a trust, and see who is beneficially interested.' But admitting that on account of this quaint maxim, "there may still be some cases in which an action cannot be maintained by an assignee of a chose in action, in his own name; it remains to be considered, whether that objection ever did hold, or ever can hold, in the case of a mercantile instrument or transaction. The law-merchant is a system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith. In *Pillans* v. *Van Mierop*, Lord Mansfield said, if a man agreed to do what, if finally executed, would make him liable, as in a court of equity, so in mercantile transactions, the law looks on the act as done. I can find no instance in which the objection has prevailed in a mercantile case; and in the two instances most universally in use, it undoubtedly does not hold, that is, in the cases of bills of exchange, and policies of insurance." (He might have added, the case of bills of lading.) 'The first is the present case; and bills are assignable by the custom of merchants.

So, in the case of policies of insurance, till the late act was made, requiring that the name of the person interested should be inserted in the policy, the constant course was, to make the policy in the name of the broker, and yet the owner of the goods maintained an action upon it. Circulation, and the transfer of property, are the life and soul of trade, and must not be checked in any instance. There is no reason for confining the power of assignment to the two instruments which I have mentioned, and I will show you other cases in which the court have allowed it. 1st. In *Fenner* v. *Meares*, 2 Bl. Rep. 1269, where the defendant, the captain of an East-Indiaman, borrowed 1000*l.* of Cox, and gave two *respondentia* bonds, and signed an indorsement on the back of them, acknowledging that in case Cox chose to assign the bonds, he held himself bound to pay them to the assignees. Cox assigned them to the plaintiff, who was allowed to recover the amount of them, in an action for money had and received. De Grey, Chief Justice, in disposing of the motion for a new trial, said, '*Respondentia* bonds have been found essentially necessary for carrying on the India trade; but it would clog these securities, and be productive of great inconvenience, if they were obliged to remain in the hands of the *first obligee. This contract is, therefore, devised to operate upon subsequent assignments, and amounts to a declaration that, upon such assignment, the money which I have borrowed shall no longer be the money of A., but of B., his substitute. The plaintiff is certainly entitled to the money, in conscience; and therefore, I think, entitled also at law; for the defendant has promised to pay any person who is entitled to the money.' So, in the present case, I say, the plaintiffs are in conscience entitled to the money, and the defendant has promised to pay, or, which is the same thing, is bound by law to pay the money to any person who is entitled. The very nature and foundation of an action for money had and received is, that the plaintiff is, in conscience, entitled to the money; and on that ground, it has been repeatedly said to be a bill in equity. We all remember the sound and manly opinion given by my Lord Chief Justice here, in the beginning of the last term, on a motion made by Mr. Bearcroft for a new trial, wherein he said, if he found justice and honesty on the side of the plaintiff here, he would never turn him round, in order to give him the chance of getting justice elsewhere. 2d *Clarke* v. *Adair* (sittings after Easter, 4 Geo. III.), Debray, an officer, drew a bill on the agent of a regiment, payable out of the first money which should become due to him on account of arrears, or non-effective money. Adair did not accept the bill, but marked it in his book; and promised to pay when effects came to hand. Debray died before the bill was paid; and the administratrix brought an action against Adair for money had and received. It was allowed by all parties, that this was not a bill, within the custom of merchants: but Lord Mansfield said, it is an assignment for valuable consideration, with notice to the agent, and he is bound to pay it. He said, he remembered a case in chancery, where an agent, under the like circumstances, had paid the money to the administrator, and was decreed, notwithstanding, to pay to the person in whose favor the bill was drawn. 3d. In *Israel* v. *Douglas* (C. B., East., 29 Geo. III.), 1 H. Bl. 242, A., being indebted to B., and B. indebted to C., B. gave an order to A. to pay C. the money due by A. to B., whereupon, C. lent B. a further sum, and the order was accepted by A. On the refusal of A. to comply with the order, it was held, that C. might maintain an action for money had and received against him. And Mr. J. Heath expressly said, he thought in mercantile transactions of this sort such an undertaking may be construed to make a man liable for money had and received. This opinion was cited with approbation in the house of lords in *Gibson* v. *Minet*. Lastly, I come to the case of *Tatlock* v. *Harris* (3 T. R. 182), in which Lord Kenyon, in delivering the judgment of the court, said, 'it was an appropriation of so much money to be paid to the person who should become the holder of the bill. We consider it as an agreement between all the parties *to appropriate so much property to be carried to the account of the holder of the bill, and this will satisfy the justice of the case, without infringing any rule of law.' All these cases prove that the remedy shall be enlarged, if necessary, to attain the justice of the case; and that if the plaintiff has justice and conscience on his side, and the defendant has notice only, the plaintiff shall recover in an action for money had and received Let us not be less

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liberal than our predecessors, and we ourselves have been on former occasions. Let us recollect, as Lord Chief Justice WILMOT said in the case I have alluded to, that not only *boni judicis est ampliare jurisdictionem*, but *ampliare justitiam:* and that the common law of the land is the birthright of the subject, under which we are bound to administer him justice, without sending him to his writ of *sulpœna*, if he can make that justice appear. The justice, equity and good conscience of the case of these plaintiffs can admit of no question: neither can it be doubted, but that the defendant has got the money which the plaintiffs ought to receive."

Thus we see, that the rule that a chose in action is not assignable, has been often shaken; that, at most, it amounts only to an objection to the form of action, and that courts of law ought to lean against an exception to form, which does not support the substantial merits of the case. No case is recollected, in which it has ever prevailed, when the instrument was made negotiable by the original contract and intention of the parties. This promissory note was intended by the parties to be negotiable; it is made payable to order, and says on the face of it, "negotiable at the bank of Alexandria." And in the cases of *More* v. *Manning*, Comyns 311; *Acheson* v. *Fountain*, 1 Str. 557; and *Edie* v. *E. India Company*, 2 Burr. 1216, it is determined, that a bill or note, negotiable in its original creation, remains negotiable in the hands of the indorsee, even if it be not indorsed payable to order. If the original contract of the maker was negotiable, the dependent contract of the indorser must be negotiable also, for he warrants that the maker shall perform his engagement; which is, to pay the money to the holder. The indorsement follows the nature of the original contract, and partakes of its negotiability.

That a chose in action may be made negotiable or assignable in its original creation, by the contract and intention of the parties, independent of the custom of merchants, and of statute law, seems not to be a new idea, but is strongly supported by the reasons assigned by the judges for their judgment in several of the reported cases. It was very early settled, that if A. deliver money to B., to be paid to C., C. might maintain an action against B. for the money. *Core* v. *Woddye*, *1 Dyer 21 *a*, pl. 128 [*428
(Trin., 28 Hen. VIII.); *Flewellin* v. *Rave*, 1 Bulst. 68 (Mich., 8 Jac. I.); *Beckingham and Lambert* v. *Vaughan*, 1 Roll. Abr. 7, pl. 2 (Trin., 1 Jac. I.); *Disborne* v. *Denaibo*, Ibid. 30–1 (Pasch., 1649); *Wherwood* v. *Shaw*, 1 Brownl. 82, and Yelv. 23 (44 Eliz.); *Babington* v. *Lambert*, Moore 854 (11 Jac. I.); *Bell* v. *Chapman*, Hardres 321 (14 & 15 Car. II.); *Brown* v. *London*, 1 Vent. 152 (23 Car. II.); *Hornsey* v. *Dimocke*, Ibid. 119 (23 Car. II.); *Cramlington* v. *Evans*, 2 Vent. 310 (1 Wm. & M.). In these cases, it will be found, that no consideration passed from C. to B., nor any promise from B. to C., and yet an action was held to be maintainable by C. against B., upon the contract made between A. and B. So that, to support an action for money had and received, it is not necessary that a consideration should pass from the plaintiff to the defendant, nor any promise from the defendant to the plaintiff; and this principle will be found to run through all the cases for money had and received.

In the case of *Oble* v. *Dittlesfield* (23 Car. II., B. R.), 1 Vent. 154, the principle is carried still further. The money in this case was not paid by A. to B., purposely to pay over to C., as in the former cases, but B. being indebted to A., and A. to C., A. appointed C. to receive the money from B. in satisfaction of the debt due to C. by A., which he (A.), signifying to B. (the defendant), he, in consideration of the premises, and that the plaintiff (C.) would forbear him a quarter of a year, promised that he would then pay him. It was moved in arrest of judgment, that there was no sufficient consideration; for the defendant was no party to this agreement, and was not liable to the plaintiff, and therefore, the plaintiff's forbearance was no benefit to the defendant; *sed non allocatur*, for HALE said, "When *assumpsits* first grew into practice, they used to set out the matter at large, viz., in such a case as this, *Quod muto agreatum fuit inter eos*, &c., and they should be discharged one against the other. But since, it hath been the way to declare more concisely. And upon the whole matter here, it appears, that the defendant agreed to the transferring of the debt to the plaintiff; and that it was agreed he should be discharged against A."

Here, then, is an assignment of a debt, and held to be valid, because the debtor agreed to it. This was a precedent debt, and was clearly a chose in action; and if such debt may be assigned by a subsequent agreement of the debtor, *à fortiori*, may a debt be assigned, which the debtor expressly makes assignable at the very moment of its creation. Its negotiability then becomes a part of the nature of the contract; it is a quality belonging to the debt itself, and enters into its very essence.

Another principle which seems to be well established is, that he for whose benefit a promise is made, may maintain an action upon it, although *no consideration pass from him to the defendant or any promise from the defendant directly to the plaintiff. This proposition is supported not only by the authorities already cited, but by the case of *Dutton* v. *Poole* (30 Car. II.), T. Jones 102; 1 Vent. 318, 332; 1 Freem. 471; T. Raym. 302; 2 Lev. 210; 3 Keb. 786, 814, 830, 836; Styles's Prac. Reg. 59; *Sadler* v. *Paine*, Saville 24; *Starkey* v. *Mill* (Mich., 1651), 1 Roll. Abr. 23, pl. 13, and Styles 296; *Hadres* v. *Levit*, Hetley 176; *Hawes* v. *Levitt*, Moore 550; *Rippon* v. *Norton*, Cro. Eliz. 652; s. c. Ibid. 849, 881; *Bourne* v. *Mason*, 1 Vent. 6, 7 (20 Car. II.); *Legat's Case*, Latch 206 (3 Car. I.); *Martyn* v. *Hind*, Cowp. 443; *Company of Feltmakers* v. *Davis*, 1 Bos. & Pul. 101 (38 Geo. III., C. B.). *429]

If A. lends B., $100, for which B. gives A. his promissory note, payable to A. or order, the money thus delivered by A. to B., is delivered to be paid over by B. to a third person, upon a contingency, viz., that A. shall, by indorsement on the note, name the person to whom it is to be paid. This differs in nothing from the case of *Core* v. *Woddye*, and the other cases before cited, except that the third person is not named at the time of the delivery of the money to B. But the case of *Oble* v. *Dittlesfield* shows, that the naming of a third person may be as well done after the debt is created, as at the time of its creation, provided the debtor agree to the transfer. These principles certainly go far to prove that a contract for the payment of money may be made negotiable in its nature, by the consent of parties, on principles of common law. It must be an obstinate principle of law, indeed, and justified by the strongest reasons, that can prevent free agents from voluntarily entering into a contract, not injurious to themselves or others. Every contract is to be construed according to the intention of the parties. A contract constitutes the law between the contracting parties, unless it be contrary to some positive law, or prejudicial to society.

No good reason can be given, why a man should not be permitted to make his contract negotiable. In the case of *Hodges* v. *Steward*, 1 Salk. 125 (3 W. & M.), it is said, "a difference was taken between a bill payable to I. S. or bearer, and I. S. or order; for a bill payable to I. S. or bearer, is not assignable by the contract, so as to enable the indorsee to bring an action, if the drawer refuse to pay, because there is no such authority given to the party by the first contract; and the effect of it is only to discharge the drawee, if he pays it to the bearer, though he comes to it by trover, *theft or otherwise. But when the bill is payable to I. S. or order, there an express power is given to the party to assign, and the indorsee may maintain an action." Here it is held, that the words "or order," make the contract negotiable. *431]

In *Hill* v. *Lewis*, 1 Salk. 132 (5 W. & M.), Lord Holt said, "for the words or order" (this was in a promissory note before the statute of Anne) "give authority to the plaintiff to assign it by indorsement; and 'tis an agreement by the first drawer, that he would answer it to the assignee." In *Jordan* v. *Barloe* (12 Wm. III.), 3 Salk. 67, it was "ruled, that where a bill" (probably meaning a promissory note) "is drawn payable to W. R., or order, 'tis within the custom of merchants, and such a bill may be negotiated and assigned by custom, and the contract of the parties, and an action may be grounded on it, though 'tis no specialty." In *Carter* v. *Palmer*, 12 Mod. 380 (12 Wm. III.), upon a promissory note, payable to bearer, "all seemed to agree, if it were made payable to him or order, the defendant by that form had made it negotiable, and by consequence, he would be liable to the action of assignee in his own name."

In *Clerke* v. *Martin*, 1 Ld. Raym. 757 (1 Anne), Shower, for the plaintiff, argued in the same manner, using nearly Lord Holt's own expressions in the cases just cited; yet his lordship was "*totis viribus*" against him. Shower contended, "that this note,

being payable to the plaintiff, or his order, was a bill of exchange, inasmuch as, by its nature, it was negotiable; and that distinguishes it from a note payable to I. S. or bearer, which he admitted, was not a bill of exchange, because it is not assignable nor indorsable by the intent of the subscriber, and consequently, not negotiable, and therefore, it cannot be a bill of exchange, because it is incident to the nature of a bill of exchange, to be negotiable: but here this bill is negotiable, for if it had been indorsed payable to I. N., I. N. might have brought an action upon it, as upon a bill of exchange. Why, then, should it not be, before such indorsement, a bill of exchange to the plaintiff himself; since the defendant, by his subscription, has shown his intent to be liable to the payment of this money to the plaintiff, or his order; and since he hath thereby agreed that it shall be assignable over, which is by consequence that it shall be a bill of exchange; and to make *such a note a bill of exchange can be no wrong to [*432
the defendant, because he, by signing the note, has made himself to that purpose a merchant, and has given his consent that his note shall be negotiated, and has thereby subjected himself to the law of merchants." Strong as this reasoning is, it was not sufficient to convince Lord Holt. A similar argument by Brotherick, produced no greater effect upon his lordship in the case of *Buller* v. *Crips*, 6 Mod. 29 (2 Anne), where it was said, that "he that gave this note did, by the tenor thereof, make it assignable or negotiable, by the words 'or order,' which amounts to a promise or undertaking, to pay it to any whom he should appoint, and the indorsement is an appointment to the plaintiff."

But although his lordship would not acknowledge the weight of his own arguments, they have been duly appreciated by subsequent judges. In the case of *Edie et al.* v. *E. India Company* (Trin., 1 Geo. III.), 2 Burr. 1216, it was contended for the plaintiffs, "that a promissory note or bill of exchange, originally made payable to one, or order, is, in its own nature, assignable; and the assignee has the whole interest in it, and may assign it as he pleases; and any restriction or confinement of his assignment of it, is contrary to the nature of the thing, and therefore, void." And the counsel for the defendants admitted that such a bill of exchange "was negotiable in its nature." But they contended, that an indorsement to a man, without the words *or order*, was no more than a naked authority to receive the money.

Lord Mansfield said, "a draft drawn upon one person, directing him to pay money to another, or order, is, in its original creation, not an authority, but a bill of exchange, and is negotiable."

Mr. Justice Dennison.—"Where a bill is originally made payable to A., or order, it is of course, and in its very essence, negotiable, from hand to hand. An inland bill of exchange is assignable in its nature." "Foreign bills are equally so by the law of merchants." "This is matter of law: and the law is clearly and fully fixed. There is no instance of a restrictive limitation, where a bill is originally made payable to a man or order." "In general, the indorsement follows the nature of the thing indorsed; and is equally negotiable." "The law has determined that the bill is negotiable in itself."

Mr. Justice Wilmot.—"This original contract is 'to pay to such person or persons as the payee or his assignees, or their assignees shall direct,' and there is the same privity (see s. c. 1 W. Bl. 299), between the drawer and the last assignee, as the first." [*433
"The first *assigns over that chose in action which, in its nature, and by the express permission of law, is assignable, with the same privileges and advantages that it had when he received it." "The indorsement is part of the original contract and is incidental and appurtenant to it, in the nature of it, and must be understood and interpreted in the same manner as the bill was drawn. And the indorsee holds in the same manner, and with the same privileges, qualities and advantages as the original payee held it; that is, as an assignable, negotiable note, which he may indorse over to another, and that other to a third, and so on, at pleasure." "And there is no difference whether the determinations be on promissory notes or on bills of exchange: it is just the same thing; because it is to be governed by the same rule." "The convenience and course of trade is to be attended to: the intention is to be regarded, not the form."

The case of *Grant* v. *Vaughan*, 3 Burr. 1516, was by the bearer against the drawer of a check in this form, "Pay ship Fortune or bearer 70*l*." This check was delivered to one Bicknell, the ship's husband, who lost it. It came honestly to the hands of the plaintiff in the way of trade. The declaration was upon a bill of exchange, and for money had and received. On the part of the defendant, it was contended, "that this was not a negotiable note, but only an authority to receive so much cash. That it cannot be considered as a negotiable bill of exchange; for it was not accepted nor indorsed, nor was it protestable, nor entitled to any day of grace."

"The plaintiff's counsel insisted that this bill or note was in its nature negotiable; that such bills were, in fact, always considered as negotiable, and actually negotiated, and commonly circulated as cash. And if they be, from the nature of the contract, negotiable, the finding of the jury cannot alter the law." "They object that it is not a bill of exchange, because it is not accepted, nor can be protested, nor is entitled to a day of grace, nor is indorsable. But it is a negotiable instrument. It is not necessary that it should be a bill of exchange; an inland bill of exchange is not like a foreign bill of exchange; for the former could not have been protested, before this act of parliament, nor needs to be so, since the act; whereas, a foreign one always absolutely required it." "Whoever gives a note payable to bearer, expressly promises to pay it to every fair bearer; however, an implied promise would suffice for our purpose."

This reasoning is evidently grounded upon general principles of the construction of contracts; for the counsel then go on to reason from the statute of Anne. "But," say the counsel, "they were negotiable, *before the act was made." "And there is
*434] no case at all where it has been determined, that a note of this kind cannot be given in evidence, upon a general *indebitatus assumpsit* for money had and received. It is enough for the plaintiff, that this note was negotiable. The bearer must prevail against the drawer, in some mode of action." "But there can be no sort of doubt on the latter count" (money had and received), "as the note is evidence of the plaintiff's money being in the hands of the person who gave it. Whether, therefore, this case be considered upon principles of law, prior to the act of 3 & 4 Anne, or upon that act, or upon what has passed since the act, it will appear, that the plaintiff ought to recover upon this action."

Lord Mansfield went into a minute examination of the cases of *Nicholson* v. *Sedgwick*, *Horton* v. *Coggs*, and *Hodges* v. *Steward*, and said, that upon general principles, they were not agreeable to law. "It is a queston of law, whether a bill or note be negotiable or not. It appears in the books, that these notes are by law negotiable; and the plaintiff's maintaining his action, or not maintaining it, depends upon the question, whether such a note is negotiable or not." Speaking of the decisions of Lord Holt, before the statute of Anne, he says, "The objection was to bringing an action upon the note itself, as upon a specialty; but I do not find it anywhere disputed, that an action upon an *indebitatus assumpsit* generally, for money lent, might be brought on a note payable to one, or order." "But upon the second count, the present case is quite clear, beyond all dispute; for undoubtedly, an action for money had and received to the plaintiff's use may be brought by the *bonâ fide* bearer of a note made payable to bearer. There is no case to the contrary. It was certainly money received for the use of the original advancer of it; and if so, it is for the use of the person who has the note as bearer."

Mr. Justice Wilmot.—"Probably, the jury took upon themselves to consider whether such bills or notes as this is, were in their own nature negotiable." But this is a point of law; and by law they are "negotiable." And again, he says, "But this is a negotiable note; and the action may be brought in the name of the bearer. Bearer is *descriptio personæ;* and a person may take by that description, as well as by any other. In the nature of the contract, there is no impropriety in his doing so. It is a contract to pay the bearer, or to the person to whom he shall deliver it (whether it be a note, or a bill of exchange), and it is repugnant to the contract, that the drawer should object
*435] that the bearer has no right to demand payment from him. *It is agreeable to common sense and reason, that if a man comes by such a note or bill fairly, and on a valuable consideration, he should have a right to maintain an action upon it as

bearer. The reasons given in the cases that are opposite to this (*Hinton's Case*, 2 Show. 235), are altogether unsatisfactory. Those determinations strike at this great branch of commerce; if they were to prevail, they would put an end to all this species of it. Even before the statute of 3 & 4 Anne, Lord Chief Justice HOLT himself thought that an *indebitatus assumpsit* for money lent, or for money had and received, might be maintained upon such a note: and if it was a question antecedent to that act, I should stand by that first case of *Hinton*, rather than the latter ones which differ from it. But that statute was made expressly, and on purpose, to obviate these doubts. However, if you would suppose it made to introduce a new law, and that such an action could not be maintained before the making of it, yet," &c. "This now under consideration is a negotiable instrument, which I think partakes more of the nature of a promissory note than of a bill of exchange. But taking it as a bill of exchange. A bill of exchange is a promise to pay the money, if the drawee does not pay it."

Mr. Justice YATES said, "Nothing can be more peculiarly negotiable, than a draft or bill payable to bearer; which is, in its nature, payable from hand to hand, *toties quoties*. It had been doubted, it is true, whether that species of action where the plaintiff declares upon the note itself, as upon a specialty, was proper; but here is a count for money had and received to the plaintiff's use. The question whether he can bring this action, depends upon its being assignable or not. The original advancer of the money manifestly appears to have had the money in the hands of the drawer; and therefore, he was certainly entitled to bring this action, and if he transfers his property to another person, that other person may maintain the like action." "Giving such a bill is, as it were, an assignment of so much property, which becomes money had and received to the use of the holder of the bill." (See also *Tatlock* v. *Harris*, 3 T. R. 182.)

It will be observed, that the whole reasoning of this case is grounded, not on the custom of merchants, but upon the check being a negotiable *instrument, in its nature; and that it applies as strongly to a promissory note before the statute of [*436 Anne, as to a bill of exchange.

A practical exposition of these principles is to be found in the case of *Fenner* v. *Meares*, 2 W. Bl. 1269, which was an action for money had and received, brought by the assignee of a *respondentia* bond, against the obligor. The bond was payable to one Cox. The defendant, in the presence of Cox, signed an indorsement on the bond, by which he acknowledged himself "bound to pay to such assignee thereof as should be duly appointed by him the said James Cox, the whole of the principal and interest of the within bond, agreeably to the tenor thereof, without any deduction or abatement whatsoever." It was objected for the defendant, that no general *indebitatus assumpsit* will lie, where the debt arises on a specialty, and if it did, yet the plaintiff ought to have recovered no more than he paid to the assignor, with common legal interest. For the plaintiff, it was said, that the objection was only to the form of the action; and the court would not grant a new trial, contrary to equity. "But the form of the action is well conceived. The indorsement is an *assumpsit* by simple contract, as much as if made on a separate paper, after the assignment had. Meares promises to pay any one to whom Cox should assign; besides the reiterated promise made to Evans, after Meares's return." "As for the damages and interest, those must pursue the terms of the original contract, which is now transferred to Fenner."

BLACKSTONE, Justice.—"As this is entirely a new question, and I cannot, upon so short a consideration, foresee all the consequences attending it, I shall avoid giving any decisive opinion upon it. I cannot, for instance, upon so transient a view, discern what effect might be derived to the assets of a person deceased, by thus turning a specialty debt into a simple contract. And from this caution, rather than from any great doubt attending this particular case, I choose to determine it upon plainer and more indisputable grounds, arising from the evidence before us. The promise made by Meares to Evans" (a messenger sent by the plaintiff to the defendant, to give him notice of the assignment, and to demand the money), "upon his return from India, is clearly an *assumpsit* to Fenner. It would be a sufficient promise, to avoid the statute of limitations. And the assignment and other transactions are fully sufficient as a consideration, to

make that *assumpsit* binding. Upon that ground, it is, therefore, clear, that a general
*437] *indebitatus assumpsit* will lie. 2d. As to the *quantum* of damages, *I think it perfectly right. Whatever would have been due to Cox, is, by the assignment, transferred to Fenner."

Nares, Justice.—"I think this is a particular promise to the assignee, whenever any such should be. When, therefore, the assignment is executed, the money is demandable, by virtue of that *assumpsit;* and of consequence, this action well lies. I agree with my brother Blackstone, in respect to the *quantum* of damages."

De Grey, Chief Justice.—"At the trial, I gave an opinion, that in point of law, this action was maintainable, and I have seen no reason to change it. Were I now silent, it might be thought I had. But I am still satisfied, that the action will lie, abstracted of the particular evidence on which my brother Blackstone has founded his opinion. *Respondentia* bonds have been found essentially necessary for carrying on the Indian trade. But it would clog these securities, and be productive of great inconvenience, if they were obliged to remain in the hands of the first obligee. This contract is, therefore, devised to operate upon subsequent assignments; and amounts to a declaration that, upon such assignment, the money which I have so borrowed, shall no longer be the money of A., but of B., his substitute. The plaintiff is certainly entitled to the money in conscience, and therefore, I think, entitled also at law; for the defendant has promised to pay any person that shall be entitled to the money."

It will be observed, that there is no difference between the ground of Blackstone's opinion, and that of the other judges, excepting in this, that the former chose to ground his opinion upon the verbal promise, made after the assignment, and the others rested it upon the written promise on the back of the bond, made before the assignment; but all must have agreed that the debt was assignable, with the assent f the debtor.

The case of *Innes* v. *Dunlop*, 8 T. R. 595, was by the assignee of a Scotch bond, against the obligor. There were two special counts, and four money counts. To the two special counts, the defendant demurred. "Onslow, Serjeant, in support of the demurrer, objected, that the plaintiff, who was merely the assignee of a *chose in action*, could not sue in his own name, but should have brought the action in the name of Hunter & Co., the obligees in the bond. But The Court, after observing that this was not an action on the bond, said that they were clearly of opinion, that the assignment
*438] of the bond *to the plaintiff was a consideration for the *assumpsit* by the defendant, in the same manner as actions of *assumpsit* are maintained, in every day's practice, upon foreign judgments; and the defendant, by demurring, had confessed both the consideration and the *assumpsit*. And therefore, they gave judgment for the plaintiff." In a note to this case, the reporter refers to the case of *Fenner* v. *Meares*, 2 W. Bl. 1269, before cited. Although the declaration states, that "by reason of the premises" (viz., the making of the bond and the assignment to the plaintiff), "and according to the law of Scotland, the defendant became, and was indebted to the plaintiff, and being so indebted, in consideration thereof, promised to pay," &c., yet the law of Scotland does not seem to be the ground of the judgment, but the court rely entirely upon the assignment of the bond being a sufficient consideration for the *assumpsit*, agreeable to Judge Blackstone's opinion in *Fenner* v. *Meares*.

The case of *Reed* v. *Ingraham*, 3 Dall. 505, is a strong case in support of the principle that a contract may be made negotiable by the intention of the parties. It was an action in the supreme court of Pennsylvania, brought by the assignee of a stock contract, to recover the amount of the difference, due on the contract, which was expressed in these words:

"On the 18th of April 1792, I promise to receive from Joseph Boggs, or order, ten thousand dollars, six per cents, and pay him for the same at the rate of 23 shillings and 7 pence 3-4 per pound.

(Signed) Francis Ingraham."

The assignment was indorsed in these words:

"I do hereby authorize William Reed, or his order, to tender or deliver the stock

within mentioned, and the said William Reed, or his order, to receive for the same, the sums of money due and payable therefor, at the rates within expressed.

(Signed) Joseph Boggs."

The defendant had notice of the assignment before the day of payment, and the stock was duly tendered. The defendant contended that the contract was not negotiable, but that if it was, he had a right to offset against Boggs.

"By the Court.—The action is well brought, as it is founded on a contract in which the defendant expressly stipulates that he will receive the stock from, and pay the price to, Joseph Boggs, or his order. On general principles of law, stock contracts cannot be regarded *as negotiable; but a contractor may certainly make himself liable, as if they were so; and the maxim, *modus et conventio vincunt leges*, applies forcibly to the case. With respect to the alleged inconvenience, that in the present form of action, the defendant is debarred from the benefit of a set-off, it would be enough to answer, that as this is the consequence of his own act and agreement, he has no reasonable cause of complaint. But it is also obvious, that when the contract was assigned, and the present action was instituted, there did not exist between him and Boggs any mutual debt or demand, which could be the subject of defalcation upon the principles of the act of assembly." Verdict for the plaintiff. [*439

Upon a policy of insurance, the person interested is allowed to bring an action in his own name, although not mentioned in the policy. 1 Show. 156. And a bill of lading has always been held to be assignable, and the assignee may bring an action in his own name, against the master or owners, for the goods. *Evans* v. *Martlett*, 1 Ld. Raym. 271; *Wright* v. *Campbell*, 4 Burr. 2051; *Caldwell* v. *Ball*, 1 T. R. 205; *Hibberts* v. *Carter*, Ibid. 745. In these cases, it was held, that the assignment of the bill of lading alters the property. So in the case of *Walker* v. *Walker*, 5 Mod. 13, Lord Holt held, that the cast of a die altered the property of the money in the hands of a stakeholder. Kyd 22, says, that notes payable to order have always been held to be negotiable." To these authorities may be added, that of the case of *Gerard* v. *La Coste et al.*, 1 Dall. 194.

From all these cases, it seems to be a maintainable proposition, that a man may make his debt negotiable, notwithstanding the principle that a *chose in action* cannot be assigned. Indeed, that principle seems to have been introduced for the purpose of preventing the creditor from transferring his right of action, contrary to the will of the debtor, but was not intended to apply to those cases where the debtor had expressly authorized his creditor to assign it.

4. The fourth point is, that no *indebitatus assumpsit* will lie without privity. This idea seems to have been founded upon the exploded doctrine, that *indebitatus assumpsit* will lie only in cases where debt will lie. But *even admitting the latter proposition to be true, yet it will not apply; for in the case of *Core* v. *Woddye* (and the other cases cited which were dependent upon it), it was held, that if a man receives money to my use, I may maintain an action of debt against him for it. Plowden, in the case of *Platt* v. *Locke* (Pasch., 4 Edw. VI.), which was an action of debt against the sheriff for an escape, fol. 36 *a*, *b*, says, "And so it appears, that the action upon the matter was maintainable, although there was not any contract between them; for upon a *liberate* delivered to the clerk of the Hanaper, who has assets in his hands, an action of debt will lie against him, as appears by 1 Hen. VII., and yet there is not any contract between them, nor any privity in words; and so in many like cases." [*440

In the case of *Wherwood* v. *Shaw* (44 Eliz.) 1 Brownl. 82, it was adjudged that although no contract was between the parties, yet when either money or goods are delivered, upon consideration, to the use of A., A. may have an action of debt. And of that opinion was Montague (28 Hen. VIII.), in *Core and Woddye's Case;* and also there is a precedent of such actions in the Book of Entries." s. c. Yelv. 23.

In *Jacob* v. *Allen*, 1 Salk. 27, an executor brought an action for money had and received against an attorney of an administrator, who had been appointed before it was known that there was a will, and it was held to lie, although the attorney had paid it

over to the administrator, before action brought. Here certainly was no privity of contract.

In *Hitchen* v. *Campbell*, 2 W. Black 830, it is said by the court, that, "the same principle which supports this action against one who receives money from the bankrupt himself, will support it against another who receives it under the bankrupt. In both cases, it is the property of the assignees. And though while this action was in its infancy (2 Jones 126; 2 Lev. 245), the courts endeavored to find technical arguments to support it, as by a notion of privity, &c., yet that principle is too narrow to support these actions, in general, to the extent to which they are admitted." In the same case, as reported in 3 Wilson 304, it is said by the court, "Whoever has received the money for the bankrupt's goods is supposed in justice to have received the same for the use of the assignees, in whom the property of those goods was, by law, vested; and to have promised to pay the same to the assignees; there is a supposed privity of contract between the persons whose money it lawfully is, and the person who has got or received it."

*441] *The same ideas are suggested by Lord MANSFIELD in the case of *Hawkes* v. *Saunders*, Cowp. 290. Indeed, among the innumerable cases in which the action for money had and received is the proper remedy, scarcely one can be found in which there exists any privity of contract between the parties. It lies to recover fees received by the defendant claiming a right to the plaintiff's office; as in the case of *Howard* v. *Wood*, 2 Jones 126; 1 Freem. 473, 478, where the action was brought to try the plaintiff's title to the office of steward of a court baron. "It was objected for the defendant, that this action did not lie, but only a special action on the case; and that this action is not only improper, but contrary to the truth of the case; for the plaintiff declares upon *assumpsit* for money received by the defendant to the use of the plaintiff, and the jury find that the defendant received the money to his own use, claiming the office of steward in his own right, and the money as fees incident to the office, which he had exercised contrary to the will of the plaintiff, and not otherwise due than by the exercise of the office. That this money was incident to the *tort* done by the defendant in the exercise of the office, and where a receipt depends merely on a *tort*, there can be no contract or privity, and without these, no debt, and by consequence, *indebitatus assumpsit* does not lie." But it was resolved by the whole court, that the action lay; for this is an expeditious remedy to facilitate the recovery of just rights; and this manner of action has now prevailed for a long time; and the point had been ruled often by the judges in their circuits, and actions frequently brought in this manner; and lately, upon solemn argument, in the court of exchequer, in the case of *Dr. Aris*, 2 Mod. 260, who brought such action for the profits of the office of comptroller in the port of Exeter, it was resolved by the Lord Chief Baron and all the court that the action lay." Here, the same exception was expressly overruled, which is now set up in the present action; and it has been uniformly overruled ever since. The same points were made and overruled in the case of *Dr. Aris*, above cited; and the court said, that *indebitatus assumpsit* will lie for rent received by one who pretends a title, and cited 4 Hen. VII. 6 *b*; and Moore 458. This was also agreed in *Hussey* v. *Fiddall*, 12 Mod. 324.

"In *assumpsit* for money received to the plaintiff's use, the question at the trial was—who was the yeoman of the black rod." 12 Mod. 607. It lies to try the title to a curacy. 3 Wils. 355. So, for money extorted by duress of goods. *Astley* v. *Reynolds*, 2 Str. 915, and *Irving* v. *Wilson*, 4 T. R. 485. And for money paid under an

*442] order of a court not having competent authority. **Newdigate* v. *Davy*, 2 Ld. Raym. 742. For a part of a sum of money paid, and the whole sum afterwards recovered by judgment. *Barbone* v. *Brent*, 1 Vern. 176. By a soldier against his captain, for the value of a horse lost in a storm. *Norris* v. *Napper*, 2 Ld. Raym. 1007. By a woman against a man who married her, having a former wife living, for rents of the plaintiff's lands received by the man. *Asher* v. *Wallis*, 11 Mod. 146. Against a sheriff, for money levied on a *fi. fa.* Comb. 430, 447; 1 Salk. 22; 6 Mod. 161. For the price of goods taken in execution, and sold under a warrant of distress upon a conviction, the conviction having been quashed. *Feltham* v. *Terry*, cited in *Lindon* v. *Hooper*, Cowp. 419. So, it lies against a stakeholder, on the determination of a wager. *Temple*

v. *Welds*, 10 Mod. 315. For money paid to insure lottery tickets, such insurance being contrary to law. *Browning* v. *Morris*, Cowp. 793. For a forfeiture undea byr -law of the corporation of barber-surgeons in London, 2 Lev. 252. So, it lies in disaffirmance of the contract, for the purchase-money paid for a thing not delivered. *Anon.*, 1 Str. 407. For money paid by mistake. *Buller* v. *Harrison*, Cowp. 567. *Ancher* v. *Bank of England*, 2 Doug. 637 (615). Against commissioners of bankrupt, for a dividend. *Brown* v. *Bullen*, Ibid. 408. Against the principal, if the money be paid over by the agent. *Cary* v. *Webster*, 1 Str. 480; *Sadler* v. *Evans*, 4 Burr. 1984. In the case of a fictitious payee of a bill of exchange, it was admitted, there was no privity, and yet the plaintiffs recovered on the count for money had and received. *Collins* v. *Emmit*, 1 H. Black. 313; *Tatlock* v. *Harris*, 3 T. R. 177; *Vere* v. *Lewis*, Ibid. 182; *Gibson* v. *Minet*, 1 H. Black. 586. In the following cases, there was no privity of contract, yet the plaintiff had judgment. *Starkey* v. *Mill*, Style 296; *Hornsey* v. *Dimocke*, 1 Vent. 119; *Harris* v. *Huntback*, 1 Burr. 374; *Moses* v. *Macferlan*, 2 Ibid. 1005; *Grant* v. *Vaughan*, 3 Ibid. 1516; *Clarke* v. *Shee and Johnson*, Cowp. 199; *Hitchen* v. *Campbell*, 2 W. Black. 827; s. c. 3 Wils. 308. These cases clearly show that the want of privity is no objection to the action of *indebitatus assumpsit* for money had and received. If, then, the want of privity is no bar, what is there to prevent the plaintiff from recovering against the defendant? Is it, that he is not in justice entitled to the money? Or has the defendant a right to retain it? It is admitted, that the plaintiff may look to the intermediate indorser, and that *he* may recover from the defendant. The objection then is, that the defendant is not liable to the present plaintiff, but to the intermediate indorser, who alone is liable to the plaintiff. But the plaintiff may sue in the name of the intermediate indorser, "for" as Lord HOLT says in *Buller* v. *Crips*, "the indorsement amounts at least to an agreement that the indorsee should sue for the money in the name of the indorser, and receive it to his own use;" and this court will prevent *the intermediate indorser from releasing the action, and from interfering in any other manner to frustrate the plaintiff's suit. Besides, a recovery and satisfaction in the present action will be a bar to any action which the intermediate indorser may bring against the present defendants, on the same note. Complete justice is done between both parties, in the shortest, least expensive, and least oppressive manner; and that circuity of action, which the "law abhors," is avoided. If the plaintiff recover against the intermediate indorser, and *he* against the defendant, the judgment will come down upon the defendant, charged with the heavy expenses of two suits, instead of one. The plaintiff will be turned round upon a mere point of form, and perhaps, may lose the debt altogether, by the insolvency of the intermediate indorser. If the indorsements are in blank, the plaintiff may strike out the intermediate indorsements, and declare as the immediate indorsee of the first indorser. Evans on Bills, 15; *Smith* v. *Clark*, 1 Esp. 180. For a blank indorsement authorizes the holder to fill it up with what he pleases, consistent with the nature and tenor of the instrument. So that, if privity is necessary, it is in the power of the plaintiff to raise it. But the cases before cited show that privity is not necessary to support the action for money had and received; and from the nature of the thing, it cannot be necessary, in any case where the instrument is negotiable, whether it be made so by the custom of merchants, by positive statute, or by the contract of the parties. [*443

5. The fifth proposition is, that a promise in writing, without a consideration expressed, is *nudum pactum*. This doctrine of *nudum pactum* seems not to be well settled, although much has been said upon the subject. It was considerably discussed in the case of *Pillans* v. *Van Mierop*, 3 Burr. 1663, but as there were other principles in that case, it was not necessary to decide absolutely upon this point. Yet the whole court seemed strongly inclined to the opinion, that the rule, *ex nudo pacto non oritur actio*, did not apply to a promise in writing. Lord MANSFIELD said, "A *nudum pactum* does not exist in the usage and law of merchants. I take it, that the ancient notion about want of consideration was for the sake of evidence only; for when it is reduced to writing, as in covenants, specialties, bonds, &c., there was no objection to the want of

consideration. And the statute of frauds proceeded upon the same principle. In commercial cases amongst merchants, the want of consideration is not an objection."

*444] *Mr. Justice WILMOT.—"I can find none of those cases that go upon its being *nudum pactum*, that are in writing; they are all upon parol. I have traced this matter of *nudum pactum;* and it is very curious." He then explained the principle of an agreement being looked upon as a *nudum pactum*, and how the notion of *nudum pactum* first came into our law. He said, "it was echoed from the civil law. '*Ex nudo pacto non oritur actio.*' Vinnius gives the reason in lib. 3, tit. *De Obligationibus* (4to ed.) 596. If by stipulation (and *à fortiori*, if by writing), it was good, without consideration. But it was made requisite, in order to put people upon attention and reflection, and to prevent obscurity and uncertainty: and in that view, either writing or certain formalities were required. Id., on Justinian (4to ed.) 614. Therefore, it was intended as a guard against rash, inconsiderate declarations: but if an undertaking was entered into upon deliberation and reflection, it had activity; and such promises were binding. Both Grotius and Puffendorf hold them obligatory by the law of nations. Grot. lib. 2, c. 11, *De Promissis;* Puff. lib. 3, c. 5. They are morally good, and only require ascertainment. Therefore, there is no reason to extend the principle, or carry it farther. There would have been no doubt upon the present case, according to the Roman law; because here is both stipulation (in the express Roman form) and writing."

Mr. Justice WILMOT then refers to a passage in Bracton, which will be considered presently, and proceeds thus: "Our own lawyers have adopted exactly the same idea as the Roman law. Plowden, 308 *b*, in the case of *Sherynton and Pledal* v. *Strotton and others*, mentions it; and no one contradicted it. He lays down the distinction between contracts or agreements in words (which are more base), and contracts or agreements in writing (which are more high), and puts the distinction upon the want of deliberation in the former case, and the full exercise of it in the latter. His words are the marrow of what the Roman lawyers had said: 'Words pass from men lightly; but where the agreement is made by deed, there is more stay,' &c. The delivery of a deed is a ceremony in law, signifying fully his good will that the thing in the deed should pass from him who made the deed to the other; and, therefore, a deed, which must necessarily be made upon great thought and deliberation, shall bind, without regard to the consideration." "The voidness of the consideration is the same, in reality, in both cases; the reason of adopting the rule was the same in both cases; though there is a difference in the ceremonies required by each law. But no inefficacy arises merely from the naked promise. Therefore, if it stood only upon the naked promise, its being

*445] in this case reduced into writing, *is a sufficient guard against surprise; and therefore, the rule of *nudum pactum* does not apply in the present case. I cannot find that a *nudum pactum*, evidenced by writing, has ever been holden bad; and I should think it good; though, where it is merely verbal, it is bad. Yet I give no opinion upon its being good always, when in writing." "It has been melting down into common sense, of late times." YATES and ASTON, Justices, concurred in opinion, nearly on the same grounds.

This opinion of the court in *Pillans* v. *Van Mierop*, does not seem to be contradicted by any subsequent case, so far, at least, as it affirms this principle, that a written promise carries with it *primâ facie* evidence of a good consideration (until the contrary appears), and throws the burden of proof upon the opposite party. So that in an action between the original parties, upon a promise in writing, it does not seem to be necessary to aver a consideration.(*a*) Blackstone's opinion (2 Com. 446) goes fur-

(*a*) At the time this argument was made, the writer had not seen the case of Rann *v.* Hughes, in the house of lords, reported in a note to the case of Mitchinson *v.* Hewson, 7 T. R. 350, which is said, in a note to the third edition of Doug. 683, to have been decided 14th of May 1778, and to be reported in 7 Bro. Parl. Cases 550. Nor is the case mentioned by Powell or Fonblanque, in treating of this subject.

The Lord Chief Baron SKYNNER, in delivering the opinion of the judges, has these observa-

ther than this, for he says, "if a man gives a *promissory note, he shall not be allowed to aver the want of a consideration, in order to evade the payment; for every note, from the subscription of the drawer," "carries with it internal evidence of a good consideration." The case, however, which he cites from Ld. Raym. 760, does not bear him out in the full extent of his proposition; for the court said, that "though no consideration was expressed in Hurst's note, yet the note, being subscribed by Hurst, was good evidence of a debt due from Hurst to the plaintiff."

There is certainly a difference between good evidence, and incontrovertible, or conclusive evidence. The expression good evidence, seems to imply only *primâ facie* evidence. And this seems to be the extent of the proposition, as it applies in an action between the original parties to a note, for when it is negotiated, and the action is between an indorsee and the maker, the latter will not be allowed to aver the want of a consideration, because "its operation is then governed by the same law as a bill of exchange, which is the law-merchant; and that is founded upon the law of nature and nations, in which the want of a consideration is no essential defect in the contract" (1 Powell on Contracts, 341), and in which the great leading principle is, *fides est servanda*. 1 Fonbl. 338, note d.

Powell and Fonblanque have both controverted the doctrine as laid down by Wil-

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tions: "But it is said, that if this promise is in writing, that takes away the necessity of a consideration, and obviates the objection of *nudum pactum*, for that cannot be, where the promise is put in writing;" "but whatever may be the rule of the civil law, there is certainly none such in the law of England." His lordship observed upon the doctrine of *nudum pactum* by Mr. J. Willmot, in the case of *Pillans* v. *Van Mierop and Hopkins*, 3 Burr. 1663, and that he contradicted himself, and was also contradicted by Vinnius, in his comment on Justinian.

"All contracts are, by the laws of England, distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavered to maintain, as contracts in writing. If they be merely written, and not specialties, they are parol, and a consideration must be proved. But it is said, that the statute of frauds has taken away the necessity of any consideration in this case; the statute of frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His lordship here read those sections of that statute which relate to the present subject. He observed, that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof, was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of, as all other agreements in writing are, by the common law, and does not prove the converse of the proposition, that, when in writing, the party must be, at all events, liable. He here observed upon the case of *Pillans* v. *Van Mierop*, in Burr., and the case of *Losh* v. *Williamson*, Mich., 16 Geo. III. in B. R.; and so far as these cases went on the doctrine of *nudum pactum*, he seemed to intimate, that they were erroneous. He said, that all his brothers concurred with him, that in this case, there was not a sufficient consideration to support this demand, as a personal demand, against the defendant, and that its being now supposed to be in writing, makes no difference."

This case, as far as it goes, must be considered as having decided the law in England, where the decisions of the highest court of judicature are regarded as binding. But in this country, it can only be respected as an opinion; and the question is still open as to the grounds of that opinion.

It is not contended, that a promise in writing cannot be a *nudum pactum*; but the question is, whether the burden of proof is not thrown upon the promisor; or whether the writing does not raise a *primâ facie* presumption of a good consideration. How far this question is affected by the case of *Rann* v. *Hughes*, is left to the consideration of the reader.

If a promissory note is admitted to be a mercantile instrument, and governed by the law-merchant, the question of *nudum pactum* cannot arise in the present case. For it is believed to be settled law, that "a *nudam pactum* does not exist in the usage and law of merchants."

Browne, in his View of the Civil Law, vol. 1, p. 558, in a note speaking of writings not under seal, as considered at common law, says, "they may be evidence of the agreement, or intent of the parties, but not conclusive evidence of sufficient consideration;" and cites the case of *Rann* v. *Hughes*.

MOT, in the case of *Pillans* v. *Van Mierop*, and by Blackstone, in the passage above cited; but their arguments only go to prove, that a note in writing is not conclusive and incontrovertible evidence of a good consideration between the original parties; and it is believed, a case cannot be found, in which the plaintiff has been put to prove the consideration of a written promise, by a mere denial on the part of the defendant. It
*447] seems to be the rule, that the plaintiff is not obliged to *prove the consideration of such a promise, until the defendant has proved circumstances tending to destroy the presumption arising from the written contract. Powell and Fonblanque have taken opposite premises, and yet both draw the same conclusion. The former says (in his Essay on the Law of Contracts, vol. 1, p. 340), "Now, it seems reasonable to conjecture, that when this maxim of the Roman law, '*quod ex nudo pacto non oritur actio*,' was adopted and received into our system, it was adopted in its full extent."

Fonblanque (vol. 1, p, 326, note a) says, "The civil law is so generally referred to in the discussion of this subject, that it may be material to take a cursory view of the different means by which a legal obligation was created by that law, in order to show that though we have borrowed the phrase *nudum pactum* from the civil law, and the rule which decides upon the nullity of its effect, yet that the common law has not in any degree been influenced by the notions of the civil law, in defining what constitutes *nudum pactum*." He then cites authorities to show that by the civil law a promise in writing might be a *nudum pactum*, and therefore, not capable of supporting an action, and hence seems to infer that such is the rule of the common law.

However, both Wilmot and Blackstone are supported by Bracton, who appears to be the first writer upon the English law, who has noticed the doctrine of *nudum pactum*. Bracton has certainly interwoven many of the principles of the civil law with his observations on the common law, but it is believed, he has done it only in cases where the common law has recognised those principles. The passages of Bracton, alluded to by WILMOT, in the case before cited, are the following: Book 3, c. 1, § 2, p. 99. edition of 1640. "*Videndum est etiam unde actio oritur? Et sciendum est, quod ex obligationibus, tanquam à matre, filia. Obligatio autem, quæ est mater actionis, originem ducit et initium ex aliqua causa præcedente, sive ex contractu vel quasi, sive ex maleficio vel quasi. Ex contractu vero oriri poterit multis modis, sicut ex conventione, per interrogationes et responsiones, ex conceptione verborum quæ voluntates duorum in unum trahit consensum, sicut sunt pacta, conventa, quæ nuda sunt aliquando, aliquando vestita; quæ, si nuda fuerint, exinde non sequitur actio, quia ex nudo pacto non nascitur actio. Oportet igitur quod habeat vestimenta, de quibus inferius dicendum est.* In the next chapter, § 1, in the same page, he tells us what are those *vestimenta* which prevent pacts from being nude. *Est enim obligatio, quasi contra ligatio, et quatuor*
*448] *habet species, quibus contrahitur, et plura vestimenta. Contrahitur enim re, verbis, *scripto, consensu, traditione, junctura, quæ omnia dicuntur vestimenta pactorum.*"

And in § 9 of the same chapter, he says, "*Inventæ autem sunt hujusmodi stipulationes et obligationes ad hoc, quod unusquisque habeat et sibi acquirat quod suâ interest, si contra ea agatur quæ in stipulationem deducuntur. Et si res in stipulatione deducta alii detur, nihilominus intererit stipulatoris, quia ille qui promisit, tenebitur ad interesse, vel ad pœnam, si pœna fuerit in stipulationem deducta. Per scripturam verò obligatur quis, ut si quis scripserit alicui se debere, sive pecunia numerata sit, sive non, obligatur ex scriptura, nec habebit exceptionem pecuniæ non numeratæ contra scripturam, quia scripsit se debere. Et non solum obligatur quis per verba, sed per scripturam, et per literas, non ut literæ quidem ipsæ, vel figura literarum obliget, sed oratio significativa quam exprimunt literæ; sed utrumque cooperatur ad obligationem, oratio significativa cum litera.*"

These expressions of Bracton are strong and clear; and if he is to be considered as only borrowing terms from the civil law to express his ideas of the common law, they are certainly conclusive.

The reason of the rule seems to be truly given by Plowden, in the cases cited by Mr. Justice WILMOT; and if a written promise is not within the reason of the rule, it

would seem, that the rule cannot apply. In the ancient books, no notice is taken of any written agreements but those under seal; and the reason probably is, that in those times by far the greater part of the people could not write, so as to sign their names to an instrument. Hence, a seal was substituted for a signature; not because it was a more solemn act, but from the necessity of the case. Witnesses also were produced for identifying the seal, and not to add to the obligation of the contract. But the difference between sealed instruments and others has now become obsolete in practice; for there is no case of a contract, where the interests of third persons are not involved, in which the defendant may not, either at law or in equity, avail himself of the want of consideration. And the most trifling consideration is now held sufficient to take even parol contracts out of the rule of *nudum pactum*.

In *Bunniworth* v. *Gibbs*, Style 419, Chief Justice ROLLE said, "a little consideration will serve to ground a promise on." Blackstone (1 Com. 445) says, "any degree of reciprocity will prevent the pact from being nude." And WILMOT (3 Burr. 1666), said, "the least spark of a consideration will be sufficient." In *Fenner* v. *Meares*, *2 W. Bl. 1271, Judge BLACKSTONE said, that "the assignment and other [*449 transactions were fully sufficient as a consideration to make the *assumpsit* to the assignee binding." And in *Hawkes* v. *Saunders*, Cowp. 290, Lord MANSFIELD said, that "a legal or equitable duty is a sufficient consideration for an actual *assumpsit*;" and that it "was too narrow ground," to say, that "there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made." And BULLER declared the true rule to be, "that wherever a defendant is under a moral obligation, or is liable in conscience and equity to pay, that is a sufficient consideration." But even admitting that the rule of *nudum pactum* applies to written contracts, yet in the present case, there is a sufficient consideration. For, according to Judge BLACKSTONE, "the assignment and other transactions," and particularly the payment of the money by the intermediate indorser to the defendant, were certainly sufficient consideration to support the *assumpsit*.

Upon the whole, therefore, whether this case be considered upon the ground of a promissory note, before the statute of Anne, or upon general principles of common law, the count for money had and received seems to be well supported by the evidence offered.

IX. It is believed, that no case has been reported in Virginia, in which this question has been decided. There are cases, however, which may possibly be considered as affecting some of the principles involved in the present inquiry.

In *Mackie* v. *Davis*, 2 Wash. 229, it is held, that the assignee of a bond may maintain *indebitatus assumpsit* for money had and received, against the assignor, upon principles of common law. There are, in that case, several assertions and admissions of counsel which are deemed not to be correct, but are warranted only by a few immature observations of some of the writers, since the statute of Anne. One of the counsel seems to consider the custom of merchants as no part of the common law. This has been shown to be an incorrect position, by the concurrent adjudications of a long series of years. It is said also, that "as to promissory notes, the right of recovery against the indorser is expressly given by the statute of Anne, and from this provision, an invincible argument is to be drawn in favor" of the defendant, "for, if in a commercial country like England, it was necessary for the legislature to provide a remedy against the indorser of a promissory note, it is obvious, that no such right existed at common law." But if the statute of Anne was in affirmance of the law as it stood before, and only enacted to remove the doubts which *had been raised by Lord HOLT'S [*450 decision in *Clerke* v. *Martin*, then this argument totally fails. And that such was the fact is believed to be proved by the authorities before cited.

One of the counsel for the plaintiff considered the case as standing on the same ground as notes of hand did, before the statute of Anne; and denies that notes were within the custom of merchants, for which he cites Kyd as an authority; but Kyd says only "that it was held," &c., and relies on the case of *Clerke* v. *Martin*, and the preamble of the statute. And in the same manner, every like assertion in the modern

books may be traced up to the same source. The only authority which can support the position is the case of *Clerke* v. *Martin*.

The statute of Anne having put the question at rest, no one has taken the pains to examine the real state of the law, prior to the statute, but one writer after another has repeated the assertion, without the least examination. In England, it is of no importance, whether they are correct or not; but in this country, where few of the states have adopted the statute, it becomes interesting to know how the law really stood before. In the case of *Mackie* v. *Davis*, the counsel and the court place much reliance on the privity between the indorser and his immediate indorsee, and it is evident, that they borrowed their ideas from Kyd on Bills 114. But Kyd cites no authority for his observations; nor are they warranted by any adjudged case, at least, so far as they apply to the action for money had and received. Judge ROANE says, "The case of promissory notes will be an important guide, and therefore, it will be proper to see how they stood previous to the statute, which it is supposed created the liability of the indorser of them." But he proceeds no farther in his investigation, than to the case of *Lambert* v. *Oakes*, 20th May, 11 Wm. III. He says, "this case was decided antecedent to the statute of Anne, and was, consequently, governed by the principles of the common law. If he considered the custom of merchants as part of the common law (as it really is), he was certainly correct. But the probability is, that the declaration was in that case grounded on the custom of merchants: 1st. Because that was the usual and established form of declaring on promissory notes in those days: 2d. Because there had not at that time been a distinction discovered between a promissory note and an inland bill of exchange: 3d. Because there never was, either before or since the statute of Anne, a time when an indorsed promissory note was not considered as a bill of exchange: and 4th. Because four out of the five reporters of that case call it a bill of exchange, and even Lord Raymond himself calls it a bill, throughout his whole report, except in the first line, where he calls it a note.

*451] *Judge ROANE further says, that "bonds, in England, are not assignable, and therefore, stand in the same situation as notes of hand did at the time when this case was determined." It is believed, upon the authority of the cases already cited, that there never was a time when a promissory note payable to order was not assignable, and even Lord HOLT, subsequent to the case of *Clerke* v. *Martin*, admitted, in the case of *Buller* v. *Crips*, that an indorsement of such a note would create a negotiable bill.

In the case of *Norton* v. *Rose*, 2 Wash. 240, the counsel admit that goldsmiths' notes "circulated like bills of exchange" before the statute of Anne, and yet it is contended, that promissory notes derived their whole negotiability from the statute. But goldsmiths' notes were simply promissory notes, and were not more negotiable than the promissory notes of any other description of persons. Again, the same counsel observes, "that though notes of hand, according to the statute of Anne, were placed on the same ground with bills of exchange, and of course, governed by the same rules, the legislature of 1748, by assimilating them in every respect to bonds, rendered them unlike to bills of exchange, in this country, and thereby gave a convincing proof that it was not their intention to suffer bonds to be governed by those rules which apply to bills." And in confirmation of his argument he cites 1 Dall. 23. Judge ROANE observes, "that notes of hand are now assignable in England, and it is admitted, that the assignee is discharged of any equity which existed against the assignor, unless the note was given for a usurious or gaming consideration. The reason of this is, not that the principle attached to them as a legal consequence of their being made assignable, but because this rule, for commercial purposes, applied to bills of exchange; and the statute of Anne, declaring notes assignable in like manner as bills of exchange, showed an intention, as it was supposed, to render the former as highly negotiable, and as current in internal, as the latter were in external commerce. The act of our assembly embraces equally the subject of bonds and notes, but contains no expressions tending to induce a belief that the making them assignable was intended for purposes of commerce. The design certainly was to make them transferable to a certain extent; the provision points

out the limits of their negotiability, and fixes a strong mark of distinction between them and bills of exchange. As to the latter, they were assignable, and the indorsement transferred a legal right to the indorsee. They did not owe this quality to statutory provisions, and of course, they continued within that principle which had attached to them, and of which they were not deprived by any statute." He then cites the case of *Peacock* v. *Rhodes*, 2 Doug. 636, *where Lord MANSFIELD observes, that the indorsee of a promissory note or bill of exchange is not to be considered in the light of [*452 an assignee at common law, because it would stop their currency, and injure trade and commerce.

He then proceeds: "It is, therefore, not because the indorsee is the assignee of the legal right to such bills and promissory notes, that the equity is barred by the indorsement, but because of their quality as a currency, and from the necessity of adopting such a principle, for the convenience of trade and commerce with respect to such currency. But bonds are not to be considered as a currency, and within the reason of the principle laid down in *Peacock* v. *Rhodes;* for that principle is founded on commercial considerations altogether, and not upon a distinction between legal and equitable assignments. The provision of this act has long governed the assignment of bonds, and it is but of late years, that the existence of such a principle, as has been contended for in this cause, has been thought of as applicable to bonds and notes."

CARRINGTON, Justice.—"To consider this case upon general principles, the question is, whether an equity, originally attached to a bond, follows it into the hands of an assignee without notice? In England, notes of hand were not assignable until the 3d & 4th of Queen Anne, so as to enable the assignee to bring suit in his own name. Courts of equity were, of course, resorted to, where the maker of the note was not precluded from setting up any equitable defence which he might have. Frequent attempts were made by the bankers and traders, to bring them within the custom of merchants, and to place them upon the same footing of negotiability with bills of exchange. But the judges still considered them as evidences of debt. At length, the statute was procured conformable with the wishes of the trading part of the community, making them assignable in like manner as bills of exchange. The likeness, thus strongly sanctioned by legislative authority, produced similar decisions, in cases where their negotiability was concerned. But no efforts were made in favor of bonds, and they remain in the same situation in England, as they stood at common law. This country was then a part of the British empire, and our legislature assimilated its laws to those of the mother country, so far as our local situation and state of society authorized it. In 1705, shortly after the English statute passed respecting notes of hand, the assembly passed a law authorizing the assignment of bonds and notes. This law I cannot meet with, but it was repealed by proclamation in 1730, and in the same year, another law was enacted, exactly similar to the act of 1748. *With the English statute before their eyes, [*453 the legislature did not choose to adopt it altogether, or to introduce into it a principle which should defeat the equity of the obligor, as it was secured to him at common law. Those expressions in the statute which assimilated notes to bills of exchange, were omitted in our law, and in the room of them, others were introduced, which established an opposing principle. The negotiability of bonds and notes was qualified and restricted within bounds consistent with the commercial station of this country. There was no necessity for exalting those kinds of papers to the high ground on which the commercial world had placed bills of exchange, and the whole complexion of the law shows that it was intended to be avoided. The doctrine which has been stated and relied upon, as applicable to foreign bills of exchange, is, consequently, inapplicable to the present discussion. These considerations have produced conclusions in the public mind, as to the construction of the law in question, the very reverse of what has been contended for by the counsel for the appellee. I should be unwilling to unsettle these long-formed opinions, unless the expressions of the law rendered it absolutely necessary. That a bond, fraudulent and void in its creation, cannot be cleansed of its impurity, and rendered valid, by assignment, is settled by the case of *Turton* v. *Benson*, and has uniformly been so decided in the courts in this country. No man

can, by the mere act of assignment, transfer a greater interest than he holds; dispose of an interest where he has nothing, or make good and valid that which was originally vicious and void, in this enlightened age though, former decisions are rejected, and a new mode of attaining justice is discovered. But is it true, that the means are adequate to the object? It is urged, as a reason for the rejection of former opinions upon this subject, that they tended to impose deceptions on the public, and to cramp commerce, by destroying the negotiability of bonds and notes. As it strikes me, they rather tend to prevent than to countenance those frauds, and if the other consequences will follow, it is preferable to sacrificing a majority of the public to the avarice and injustice of a few. But I cannot perceive how commerce, or that sort of it which is most useful to society, can be injured. That their negotiability will be restrained, I admit, but they will answer the purposes for which the law intended them, by facilitating the collection of debts, and thereby affording a convenient and desirable accommodation to the people of this country."

Judge Lyon, in giving his opinion, observed, that "the arguments used to assimilate this to the case of a bill of exchange and promissory note, are totally without foundation. The reason of the law, *as applicable to those cases, is not founded upon the principle stated by the counsel for the appellee, but upon considerations altogether of a commercial nature." *454]

These observations certainly claim great respect, not only as coming from the highest court of judicature in Virginia, but as containing the opinions of gentlemen high in the confidence of the people of that state, and whose decisions have been so generally correct. But still their weight depends upon the accuracy of the facts on which their opinions are founded, and the correctness of the arguments derived from those facts. In this case of *Norton* v. *Rose*, the question was not upon a promissory note, but whether an equity, originally attached to a bond, follows it into the hands of an assignee without notice. Hence, what is said respecting promissory notes comes in incidentally, and was not properly before the court. The decision, as far as it respects the question before the court, seems to be correct.

The observations in these cases from Virginia, respecting promissory notes, may be reduced to three propositions. 1st. That promissory notes were not negotiable, before the statute of Anne, so as to enable the indorsee to bring an action in his own name. 2d. That the act of assembly, by assimilating notes to bonds, shows an intention in the legislature to restrain the negotiability of both within the same limits. 3d. That the negotiability given by the act of assembly to bonds and notes was not "intended for purposes of commerce."

The first of these propositions is clearly incorrect. It never was doubted, until the case of *Clerke* v. *Martin*, in the first year of Queen Anne, that a promissory note was a bill of exchange, even between the payee and the maker. And no case has yet decided, that a promissory note, payable to order and indorsed, is not a good bill of exchange. It was never doubted, until the case of *Buller* v. *Crips*, in the second year of Queen Anne, and that case was never decided. Judge Carrington says, "courts of equity were, of course, resorted to;" that is, because the indorsee could not bring a suit at law in his own name. If this was the case, it must have happened between Michaelmas term, 2 Anne, when *Buller* v. *Crips* was argued, and 3 & 4 Anne, when the statute was enacted. For before the 2d Anne, the indorsee could bring and support a suit in his own name, at law, against the maker or any or all of the other *parties to the note. The case of *Buller* v. *Crips* only raised a doubt, and the statute followed immediately and dispelled it. No case, it is believed, can be found of an application to equity on the grounds suggested by the judge. *455]

The second proposition, that the act of assembly, by assimilating notes to bonds, intended to restrain their negotiability within the same limits, contains an argument which, if used at the trial, was not much insisted on, but which seems to be the only ground upon which a doubt can be supported. It is much to be regretted, that the act of 1705, c. 34, is not to be found, as it would probably throw some light upon the subject. Its title does not, like that of its successors, mention promissory notes. It is

"an act declaring how long judgments, bonds, obligations and accounts shall be in force; for the assignment of bonds and obligations; directing what proof shall be sufficient in such cases, and ascertaining the damage upon protested bills of exchange."

Whether the legislature of Virginia, at the time of passing this act, had before them the statute of 3 & 4 Anne, c. 9, is very doubtful. It is not probable, that the acts of that session of parliament were printed, until some time after the end of the session, which was on the 14th of March 1705, on which day, the statute of Anne respecting promissory notes received the royal assent. The Virginia assembly of 1705 met on the 23d of October, in the same year. There does not seem to have existed any particular motive for transmitting, in the most expeditious manner, the new acts of parliament; and if their transmission was left to accident, as was probably the case, the presumption is (especially, as it was a time of war), that the legislature of Virginia had no knowledge of the English statute, until after their session of 1705. But however this may be, there is at present no evidence that promissory notes were made assignable by that act of assembly.

The act of 1730, c. 5, is entitled "an act for ascertaining the damage upon protested bills of exchange; and for the better recovery of debts due on promissory notes; and for the assignment of bonds, obligations and notes." As the act of 1705 was repealed by proclamation, in 1730, it is not probable, that the new act of that year would re-enact the same thing in substance. Hence, a material variance may be presumed between the two. The act of 1730, c. 5, § 8, is as follows: "And to the end the recovery of money upon promissory notes, and other writings without seal, may be rendered *more easy, be it enacted, &c., that if any person or persons shall have signed, or hereafter shall sign, any note, or by any other writing, he, she or they have [*456 promised or obliged, or shall promise or oblige him, her or themselves, to pay any sum of money, or quantity of tobacco, to any other person or persons, such person or persons, to whom the same is or shall be payable, shall and may commence and maintain an action of debt, and recover judgment for what shall appear to be due thereupon, with costs." And by the 11th section, it is enacted, "that it shall and may be lawful to and for any person or persons to assign and transfer any bond or bill for debt, or any such note as aforesaid, to any other person or persons whatsoever: and that the assignee or assignees, his and their executors and administrators, by virtue of such assignment, shall and may have lawful power to commence and prosecute any suit at law, in his, her or their own name or names, for the recovery of any debt due by such bond, bill or note, as the first obligee, his executors and administrators might or could lawfully do: provided always, that in any suit commenced upon such bond, bill or note, so assigned the plaintiff shall be obliged to allow all discounts that the defendant can prove, either against the plaintiff himself, or against the first obligee."

The intention of this act seems clearly to be to extend and enlarge, and not to restrict or limit, the negotiability of the instruments of which it speaks. Such bonds, bills and notes as are described in the act, certainly were never negotiable or assignable at common law; and for this plain reason, because it was not the intention of the parties to make them assignable. The debtor had never consented to the making his debt negotiable; it would, therefore, have been unjust in the legislature, not to have given him the full benefit of all discounts against his original creditor as well as against the assignee. The notes described by the act are those by which the signer shall promise or oblige himself to pay a sum of money, or quantity of tobacco, to any other person. Such a note is not negotiable in its nature, nor by the original contract and intention of the parties; the signer never gave any authority to his creditor to negotiate it, and therefore, legislative aid was necessary to render it negotiable. But legislative aid was never necessary to render negotiable a promissory note, payable to order. Let it be again repeated, that although promissory notes had been in common use in England, for more than half a century before the statute of Anne, yet there never was an adjudged case, in which it was decided, that an indorsee of such a note could not maintain an action in his own name against any of the parties to the note; but the whole course of decisions was uniformly to the contrary. There was no *ne- [*457

cessity, therefore, for the Virginia assembly to provide for the negotiability of notes payable to order, and hence we find, that they confine the act to bonds, bills and such notes as, at common law, stood upon the same ground as bonds; and were considered as mere *choses in action*, unassignable in their nature, and only simple evidence of a debt due by one man to another. Although it must be presumed, that the legislature of Virginia, in 1730, had full knowledge of the statute of Anne, yet it is equally to be presumed, that they knew that it was made in affirmance of the law as it before existed, and solely to remove the doubts which had been suggested by Lord HOLT. It must also be presumed, that they knew what had been the uniform practice and course of adjudications, ever since the first introduction of promissory notes. The evidence which we still have of these facts is strong and clear; but it must have been more strong and clear, in the year 1730, when many persons were living, who probably had personal knowledge of the whole history of the statute of Anne. Hence, then, it may be fairly concluded, that the assembly intended to leave those instruments which, in their own nature, and by the consent of the parties, were negotiable, as well as those which were negotiable under the custom of merchants, to the protection of such principles of law as had been already found sufficient to support them.

The act of 1748, c. 27, has precisely the same title as the act of 1730, and precisely the same provision as to the assignment of bonds, bills and notes, making use of exactly the same expressions, excepting that the words "before notice of such assignment was given to the defendant," are added, immediately after the word "obligee," in the last line of the passage before cited. So that this act of 1748 gave the assignee of such bonds, bills and notes, the same remedy at law, which he had before in equity; and this seems to have been the only use and intent of the act.

The act of 1786, c. 29, § 3 and 4, is in these words: "An action of debt may be maintained upon a note or writing by which the person signing the same shall promise or oblige himself to pay a sum of money, or quantity of tobacco, to another. Assignments of bonds, bills and promissory notes, and other writings obligatory, for payment of money or tobacco shall be valid; and an assignee of any such may, thereupon, maintain an action of debt, in his own name, but shall allow all just discounts, not only against himself, but against the assignor, before notice of the assignment was given to the defendant." This act, although its language is more concise, does not, as it respects the present question, differ in substance from the act of 1730. It is evident, that it refers to the same kind *of notes. If notes payable to order were negotiable, before the passing of these acts, it is clear, that there is nothing contained in either of them to restrict that negotiability. This brings us back to the inquiry, what was the law respecting such notes previous to the statute of Anne. If an indorsed promissory note, payable to order, was in its nature an inland bill of exchange, and if, in practice, it was always so considered, there is nothing in the acts of assembly of Virginia that forbids its being still considered as such. How and when did the law first obtain in Virginia, respecting inland bills of exchange? Nothing is said of them in the statute law of Virginia, until the act of 1786, c. 29, which adopts the provisions and nearly the words of the English statute of 9 & 10 Wm. III., c. 17, and 3 & 4 Anne, c. 9. Their negotiability is taken for granted, and must have been derived from the custom of merchants. But the same custom which gave negotiability to inland bills of exchange, gave equal negotiability to indorsed promissory notes, payable to order: it made no distinction between them. What the practice has been in Virginia seems doubtful; lawyers differ in their accounts of it; and it cannot be considered as settled.

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The case of *Lee* v. *Love*, 1 Call 499, was by the indorsee against the indorser of a promissory note, payable to order. The count relied upon was money had and received. But the court held, that the plaintiff was not entitled to recover against the defendant, because he had not first brought suit against the maker of the note. It is to be regretted, that the court did not give their reasons for supposing such a suit necessary. It was said, that they considered the case as having been already decided; and they probably alluded to the case of *Mackie* v. *Davis*, as that is the only case cited

by the counsel for the defendant. But this point was not decided in that case. Judge CARRINGTON said, "As to the lengths which it behooves the assignee to go in pursuit of the obligor, before he can resort to the assignor, it is unnecessary to lay down any general rule; it may suffice to say, that in the present case, he went far enough." Judge ROANE said, "In this country, the assignee of a bond acquires a legal right to bring suit upon it, and to receive the money, discharged from any control of the assignor over the subject; it is, therefore, his duty to bring suit." The duty of bringing a suit does not, at the first glance, seem to be the inevitable consequence of a right to sue; and it is regretted, that the intermediate terms were not hinted, which connect the conclusion with the premises. But the *dictum* of a single judge, however respectable, upon a point not necessary to support the judgment, cannot be considered as conclusively settling the law. The only points decided in that case were, that an assignee of a bond might maintain *an action for money had and received against the assignor; and that the assignee had done enough to entitle himself to such action, [*459 by bringing suit against the obligor, prosecuting it to judgment, and taking out a *fieri facias*, which was returned *nulla bona*. These seem to be all the reported cases in Virginia, which bear upon the present question.

In Pennsylvania, a number of cases have occurred, from the whole of which it appears doubtful, whether the statute of Anne is to be considered as having been extended in practice to that state, or whether their actions upon promissory notes are grounded upon the custom of merchants. Their act of assembly of 28th May 1715, seems to have been passed in the full contemplation of the statute of Anne, but it provides a right of action only for the indorsee against the maker, and that only to recover so much "as shall appear to be due at the time of the assignment, in like manner" as the payee might have done. But it gives no action to the payee against the maker, nor to the indorsee against any of the indorsers. Yet such actions are maintained in that state upon promissory notes, considered as instruments. Judge SHIPPEN, in the case of *Robertson* v. *Vogle*, 1 Dall. 252, says, "there can be no doubt, that the right of indorsees to call upon the indorsers must be founded on the custom of merchants." It appears by their act of assembly, that a right of action already existed by the payee against the maker; and Judge SHIPPEN supposes it to be under the statute of Anne, which he imagines had been extended in practice to that state. But this could hardly have happened, prior to the year 1715 (the date of their act of assembly), which was only ten years after the statute of Anne. He observes also, that "the legislature, when regulating the assignment of bonds and notes, though they did not expressly put them on the same footing with bills of exchange, must, from the terms of the act, have taken it for granted, that an action might be brought upon a promissory note, considered as an instrument. Till, therefore, a contrary opinion is pronounced, we must proceed as in the case of a bill of exchange, under the statute of Anne," &c.

But in the subsequent case of *McCulloch* v. *Houston*, in the supreme court of Pennsylvania, 1 Dall. 441, Chief Justice MCKEAN was of opinion, that the legislature intended to put promissory notes on the same footing as bonds, at least, so far as to admit the equity of a note to follow it into the hands of the indorsee. He says, "before this act, it appears, that actions by the payee of a promissory note were not maintained, nor can they since be maintained, otherwise than by extending the English statute of Anne." And to account for this *extension of the statute, he supposes, "that [*460 actions upon promissory notes were brought here, soon after the passing of the statute, by attorneys who came from England, and were accustomed to the forms of practice in that kingdom, but did not perhaps nicely attend to the discrimination with regard to the extension, or adoption, of statutes." But this could not have happened in the course of ten years, so as to have established a practice; for we are first to suppose a practice in England under the statute, a subsequent removal of attorneys from England to Pennsylvania, and then a practice in Pennsylvania to be established, and all this between the passing of the statute of Anne in the year 1705, and the act of assembly in 1715. A more probable conjecture seems to be, that the first settlers who came over from England about the year 1683, were well acquainted with the use of promis-

sory notes, and the laws respecting them, as they had been practised upon in that country, for at least thirty years. The first emigrations to Pennsylvania were about the time when the banking business of the goldsmiths was at its greatest height, and it was fifteen or twenty years after the first settlement of Pennsylvania, before a doubt was suggested, whether an action would lie on a promissory note, as an instrument. Hence, it is probable, that actions on such notes were brought in the same manner as they had been used in England, to wit, on the custom of merchants; and upon that ground, and not upon the statute of Anne, probably rests the present practice in Pennsylvania.

The practice in New Hampshire and Massachusetts seems to have the same foundation. They declare upon promissory notes, as instruments, and rely upon the express promise in writing, without alleging a consideration, or referring to any statute or custom whereby the defendant is rendered liable, without a consideration. In Connecticut, it is said by Swift, in his System of the Laws, that the indorsee must sue in the name of the payee; but the payee can maintain an action upon the note, without alleging any custom, or statute or consideration. In New York, they have nearly copied the statute of Anne, as far as it relates to promissory notes, but how the law was considered, before their act of assembly of 1788, we are not informed. In Maryland, the statute of Anne was considered as in force and always practised upon. Their declarations have been precisely in the English form, alleging the defendant to be liable by force of the statute, and the courts have strictly adhered to the adjudications in England. Hence, nothing conclusive can be inferred from the practice of the states.

The third proposition drawn from the reported cases in Virginia is, that the negotiability given to bonds and notes by the act of assembly *of that state, was not
*461] intended for purposes of commerce. It seems difficult to assign a reason why the legislature should have made bonds and notes assignable, unless it was to enable people to transfer that kind of property which existed in such bonds and notes; and the transfer of property is the only means of commerce. It will not be contended, that the sole object of the legislature was to enable the holders of such paper to give it away in voluntary donations. It must, therefore, have been intended to enable them either to pass it away, in payment of debts previously contracted in the way of commerce, or to make it in itself an article of merchandise. If, therefore, for the purposes of commerce, the legislature intended to make those contracts negotiable, which were not so, either in their nature or by the consent of the parties, it is fair to presume, that they did mean to impede the negotiability of such as were in their own nature negotiable, and were expressly intended to be made so, by the will of the contracting parties? If there were any principles of law which would support the negotiability of a promissory note, payable to order, it cannot be supposed, that the legislature intended, by implication alone, to obstruct their operation. And even admitting that they did not, by the act making bonds and notes assignable, mean, to aid commerce, yet it cannot be presumed, that they intended to wage war with those commercial principles which were already established.

This brings us back again to the first inquiry, what were the principles upon which the negotiability of promissory notes was supported, before the statute of Anne? If such principles did exist, there seems to be nothing in this act of assembly which prevents their full operation in Virginia.

The conclusion from the whole is, that there is no principle derived either from the common law, or from the act of assembly of Virginia, which will prevent a court of law from carrying into effect the contract of the parties, according to their original intention. Even admitting, that the contract of the defendant is not negotiable at law, so as to enable the plaintiff to declare upon the instrument itself, yet it cannot be denied, that it is assignable in equity, and if so, the plaintiff becomes, in equity, entitled to the money which the defendant received from the intermediate indorser; and in such a case, there never has been a doubt, since the time of Lord Mansfield, that the plaintiff is entitled to recover in an action for money had and received.

*Note (B) to Lindo *v.* Gardner, *ante*, p. 345.

This case was much debated in the court below. It appeared from the books, that the only reported case in which it had been decided that an action of debt would not lie upon a promissory note, was that of *Welsh* v. *Craig* (11 Geo. I.), 8 Mod. 373; 1 Str. 680, which is so inaccurately reported, that it is impossible to say, between what parties to the note the action was. In 8 Mod., "it was said, that it would not lie against the indorser, but that it would lie against the drawer." But we collect from the report, that the reason of the decision was, that before the statute of Anne, no action at all would lie upon the note, as a note (for which the case of *Clerke* v. *Martin*, 1 Salk. 129, was cited). That the statute gave only the same kind of action as upon inland bills, and that an action of debt was never known to be brought upon a bill of exchange. And probably, the court in that case relied on Hardr. 485, to support this position. Another reason given is, that the statute declares "that the assignee or indorsee may maintain an action against the drawer or indorser, and recover damages, &c., which shows that an action of debt will not lie, because damages are never recovered in debt."

The first position, viz., that no action, before the statute, would lie upon a note, as a note, seems not to be correct, although supported by the case of *Clerke* v. *Martin*, for that case was directly contrary to the whole current of authorities prior to that time, particularly to the case of *Williams* v. *Williams* (5 Wm. & M.), Carth. 269; and the statute of Anne seems to have been made, not to alter the law, but to overrule this case of *Clerke* v. *Martin*, and to place promissory notes on the same footing on which they stood prior to that decision. (See the preceding note.)

It is true, that in *Milton's Case*, Hardr. 485, it was decided, that an action of debt would not lie against the acceptor of a bill of exchange; but the reason given shows that it would lie against the maker of a promissory note. For it was said, that the undertaking of the acceptor was only collateral, to pay the debt of another, and that the drawer continued debtor, notwithstanding the acceptance. So that the reason seems to be, that the acceptor was not the original debtor. But the maker of a promissory note is the original debtor, and therefore, an action of debt would lie against him, by the same rule that it would not lie against the acceptor of a bill.

*In *Baker* v. *Hill*, 3 Keb. 627, the action was debt on an inland bill, but it [*463 is not stated between what parties. There was a demurrer to the plea, and judgment for the plaintiff. This was eight years after the case in Hardres. And in the case of *Brown* v. *London*, 2 Keb. 695, 713, 758, 822; 1 Vent. 152; 1 Lev. 298; and 1 Mod. 285, it seems to be admitted, that an action of *indebitatus assumpsit* for money had and received would lie, if the acceptor had the money in his hands to pay.

In early times, "all matters of personal contract were considered as binding only in the light of debts; and the only means of recovery was by this action of debt." 1 Reeve 159. It was not without repeated struggles, that the action on the case was permitted to be brought for breach of a personal contract. Even as late as the reign of Queen Elizabeth, it was considered as a matter of great doubt, whether *assumpsit* would lie, in any case, where an action of debt might be brought. The court of king's bench held, that it would; and the common pleas held, that it would not; but it was finally determined, after great debate, before all the judges of England, in the exchequer chamber, in *Slade's Case*, 4 Co. 93, that *assumpsit* would lie for the price of corn sold. The case of *Core* v. *Woddye* (28 Hen. VIII.), Dyer 20, is a strong case, to show that where the defendant has received money to which the plaintiff is entitled, he may have an action of debt for it.

A promissory note has always been held to be good evidence of money received by the maker of the note to the use of the payee. In that case, the court, in giving their opinion, said, "admit that there was not any bill testifying the receipt, yet by the common opinion of the books, it is in the election of the bailor to have an action of debt, or

account, in such a case." And in the case of *Meredith* v. *Chute*, 2 Ld. Raym. 760, it was said by the whole court, that a note was good evidence of a debt due from the maker to the payee. In Godbolt 49, the action is said to be "debt upon a *concessit solvere*, according to the law-merchant." This seems to have been some kind of an acknowledgment of a debt, in the nature of a promissory note. In *Domingo Franca's Case*, 11 Mod. 345, it was held, that debt or *indebitatus assumpsit* might be brought upon a bill of exchange by the payee against the drawer, "because it is in the nature of a security."

The action of debt was the ordinary remedy upon a tally, which seems to have been no better evidence of a debt than a promissory note. *A tally is thus defined by Spelman, in his Glossary, p. 532 (edit. 1637). "*Tallium, alias Talea, est clavola vel ligni portiuncula, utrinque complanata, cui summa debiti inciditur; fissaque inde in duas partes, una debitori, altera creditori traditur, in rationis memoriam.*" These tallies seem to have been a kind of common security for money, and to have been negotiable like bank-bills, passing from hand to hand by delivery only. 12 Mod. 241. Actions of debt upon them are mentioned in Fitz. Abr. tit. Debt, 4; 4 Edw. II.; Fitz. Abr.; Ley 68, 70; F. N. B. 122, I.; Dyer 23; Hardr. 333; and 2 Keb. 713. Sometimes, they were sealed, but in general, they were without a seal, and were only evidence of a simple contract. Against a common tally, the defendant might wage his law; and in Dyer 23, it appears, that "there is one book which says that a man may wage his law against a sealed tally, if the tally have only notches or scotches in dented, each scotche for twelve pence, according to the common usage; but if the sum be inscribed upon the sealed tally, he shall be ousted of his law."

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The case of *Rumball* v. *Ball*, 10 Mod. 38, was debt upon a promissory note; and although an objection was taken to the want of a demand, yet none was made to the form of the action. In *Rudder* v. *Price*, 1 H. Bl. 547, the action was debt upon a promissory note, payable by instalments; and although the case was warmly contested, and although Mr. Justice Lawrence, who was then at the bar, was for the defendant, yet no objection was suggested to the form of the action; but it was contended, and so held by the court, that an action of debt would not lie upon such a note, until all the instalments had become due.

Morgan, in his Precedents, p. 584, has given the form of a declaration in debt on a promissory note, and Kyd, in his Treatise on Bills and Notes, p. 114 (Dublin edit. 1791), after noticing some of the authorities on this subject, says, "the conclusion resulting from the whole seems to be this, that where a privity exists between the parties, there an action of debt or *indebitatus assumpsit* may be maintained." Comyns (Dig. tit. Debt, A, 8) lays down the proposition generally, "that debt lies upon every express contract to pay a sum certain," and cites 1 Leon. 208. And Blackstone (3 Com. 154) says, "the legal acceptation of debt is, a sum of money due by certain and express agreement; as by a bond for a determinate sum, a bill or note," &c. "The non-payment of these is an injury, for which the proper remedy is by action of debt."

*But the question is now settled in England, in the case of *Bishop* v. *Young*, 2 Bos. & Pul. 78, where it was held, that "an action of debt lies by the payee against the maker of a promissory note, expressed to be for value received. The declaration in that case was, "for that the defendant, on ——, at ——, made his certain note in writing, commonly called a promissory note, with his own proper hand thereto subscribed, bearing date the same day and year aforesaid, and then and there delivered the said note to the plaintiff, by which note, the said defendant, one month after date, promised to pay to the plaintiff, or order, 8*l.*, value received in goods by the defendant, by reason whereof, and by force of the statute in that case made and provided, the defendant became liable to pay to the plaintiff the said sum of money in the said note mentioned, whereby an action hath accrued," &c. To this declaration, there was a general demurrer, in support of which the counsel relied chiefly on the case of *Welch* v. *Craig*, 8 Mod. 373; 1 Str. 680.

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Lord Chief Justice Eldon, in delivering the opinion of the court, examined the cases cited, and the principles on which the action of debt is founded. He held, that the

statute of Anne had put promissory notes on the same footing, and given upon them the same remedy, as was before had upon inland bills of exchange. That an action of debt would lie upon an inland bill of exchange, by the payee against the drawer, whom he considered as the original debtor, and therefore, debt would lie by the payee of a promissory note against the maker, who is the original debtor. He relied also on the words value received; and cited Hardr. 485; *Pearson* v. *Garrett*, Skin. 398; Com. Dig. Debt, B, Debt, A, 8 and 9; *Hard's Case*, 1 Salk. 23; *Hodges* v. *Steward*, Skin. 346; *Rumball* v. *Ball*, 10 Mod. 32.

The obection that the statute of limitations was not permitted to be given in evidence upon the plea of *nil debet*, is supported only by a *dictum* of Chief Justice HOLT, in 1 Salk. 278, *Anon.*, at *nisi prius* (Anno 1690), and in the case of *Draper* v. *Glassop*, 1 Ld. Raym. 153 (8 & 9 W. III.). The reason which he gives in the first case is, "For the statute has made it no debt, at the time of the plea pleaded; the words of which are in the present tense. But in case, on *non assumpsit*, the statute of limitations cannot be given in evidence, for it speaks of a time past, and relates to the time of making the promise." The reason given in the case of *Draper* v. *Glassop* is, "because *non assumpsit* goes to the *præter* tense; but upon *nil debet* pleaded, the statute is good evidence, because the issue is joined *per verba de præsenti*, and *without doubt, *nil* [*466
debet by virtue of the statute; and it is no debt at this time, though it was a debt." In 1 Morgan's Vade Mecum 220, this case is cited with a "*sed quære*," and he advises that the statute should be pleaded.

The expression of the statute of Jac. I., c. 16, which is the same as that of the act of assembly of Maryland, 1715, c. 23, is, that the action shall be brought within such a time, and not after. It does not extinguish the debt, but only bars the remedy at law. The lapse of time is not, of itself, evidence that the defendant does not owe the money. The statute only creates a disqualification of the plaintiff to recover, like that of outlawry, alien enemy, *feme covert*, &c., or it may be considered as a special protection of the defendant, like a certificate of bankruptcy, infancy, or a discharge under an insolvent act.

That the debt is not extinguished by the statute, is clear, from the cases which have been decided since the time of Lord HOLT. In the case of *Quantock* v. *England*, 4 Burr. 2628, it was held, that a debt barred by the statute is a good debt to support a commission of bankruptcy. The same was expressly decided by Lord MANSFIELD, at *nisi prius*, in the case of *Fowler* v. *Brown*, cited in Esp. N. P. 563. And in *Trueman* v. *Fenton*, Cowp. 548, his lordship said, "all the debts of a bankrupt are due in conscience, notwithstanding he has obtained his certificate. Though all legal remedy may be gone, the debts are clearly not extinguished in conscience. Where a man devises his estate for payment of his debts, a court of equity says (and a court of law, in a case properly before them, would say the same), all debts barred by the statute of limitations shall come in, and share the benefit of the devise." Hence it appears, that the reason which Lord HOLT gives for the distinction between *non assumpsit* and *nil debet*, is not supported. And if the reason fails, the law fails with it.

The objections respecting the letters of administration, and the omission of the *debet* and *detinet*, were supposed to come too late, after verdict.

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1. When all the requisites have been performed, which authorize a recording officer to record any instrument, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labor of inserting it in a book kept for that purpose, may not have been performed. *Marbury* v. *Madison*.....*160
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