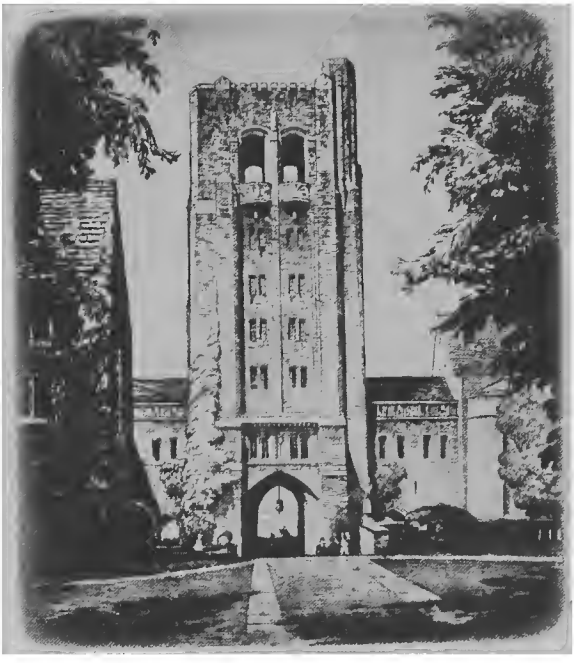

LAW BOOKS

PUBLISHED BY

T. & J. W. JOHNSON,

LAW BOOKSELLERS, PUBLISHERS AND IMPORTERS,

197 CHESTNUT STREET,

PHILADELPHIA.

TOPLIFF JOHNSON. J. WARNER JOHNSON.
S. P. PUTNAM.

NEW AND VALUABLE LAW BOOKS.

T. & J. W. JOHNSON,

Invite the attention of the Profession throughout the United States to their very complete assortment of Law Books, embracing all American, and a large number of English and French publications, constantly for sale at the lowest rates. Private and Association Libraries supplied, and new volumes of Reports and Elementary Books forwarded upon publication.

Our business being confined entirely to the publication and sale of Law Books, gentlemen of the Bench and Bar will find us able to supply any Law publication of this country or of England.

Our cheap series of English Reports and Elementary works are urgently recommended to your notice.

ENGLISH COMMON LAW REPORTS. 65 VOLS.

WITH A COMPLETE INDEX TO THE FIRST FORTY-SEVEN VOLS.

Vols. after 65 will contain American Notes by Hon. George Sharswood.

The cheapest and most valuable series of Law reprints now before the public, are the Philadelphia editions of the regular series of the English Common Law Reports and the English Exchequer Reports.

THE ENGLISH COMMON LAW REPORTS in 65 volumes, contain, with a few exceptions, a full reprint of all the cases decided in the Courts of King's Bench, Common Pleas, and at Nisi Prius, from 1813 to the present time—reported by Adolphus & Ellis, Barnewall & Adolphus, Barnewall & Creswell, Barnewall & Alderson, Bingham, Broderip & Bingham, Carrington & Paine, Manning, Granger & Scott, Holt, Starkie, Taunton, and numerous others.

Price per volume, 1 to 43, containing two English volumes, $3 50.

Price per volume, 44 to 65, containing one English volume, $2 50.

New volumes, as issued, containing about 1000 English pages printed in full, and bound in best style, with American Notes. $2 50.

"The absolute necessity to the American lawyer for keeping up an acquaintance with the English decisions, is well understood; and this series highly commends itself both on account of the neat, accurate and cheap manner in which it is furnished, and the mine of excellent Reports which it embraces."
Marvin's Legal Bibliography.

NEW ENGLISH EXCHEQUER REPORTS.

PLEAS AND EQUITY.

Reprinted in full, in best style, with American Notes, by J. I. Clark Hare and H. B. Wallace, Esqrs., at $2 50 per volume, bound. Including M'Clelland & Younge, Younge & Jervis, Crompton & Jervis, Crompton & Meeson, Crompton, Meeson & Roscoe, Meeson & Welsby, Welsby, Hurlstone & Gordon, Younge & Collyer, in Equity.

Crompton, Meeson & Roscoe, in 2 vols., $5 00.
Meeson & Welsby, in 16 vols., $40 00.
Welsby, Hurlstone & Gordon, in 5 vols., $12 50.

Are published, and ready for delivery.

THE NEW ENGLISH EXCHEQUER REPORTS, in 23 volumes, contain a verbatim reprint of all the Cases reported by Crompton, Meeson & Roscoe, in 2 vols., Meeson & Welsby, in 16 vols., and by Welsby, Hurlstone & Gordon, present reporters, in 5 vols. They derive increased value from the Notes and Referenees to American Decisions, appended by Messrs. J. I. Clark Hare and Horace Binney Wallace, whose labours in editing Smith's, the American, and White's Equity Leading Cases, have rendered them so popular with the profession. The low price ($2 50 per volume,) at which they are sold, places them within the reach of every book buyer. Their merit recommends them to every lawyer.

These series of Reports are by the regular reporters, and form part of the great chain of the English authorities, extending from the Year Books to the present time. The same difference exists between them and the *Opposition Reports* issued in the English Periodicals, as is found in this country between the regular reports, and the issues of the various magazines. These are the only series issued by authority and under sanction of the Court, or cited, with but few exceptions, by elementary writers. Being reprinted without condensation or omission, and issued in this country immediately upon their completion in England, the regular or authoritative series of the English Common Law and Exchequer Reports is believed to present to the American Lawyer inducements and advantages greater than those offered by any other series of English or American Reports. In cheapness, practical value, and authority, the great elements of value, they are unsurpassed, while in punctuality of appearance, they are in advance of most American editions. The publishers are determined that no effort connected with their duties shall be wanted to render them, as they always have been, highly popular and satisfactory to the profession.

We take pleasure in referring to the accompanying letters, explanatory of the character of these reports, and their value to the profession in this country:—

Cambridge, January 25, 1845.

Messrs. T. & J. W. Johnson.

GENTLEMEN:—In reply to your letter, I can with great sincerity say, that I entertain a very high opinion of the recent Exchequer Reports. In my judgment they are not excelled by any contemporaneous Reports, in learning, ability, or general utility and interest. The cases decided are discussed with great care, and expounded with uncommon force. I scarcely know of any volumes, which I deem of more importance or value for a professional library.

JOSEPH STORY.

Cambridge, Jan. 25, 1845.

GENTLEMEN:—Your letter of the 24th has been received, in which you ask my opinion as to the value of the English Exchequer Reports, from Price downwards to this time, to an American lawyer, and as to the expediency of reprinting them in this country. Of the high value of these Reports, both on the Pleas and Equity sides of the Court, I have not the least doubt, the decisions of this Court for the last fifteen or twenty years, both at Equity and in Common Law, being entitled to equal respect with any others in England. I should think an American lawyer's library essentially incomplete without them.

I am, Gentlemen, very respectfully yours,

Messrs. T. & J. W. Johnson.

SIMON GREENLEAF.

BACON'S ABRIDGMENT.

10 vols, $50 00. New Edition.

A new ABRIDGMENT OF THE LAW, by MATTHEW BACON, of the Middle Temple, Esq., with large additions and corrections, by Sir Henry Gwillim and Charles Edward Dodd, Esq., and with the notes and references made to the edition of 1829, by Bird Wilson, Esq., to which are added Notes and references to American Law and Decisions, by John Bouvier, author of the American Law Dictionary. 10 vols. super royal 8 vo.

Bacon's Abridgment is a work so well known, that it is altogether unnecessary to say one word as to its worth to the practising lawyer. No library is considered complete without it.

With regard to the edition now offered to the public, it is undoubtedly the best ever given to the profession, either in this country or in England. The editor has displayed his usual industry in the annotations he has made, and by his exertions the work has been Americanized as much as a work of that nature can be. Any one who will take the trouble to examine the titles Arbitrament and Award; Assignment, where five-sixths of the matter is new, and relates to American law; Assumpsit, where two out of eight heads have been added; Courts of the United States, which is an entirely new head, containing thirty-four pages; Damages, where three new heads have been added; Descent, where the general rules in the United States are stated; Estates for Life; Evidence; Master and Servant; Merchant and Merchandise; Mortgage; Nuisances; Set-off; Statute; Trespass; and Uses and Trusts; may form a pretty correct idea of the labors the editor has bestowed upon the work, and how far he has adapted it to the laws of this country. To show the extent of his labours, it is only necessary to state that he has referred to upwards of forty thousand cases, decided since the last publication of this work in England.

But this is not all: he has added a very perfect index to each volume, and, in the last a general index to the whole work, occupying 137 pages. Without this convenient key, this remained a sealed book: with it, the practitioner will find answers to most questions he may examine, in the shortest possible space of time.

RAWLE ON COVENANTS FOR TITLE, 8vo, 600 pages. $1 50.

A practical Treatise on the Law of Covenants for Title, by William Henry Rawle. This work is devoted to the consideration of the liabilities and rights of vendors and purchasers of real estate, arising from their covenants for title. As such covenants are in some shape or form introduced into nearly every conveyance of real estate, on both sides of the Atlantic, it is hoped that the Profession may not deem unnecessary a work which has for its object their analysis and practical effect. In English treatises on the law of Vendor and Purchaser, the subject of Covenants for Title, has allotted to it only a limited space, but there is a vast body of American authorities which have not hitherto received the classification and analysis which the importance of the subject demands.

CAMBRIDGE, MASS., March 8th, 1852.

Messrs. T. & J. W. JOHNSON:

Dear Sirs—I received a week or two since, the copy of Mr. Rawle's book on Covenants for Title, for which be pleased to accept my grateful acknowledgments.

Without time to read it through, I have nevertheless been able to look it over and to give some of its topics a close study. As an original treatise, well considered and carefully elaborated, it certainly does great credit to the learned author, and entitles him to the gratitude of the profession for so valuable an addition to the stock of legal science among us. I remain, gentlemen,

Your much obliged and obedient servant,
SIMON GREENLEAF.

Extract from a letter from C. B. Goodrich, Esq.

BOSTON, March 13, 1852.

"I have carefully read the work of Mr. Rawle on the Law of Covenants for Title. It is evident the author has written with care, diligence and eminent ability. In its arrangement, and in some of the subjects discussed, it is new. The chapters upon 'The Covenant for Further Assurance;' 'The Operation of Covenants for Title, by way of estoppel or rebutter;' 'The purchaser's right to recover back, or detain the purchase money after the execution of the Deed,' are of great value and have interested

me. The matter of warranty is discussed fully, and must be of constant use to those engaged in the preparation of assurances. The entire work is important and valuable to the profession. It is better adapted to the use of an American Lawyer, than any other book embracing the same subjects with which I am conversant.

"The profession will readily accord to him an acknowledgment of their obligation for his successful effort to promote and illustrate the science of Law, and will avail themselves of the benefit resulting therefrom."

A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED.

By HERBERT BROOM, Esq., of the Inner Temple, Barrister at Law.

Third edition. Philadelphia: T. & J. W. Johnson, Law Booksellers, Publishers, and Importers. 1852. pp. 607. $4.00.

The only reprint of this work heretofore published in this country, was from the first London edition, this by the Messrs. Johnson is from the second, in which a new and more complete arrangement of the matter has been made, and to which references to all the American cases has been added by the author, thereby rendering it, although but a reprint, of as much practical value on this side the water, as an American edition. That portion of the work for instance which relates to Property and its attributes, has been divided into three heads, which treat respectively of its Acquisition, Enjoyment, and Transfer; a mode of considering this subject, says the author, which has been adopted for the sake of simplicity, and with a view to showing in what manner the most familiar and elementary maxims of our Law may be applied to the exposition and illustration of its most difficult and comprehensive branches.

The book is published in a style more than usually attractive, and cannot fail to be considered a valuable addition to the library of the reading lawyer.—*Legal Intelligencer.*

A DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES.

By HENRY ROSCOE, Esq., of the Inner Temple, Barrister at Law, with considerable additions, by T. C. Granger, Esq., Barrister at Law. Fourth American, from the third London edition, with notes and references to American decisions, and to the English Common Law and Ecclesiastical Reports. By George Sharswood, Philadelphia: T. & J. W. Johnson, Law Booksellers. 1852, pp. 993. $5.50.

There is, we presume, no lawyer unacquainted with the value of Mr. Roscoe's work on Criminal Evidence, and to the practitioner of this country that value is much enhanced by the American annotations; the rapid sale of the three previous editions abundantly testifies this fact.

Owing to recent rulings in criminal practice, a want has been for some time felt for a new edition embracing all the late decisions, and this want, the publishers now amply supply by this the fourth American, from the third London edition, which has been very much enlarged and improved, while the price, we believe, remains the same. The American references have again been revised and brought up, so as to embrace every case bearing upon the subject, and the book is as rich in authorities as it can be made. To the lawyer in criminal practice, and to the committing magistrate, the work is indispensable; the headings are so arranged as to embrace the whole of each subject, while a copious and well digested index renders reference, if possible, more easy, and enables one at a glance to find all the law and the rulings upon any particular case. We predict for this edition a very rapid sale, and consider the Messrs. Johnson entitled to the thanks of the profession for the very handsome manner in which the book is published.

IN PRESS.

SMITH'S LEADING CASES, 2 vols. new ed. 1852.
AMERICAN " " 2 vols. " "
WHITE & TUDOR'S " EQUITY, 3 vols. new ed. 1852.
SMITH'S LAW OF CONTRACTS, American Notes by W. H. Rawle, Esq.
ADAM'S DOCTRINE OF EQUITY, " " J. R. Ludlow, Esq.
WILLIAMS' REAL PROPERTY, " "
Do. PERSONAL do. " "
WELSBY, HURLSTONE & GORDON'S EXCHEQUER REPORTS, Vol. 5., with American Notes by Messrs. Hare & Wallace, $2.50.

Samuel N. Wilcox

Law Library

Ithaca

N.Y.

1861

AMERICAN

LEADING CASES.

VOLUME THE FIRST.

BY H. B. WALLACE.

AMERICAN

LEADING CASES:

BEING

Select Decisions

OF

AMERICAN COURTS.

IN

SEVERAL DEPARTMENTS OF LAW;

WITH ESPECIAL REFERENCE TO MERCANTILE LAW.

WITH NOTES,

BY

J. I. CLARK HARE AND H. B. WALLACE.

THIRD EDITION, ENLARGED AND IMPROVED.

VOL. I.

PHILADELPHIA:
T. & J. W. JOHNSON,
LAW BOOKSELLERS, PUBLISHERS, AND IMPORTERS,
197 CHESTNUT STREET.
1852.

C SHERMAN, PRINTER.

19 St. James Street.

PREFACE

TO THE THIRD EDITION OF THE FIRST VOLUME.

THE approbation which the plan of Mr. Smith's Selection of Leading Cases generally received, has induced the Editors of the American Edition of that work, to employ the same method in treating of other points supposed to possess interest and importance in the jurisprudence of this country. The popularity of Mr. Smith's book was undoubtedly due, in a very great degree, to the clearness, neatness, and simplicity with which the most difficult subjects were explained in the notes of that intelligent and accomplished writer. In these qualities the present Editors make no pretension to be his rivals. The design of his Work, however, is quite as well adapted to the laws and the reports of this country, as to those of England. The essential merits of the plan seem to consist, partly, in the arrangement which it suggests, by which the subjects are distributed according to a connexion, natural and positive, rather than speculative and theoretical; and partly, in introducing the discussion of a topic of law, with a practical exemplification of the principal doctrine, in which it is seen at large and in its applied form. The plan of Mr. Smith's work has therefore been followed; and the title of LEADING CASES has been adopted, although it cannot with quite the same propriety be applied to any considerable selection of American decisions. The common law of the different States of the Union is, to a great extent, the same; but the instances are not very numerous in which cases in any of the courts can be referred to, as having, for the first time, established particular principles, and, by force of authority, led other tribunals to adopt them. The title used by Mr. Smith has been retained, however, from convenience: and

great attention has been given to the choosing of such decisions as, in point of fact, have been, and are, in their several departments, the most guiding and authoritative in American law. The Selections in the present work, are proposed as Illustrations of the law; embodying and exemplifying important principles; sometimes, fairly entitled to the name of Leading Cases; chosen, in all instances, as decisions whose character is approved, or whose importance is unquestionable.

In some of the points selected for discussion in the present volume, a reference has been had to the subjects of the American notes to Mr. Smith's work, so as to complete certain titles, by treating of matters not touched in those notes, yet allied to the topics there concerned. In the American note to Twyne's Case, in the former publication, the subject of fraud, under the statutes of Elizabeth, as connected with the retaining of possession on sales of chattels, was discussed: in the present volume, the subjects of fraud in voluntary conveyances, and in assignments to trustees for the benefit of creditors, the latter of which is quite peculiar to this country, are treated at large. In the note to Bickerdike v. Bollman, the necessity of demand and notice, in respect to the liability of the endorsers of negotiable instruments, was illustrated; in several notes in this volume, the negotiability and negotiation of notes and bills, and the nature of the demand and notice required, are investigated. In the earlier publication, the formation of partnerships, and the powers of one partner after a dissolution of the association, were treated; in this, the power of one partner to bind the firm, during its continuance, and the rights of joint and separate creditors, and the incidents of real estate held by a partnership, are examined.

Besides these subjects, the title of Agency is exhibited in full, in this volume, in a series of cases. Owing, perhaps, to a peculiar state of society among us, it has happened that the subject of the Contracts of Infants is capable of being illustrated from the American Reports, with a copiousness of examples, and a certainty in principle, which the English books do not exhibit; there is a note, accordingly, upon that subject. The topics of Interest, Domicil, and Application of Payments, are also discussed; and the whole subject of Slander, Libel, and Malicious Prosecution, is treated in a series of notes.

It is proper to say that the Syllabus, now prefixed to the cases, is not always the same with that given by the reporter.

In the preparation of this Volume, the reports of all the courts of the Union have been consulted; all of them, at least, which had reached Philadelphia before the work was put to press. But the editor has not undertaken to collate anything more than the *American* authorities. On most of the subjects discussed, the English cases have so often been brought together, that a repetition of them seemed not to be desirable. British authorities, therefore, are cited only at times, to point out a difference in the law, or to supply an occasional illustration.

PHILADELPHIA, March, 1852.

CONTENTS.

PAGE

VOLUNTARY CONVEYANCES.
Sexton v. Wheaton and Wife, ... 49–62
Salmon v. Bennett, ... 62–67
Note, ... 67–85

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.
Thomas v. Jenks, Parry v. The same, ... 86–92
Grover v. Wakeman, ... 92–94
Note, ... 95–102

SLANDER.
Brooker v. Coffin, ... 103–106
Burtch v. Nickerson, ... 107–110
Note, ... 110–128

LIBEL.
Steele v. Southwick, ... 129–131
Note, ... 131–138

CONSTRUCTION AND PLEADING IN SLANDER.
Van Vechten v. Hopkins, ... 138–152
Note, ... 152–167

DEFENCES TO SLANDER AND LIBEL.
Howard v. Thompson, ... 167–177
Note, ... 177–188

DAMAGES IN SLANDER AND LIBEL.
Gilman v. Lowell, ... 189–197
Note, ... 197–208

ACTION FOR MALICIOUS PROSECUTION.
Munns v. Dupont et al., ... 209–215
Note, ... 216–229

INFANCY.
Tucker et al. v. Moreland, ... 230–242
Vasse v. Smith, ... 242–247
Note, ... 247–267

APPLICATION OF PAYMENTS.
The Mayor, etc., of Alexandria v. Patten and others, . . 268–271
Field and others v. Holland and others, ... 271–285
Note, ... 286–303

NEGOTIABILITY OF INSTRUMENTS.

Overton v. Tyler et al., ... 303–306
McCormick v. Trotter, ... 306–309
Gerard v. La Coste et al., ... 309–312
Note, ... 312–327

NEGOTIATION OF BILLS AND NOTES.

Swift v. Tyson, ... 328–336
Note, ... 336–339

PRESENTMENT OF BILLS AND NOTES.

M'Gruder v. Bank of Washington, ... 340–342
Bank of the United States v. Smith, ... 342–348
Wallace v. McConnell, ... 349–360
Note, ... 360–369

FORM OF NOTICE OF DISHONOUR.

Mills v. Bank of the United States, ... 369–375
Note, ... 375–383

TIME OF NOTICE OF DISHONOUR.

Lenox v. Roberts, ... 383–385
Bank of Alexandria v. Swann, ... 386–388
Note, ... 389–395

MODE OF COMMUNICATING NOTICE.

Bank of Columbia v. Lawrence, ... 396–400
Note, . . . 400–406

POWER OF ONE PARTNER TO BIND THE FIRM.

Livingston v. Roosevelt, ... 406–426
Anderson v. Tompkins, ... 427–433
Rogers and Sons v. Batchelor, ... 434–440
Note, ... 440–453

RIGHTS OF JOINT AND SEPARATE CREDITORS.

In the matter of Peter S. Smith, ... 454–459
McCulloh v. Dashiell's Administrator, . . . 460–469
Note, ... 469–478

REAL ESTATE HELD BY A COMMERCIAL PARTNERSHIP.

Coles v. Coles, ... 478–480
Dyer v. Clark, ... 481–487
Note, ... 487–492

INTEREST.

Selleck v. French, ... 493–496
Note, ... 496–523

APPOINTMENT AND POWERS OF AGENTS.

Batty v. Carswell, ... 524–525
Peck v. Harriott, ... 526–530
Rossiter v. Rossiter, ... 530–534
Odiorne v. Maxcy, ... 535–536
M'Clure v. Richardson, ... 536–539
Jaques v. Todd, ... 540–544
Note, ... 544–556

TERMINATION OF THE POWERS OF AN AGENT.

Hunt v. Rousmanier's Administrators, ... 556–566
Note, ... 567–568

RATIFICATION OF AGENCY.

Culver v. Ashley, ... 569–571
Note, ... 572–574

EXECUTION OF DEEDS BY AN ATTORNEY.

Elwell v. Shaw, ... 575–576
New England Marine Insurance Co. v. De Wolf, ... 577–578
Note, ... 579–589

PAROL CONTRACTS MADE BY AN AGENT.

Rathbon v. Budlong, ... 589–591
Pentz v. Stanton, ... 592–597
Dusenbery v. Ellis, ... 597–598
United States v. Parmele, ... 598–600
Taintor v. Pendergast, ... 601–602
Note, ... 602–617

RESPONDEAT SUPERIOR.

Wilson v. Peverley, ... 617–619
Note, ... 619–622

A FACTOR MAY SELL ON CREDIT.

Goodenow v. Tyler, ... 622–630
Note, ... 630–636

A FACTOR CANNOT PLEDGE THE GOODS OF HIS PRINCIPAL.

Laussett v. Lippincott, ... 636–642
Note, ... 643–648

PRINCIPAL'S OWNERSHIP OF PROPERTY IN THE HANDS OF HIS FACTOR.

Veil and Petray v. Administrators of Mitchell, ... 649–650
Note, ... 650–652

DUTY AND LIABILITY OF AN AGENT TO HIS PRINCIPAL.

Burrill v. Phillips, ... 652–654
Courcier v. Ritter, ... 654–660
Clark v. Moody, ... 661–665
Note, ... 665–675

RIGHTS OF AN AGENT AGAINST HIS PRINCIPAL.

D'Arcy v. Lyle, ... 676–688
Bradford v. Kimberly and Brace, ... 688–691
Note, ... 691–697

DOMICIL.

Guier v. O'Daniel, ... 697–702
Note, ... 706–714

TABLE OF CASES

CITED IN THE NOTES TO VOL. I.

THE NAMES OF THE ENGLISH CASES ARE IN ITALICS.

Abbe v. Newton, 69
Abell v. Warren, 251
Abercrombie v. Bradford, 97
Abington v. North Bridgewater, 707, 708, 709, 710, 713
Abrams v. Smith, 122
Ackerman v. Emott, 513
Adams v. Adams and Allen, 517
v. Bankart, 449
v. Beach, 500
v. Broughton, adm'r, 68
v. *Kelly*, 137
v. Lesher, 220, 222, 223, 226
v. Spalding, 515
v. Whittlesey, 586
's Adm'r v. Adams's Adm'r, 509
v. Torbet, 360
et al. v. Cordis, 517
Adcock v. Marsh, 180, 182
Addams v. Heffernan, 509
Adlum v. Yard, 97, 101
Agnew v. The Bank of Gettysburg, 390
Ahrens v. Cobb, 611
Aiken v. Cathcart, 535
v. Peay, 510
Ainslie v. Wilson, 632
Ainsworth v. Partillo, 674
Akom v. Hooker, 116
Albright v. Pickle, 500
Alderman v. French, 180, 201, 204
v. Tirrell, 264
Aldis et al. v. Johnson, 322, 391
Aldrick v. Brown, 121
Aldrich v. Grimes, 256, 257
v. Wallace, 472
Alexander v. Alexander, 119
v. *Angle*, 158
v. *Burchfield*, 362
v. Heriot, 257
v. Troutman, 497
Alexandria, Mayor of, v. Patton and others, 288, 289, 291
Algor v. Stillwell, 218
Allaire v. Hartshorne, 337
Allen v. Adams and Allen, 502
v. Butler and others, 253
Allen v. Coit, 612
v. Crofoot, 160
v. Crosland, 508
v. Culver, 288, 290, 300
v. Greenlee, 217
v. Kimball, 287, 288
v. Merchants' Bank, 667
v. Ogden, 544
v. Perkins, 164
v. Smith's Adm'r, 365, 367
v. Suydam, 675
v. Wells, 469, 475
et al. v. Montgomery R. R., 95
and another v. Rostain, 609
and Ward v. Camp and Gray, 83
Allensworth v. Coleman, 155
Allison v. Taylor, &c., 252
Ally v. Neely, 117
Alsop v. Coit, 701
Alston v. Heartman, Treasurer, &c., 614
Amee v. Wilson, 506
American Bank v. Jenness and others, 338
Life Ins. and Tr. Co. v. Emerson, 393
Ames v. Blunt, 101
Amory v. M'Gregor, 504
Amsbaugh v. Gearhart, 326
Ancrum v. Sloan, 504
Anderson v. Belcher, 74
v. Buchanan, 217
v. Coonley, 547
et al. v. Fuller et al., 80, 97
v. Hooks et al., 101
Lessee of, v. Brown and others. 579
and others v. State of Georgia, 513
and Wilkins v. Tomkins & Co.. 447, 492
Andres v. Wells, 137
and Wife v. Koppenheafer, 112, 113, 114, 115
Andress v. Doolittle, 75
Andrews v. Allen et al., 607
v. Bartholomew, 203
v. Estes et als., 588, 605
v. Kneeland, 552

Andrews v. Lndlow and Trs., 100
v. Pond et al., 338
v. The Planters' Bank of Mississippi, 451
v. Vanduzer, 178
v. Woodmansee, 118, 158, 160
& Brothers v. M'Coy, 337
v. Jones et al., 81
Angel v. McLellan, 248, 249
v. Pownal, 548
Angle v. Alexander, 123
Ann Green, The Ship, 706, 711, 713
Anon., 537
Anonymous, 266, 361, 503, 521
Anonymous, 286, 294, 296
Anthony v. Stephens, 198, 201, 202
Appleton v. Binks, 585
Apthorp v. Backus, 264
Archer v. Dunn, 519
Arfridson v. Ladd, 609
Armentront v. Moranda, 136
Armistead v. Armisteads, 367, 368
Armstrong v. Caldwell, 368
v. Christiani, 377
v. Smith, 673
Arnett v. Linney, 515
Arnold v. Brown, 442, 450
v. Cost, 118
v. Halenbake, 552
v. Johnson, 287
v. Mayor of Poole, 289
v. Sandford, 265
's Adm'r v. Voorhees, 266
and Pinchard v. Harmer et al., 475
Arnott v. Redfearn, 498
Arrington v. Gee, 519
v. Jones, 178, 198, 199, 203
Arrott v. Brown, 635
Arthur v. The C. & R. Bank of Vicksburg, 95, 96
Ash, Adm'rs of, v. Ex'rs of Brewton, 500
Ashbell v. Witt, 120, 121
Ashby v. Ashby, 320
Ashurst v. Martin, 101
Ashmead v. Hean & Moulfair, 72
Astley v. Younge, 186
Atcherson's Adm'r v. Talbot, 616
Atchison's H'rs v. Lindsay et al., 706
Atkinson v. Hartley, 203
v. Reding, 118
and Rollins v. Jordan, Ellis & Co., 100
Atlas Bank v. Nahant Bank, 516
Attorney General v. Cape Fear Nav. Co., 500
Atwood v. Taylor, 496, 522
Auditor v. Dugger et al., 500
Austill & Marshall v. Crawford, 671, 672, 674
Austin v. Bell, 98, 99
v. Boyd, 326
v. Charlestown Female Seminary, 252, 253, 267
v. Johnson, 98, 99
v. Roberts, 609
v. Vandermark, 451, 452
& Taylor v. Williams, &c., 445
Avery v. Latimer and Fell, 326
v. Street, 68
Avorille v. Loucks, 97, 469, 475
Aycinena v. Peries, 696
Ayer v. Hutchins et al., 338
v. Hawkins, 289
Aymar v. Beers, 362
Ayre v. Craven, 123, 125
Ayres and another v. Sleeper, 675

Babcock v. Booth, 75
v. Western R. R. Corporation, 547
Backhouse's Administrator v. Jett's, Adm'r et al., 69, 74, 75, 85
and others v. Patton and others, 294
Backus v. Danforth, 321, 322
v. Richardson, 125
Bacon v. Brown, 287, 297
v. Dyer, 367
v. Raven & Sondley, 611
v. Townsend, 227
Badger v. Phinney, 260, 261
Badgley v. Hedges, 186
Bagnall v. Underwood, 166
Bailey v. Adams, 498
v. Dean, 128
v. Miller, 74
v. Porter, 378
Ex parte, 153, 166
v. The Mayor, &c., of the City of New York, 622
Bainbridge v. Owen, 320
& Co. v. Wilcocks, 496, 523
Baird v. Cochran and Dowling, 451
Baker v. Dolbyns, &c., 77
v. Langhorn, 635
v. Lovett, 261
v. Stackpole, 286
and Vardeman v. Byrne, 574
Baldwin v. Weed, 225, 229
Ball v. Dunsterville and another, 446
Ballou v. Talbot, 610
Bander v. Bander, 499
Bank v. Greely, 464
v. Johnson, 549
Agricultural v. Commercial Bank, 666
Com'th v. Curry, 555
The East Haddam v. Scovil, 667
The Farmers' et al. v. Douglass et al., 65, 71
of Alexandria v. Patton, &c., 72, 78, 79
v. Swann, 379, 381, 390
Columbia v. Lawrence, 400
v. Patterson's Adm'r, 585
Cape Fear v. Seawell, 381
England v. Newman, 324
Geneva v. Howlett, 401, 403
Hamburg v. Wray, 610
Kentucky v. Brooking, &c., 452
v. Garey, 321, 568
v. Sanders et al., 318
Limestone v. Penick, 555
Logan v. Butler, 402
Manchester v. Slason, 403
The Metropolis v. Guttschlick, 585
v. New England Bank, 695
Mobile, Hallett, &c., v. Hall, 337
v. Huggins, 666, 674
v. Marston, 666
North America v. Meredith, 290
Orleans v. Merrill, 313
v. Smith, 667
Rochester v. Bowen, 451

Bank of Rochester v. Gould, 382
v. Monteath, 445, 603
St. Albans v. Gilliland, 337
Salina v. Babcock, 337
Scotland, App. v. Watson, Resp. 552
The State of So. Car. v. Flagg, 365
Tennessee v. Saffarans, 451, 452
The United States v. The Bank of Washington, 613
v. Beirne, 546
v. Binney et al., 445
v. Burke, 79
v. Carneal, 363, 365, 381, 403
v. Corcoran, 401
v. Davis, 394
v. Ennis and Sandige, 69
v. Goddard, 394
v. Hatch, 401
et al. v. Huth, 95
v. Lane, 404
v. Lyman et al., 608, 614
v. Magill et al., 500
v. Norwood, 379, 402
v. Ritchie et al., 266
v. Singer and others, 301
v. Smith, 365, 368
Utica v. Bender, 401, 405
v. Davidson, 405
v. De Mott, 405
v. Magher, 606, 607
Vergennes v. Cameron, 363, 401, 451
Washington v. Triplett & Neale, 365, 666
Banks v. Brown and others, 81, 82
v. Thomas, 76
et al. v. Sharp, 579, 585
Banorgee v. Hovey et al., 544
Bantleon v. Smith, 501
Barber v. Graves, 252, 265
v. Hartford Bank, 470
v. Ketchum, 327
Barclay v. Thompson, 122
Bard & Co. v. Stewart, 695
Bardwell v. Perry et al., 475, 477
Barger v. Miller, 579
Baring v. Peirce, 544
Barker v. Clark, 404
v. Hall, 402
v. Hall & Trustee, 102
v. Mechanics' Ins. Co., 606
Barksdale v. Brown & Tunis, 668
Barlow v. Reno, 448
v. Wiley et al., 253
et al. v. The Planters' Bank, 361
Barnaby v. Barnaby, 252, 256
Barnard v. Bartholomew, 506
& others v. Cushing & others, 317
Barnes, Adm'r v. Brashear et al., 706
v. Holloway, 165
v. Webb, 178
Barnett v. Brandao, 694
v. Goings, 81
Barney v. Earle et al., 337
Barnum v. Hempstead, 97
Barnwell v. Mitchell, 405
Barr, etc. v. Marsh, 404
Barrell et al. v. Joy, 516
Barret v. Lewis, 288
v. Swann, 451
& Nicholson v. Reida et al., 100
Barriere v. Nairac, 322
Barry et al. v. Crowley, 404
Bartlett v. Brisbane, 707
v. Marshall, 499
v. Pearson, 339
Bartow v. Brands, 158
Bascom v. Young, 441
Bassett v. Spofford, 164
Bate v. Bun, 611
Bateman v. Phillips, 615
Batea v. Coe, 102
v. Keith Iron Co., 549
Batty v. Carswells, 545
Bauerman & Christie, Ex parte, 475
Bavington & others v. Clarke, 250
Baxter, App. v. Brown, Resp., 488
v. Duren, 609
v. Little & Harris, 339
Bay v. Cook, 609, 610
v. Freazer, 326
Bayard v. Hoffman, 74, 76
Bayley v. Bryant, 572
v. Hyde, 199
v. The Onondaga Co. Mutual Ins. Co., 614
v. *Wilkins*, 547
v. Wynkoop, 286, 292
Baylis v. Dineley, 254
v. Lawrence, 162
Bayne v. Wylie, 100
Beach v. Ranney, 126, 127, 128
Beacham v. Eckford's Ex'rs, 506
Beal and wife v. Crafton, 507
v. Robeson, 223
Beall v. Silver, 522
Beals v. Allen, 544
v. Guernsey, 72, 507
Bean v. Smith, 83
Beard v. Kimball & Trustees, 102
v. Kirk, 567
Beardsley v. Maynard, 203
Beatty v. Anderson, 326
Bechler v. Steever, 157, 165, 199, 200, 203, 208
Beck v. Burdett, 84
v. Martin, 440, 441
Becket v. Sterrett, 117, 154, 155
Beckham v. Drake, 446, 607, 608
and Eckles v. Peay, 450
and Wife v. Secrest, 68
Beckwith v. St. Croix Man. Co., 393
v. Sibley, 696
v. Smith, 393
et a. v. Baxter et a., 573
Bedell v. Janney et al., 513, 673
Bedford Commercial Ins. Co. v. Cowell, 603
Beebee v. Robert, 607, 611, 615
Beeler v. Bullitt, 266
v. Young, 248, 249
's Heirs v. Bullitt's Heirs, 252
Beers v. Botsford, 69
Beeson's Adm'rs v. Beeson's Ex'r, 509
Beetim v. Buchanan, 511
Beirer v. Bushfield, 116, 152, 160
Belden v. Lamb, 401
Bell v. Graham, 227
v. Newman, 469, 477, 478

Bell v. Palmer, 668
v. Pearcy, 222, 226, 227
v. Robertson, 377
v. Stone, 135
v. The State Bank, 402
's Adm'rs v. Logan, 510
et al. v. Cunningham, 671, 674
Bellamy v. Burch, 124
Bellas v. Hays, 581, 585
Bellemire v. Bank U. S., 666
Belmont Bank v. Patterson, 364
Beltzhoover v. Blackstock, 338
Bend v. Hoyt, 613
Benjamin v. Le Baron's Adm'r, 75
Benjamin v. Garee, 227
Bennett v. Bedford Bank, 71
v. Bennett, 203
v. Black, 217
v. Davis, 251
v. Deacon, 182
v. Hyde, 207, 208
et als. v. Union Bank et als., 96
Bent v. Manning, 248, 249
Bentley et als. v. Harris's Adm'r, 82
Benthal v. Judkens and others, 325
Benton v. Burgot, 520
v. Gibson, 322
v. Jones, 71
Berkeley v. Hardy, 585
Berry v. Adamson, 218
v. Carter et ux., 115
v. Dryden, 165
v. Robinson, 360
Berryhill v. Wells, 502
Best v. Givens & Wood, 252, 256
Beswick v. Chappell, 119, 120, 158
Bethea v. McCall, 264
Betts v. Union Bank of Maryland, 81
Bevan et al. v. Eldridge, 395
Bicknell v. Dorion, 219
Bigelow v. Grannis, 254
v. Heaton, 696
v. Kinney, 258, 261
Biggs v. Dwight, 280
Billings v. Wing, 112
Binns v. M'Corkle, 203
Binney et al. v. Plumley, 614
Birch and another v. Tebbutt, 289
Birckhead v. Brown, 327
Bisbing v. Graham, 339
Bisel v. Hobbs, 445
Bishop v. Dexter, 360
v. Ross, 505
v. Williamson, 621
Bissell v. Cornell, 113, 114, 179
v. Hopkins, 507, 521
Bitzer v. Shunk, 448
's Executor v. Hahn and Wife, 509, 513, 515
Black v. Goodman & Miller, 511
Black v. Shooler, 286
et al. v. Burk et al., 475
and Manning v. Oliver, 76
Black's Ex'rs v. Reybold, 504
Blackford v. Dod, 225
Blackburn v. McCallister, 446
Blackburne v. Blackburne, 180, 184
v. Hawkins, 508
Blackham v. Pugh, 183
Blackstone Bank v. Hill, 295, 300
Blair and Johnson v. The Pathkiller, 573
Blake v. Bigelow and others, 85
v. Jones, 71
v. Nuttur, 491
v. Pilford, 184
Ex'ors v. Ex'ors of Quash, 518
Blanchard v. Fiske, 118
v. Stearns and others, 707
's Lessee v. Ingersoll, 81
& another v. Stevens, 337
, Coolidge et a. v. Gregory, 265
Blandy v. Allan, 645
Blanton v. Rice, 294
Blessing v. Davis, 164
Blevins v. Blevins, 317
v. Pope, 671
Bliss et al. v. Perryman, 255
Blizzard v. Kelly, 164, 185
Blood v. Goodrich, 587
v. Harrington, 264
Bloodworthy v. Gray, 123
Bloom v. Burdick, 252
and Wife v. Bloom, 112, 152
Bloss v. Tobey, 111, 117, 152, 158
Blot v. Boiceau, 668, 674
Blum v. Torre, 616
Blunt v. Little, 223, 227
Board of Justices, The v. Fennimore, 511
Boardman v. Gore et al., 440
v. Halliday, 97, 102
Bodenham v. Purchas, 299
Bodley et al. v. Goodrich, 96
Bodwell v. Osgood, 184, 217
v. Swan et ux., 198, 201, 206
Bogard v. Gardley, 68, 71
Bogart v. De Bussey, 585
Bohn v. Headley, 79
Bois v. Cranfield, 286
Bonaffe v. Woodberry, 286
Bond v. Aitkin, 446
v. Central Bank of Georgia, 337
v. Chapin, 229
v. Douglas, 137
v. Storrs, 367
Bonner v Boyd, 117
Bonzi v. Stewart, 645
Boody v. McKenney, 257, 258, 259, 260
et al. v. U. States, 299, 621
Booker et al. v. Tally, 572
Bool v. Mix, 250, 251, 252, 253, 259, 267
Boon v. Maul, 218
Booth v. Patrick, 75
Boothbay v. Wiscassett, 708
Borden et al. v. Sumner, 100
Bordley v. Eden, 518
Boring et al. v. Williams, Treas'r, 300
Bornman v. Boyer, 117, 155, 156, 157
Bosanquet v. Wray, 289, 290
Bosley v. Farquar, 552
v. Porter, &c., 286
Boston Bank v. Chamberlin et al., 251
Iron Co. v. Hale, 548
and Sandwich Glass Co. v. City of Boston, 512
Bostick v. Rutherford, 223
Bostwick v. Dodge, 337
Bothick's Adm'rs v. Purdy, 326
Botsford v. Beers, 77, 84
Bouche v. Ryan, 264
Bouchell v. Clary, 248
Boulton v. Welsh, 376, 377
Bourne's Ex'or v. Mechan's Adm'r, 515

Bourke v. Warren, 156
Bourne v. Wooldridge et al., 449
& Wife v. Simpson, 252
Boutwell v. Mason & Scott, 286
Bowen v. Huntington, 502, 507
Bowling v. Harrison, 401
Bowerbank v. Morris, 567
Bowes v. Lucas, 287
Bowen v. Hall, 198
Bowie, use of Ladd et al. v. Duval, 367, 368
& Sons v. Napier & Co., 643
Bowker v. Burdekin, 448
Boyce & Henry v. Edwards, 519
&c., v. Prichett's H's, 516, 518
Boyd v. Boyd, 500
v. Dodson, 587
v. Dunlap, 80
v. Gilchrist, 513
v. Plumb, 451
v. Rumsey, &c., 320
and Wife v. Brent, 115
Boyden v. Boyden and another, 253, 257, 260
Boydell v. Jones, 125, 135, 158
Boyers v. Elliott, 489, 490
Boyle & others v. Abercrombie, 81
Boynton v. Dyer, 513, 514
Bracket et ux. v. Waite et al., 69
Bradbury v. Smith, 471
Bradee & Wife v. Walker, 204
Bradford v. Bush, 567
v. Gouldsborough, 82
et al. v. Eastburn, 607, 612
Bradish v. Gibbs, 80
Bradlee v. Boston Glass Co., 603, 604
Bradley v. Amidon, 265
v. Gibson, 198, 201, 204
v. Heath, 183
et al. v. Lowry, 706, 708, 710, 711, 713
v. Morris, 319
Brady's Adm'r v. Hill & Keese, 291
Brady v. Wilson, 112, 117
Bradt v. Townley, 128
and wife v. Roberts and wife, 111
Brahan & Attwood v. Ragland, 389
Br. Bank at Decatur v. Hodges, 364
v. Pierce, 404, 405
Montgomery v. Gaffney, 360
v. Sydnor, use, &c., 616
Brandt v. Peacock, 228
& Wife v. Roberts & Wife, 115
Brashier v. West and others, 95, 100, 101
Braveboy v. Cockfield, 217, 221, 223, 224
Brawneo & Wife v. Franklin et al., 260, 261
Brayne v. Cooper, 115, 124
Bray v. Hadwen, 389
Brazier v. Bryant, 289, 295
Breckenridge v. Moore, &c., 337
v. Shrieve, 441
v. Taylor, 510
's Heirs v. Ormsby, 247, 251, 253
Bredin v. Dubarry, 573
Brenzer v. Wightman, 313, 323, 362, 392
Brett v. Marsh, 287
Brewer v. Hastie & Co., 518
v. Knapp et al., 288, 289
v. Tyringham, 505
Brewster v. Hammet, 470
v. Hobart, 568
Brewster v. Mott et al., 450
Breyfogle v. Beckley, 499
Brice v. Myers et al., 69
Brickett v. Davis, 179
Bridgeport Bank v. Dyer, 362
Briggs v. Williams et als., 287, 289, 295
Brindley v. Barr, 401
Brinton's Estate, 515
Bristow v. Heywood, 224, 228
Brittain v. Allen, 157, 204, 205, 207
Britton v. Bishop et al., 339
Bristow et al. v. Eastman, 262
Broad v. Ham, 225, 226
Brockenbrough et al. v. Blythe's Ex'rs et al., 516
Brockman v. Bowman, 74
Brockway v. Allen, 585, 605, 607, 610
Brodie v. Bickley, 74
Bromage v. Prosser, 164, 180, 182
Brook v. Carpenter, 227
Brookshire v. Brookshire, 567
Brooke v. Enderby, 299
Brooker v. Scott, 249
et al. v. Talley, 592
Brooks v. Bryce, 694, 695
v. Blanchard, 166
v. Mitchell, 339
v. Page, 319
Broughton v. Badgett, 321, 326
Brown v. Armistead, 266, 367
v. Arrott, 631, 632, 633, 635, 671, 675
v. Austin, 586
v. Berry, 545
v. Brown, 118, 160, 164
v. Caldwell, 250
v. Campbell, 502
v. Chapman, 219
v. Connelly, 226
v. Croome, 180, 208
v. Dudham, 262
v. Force, etc., 72
v. Gilman et al., 321
v. Gosden, 158
v. Griffin, 224
v. Hatton, 587
v. Knox, Boggs & Knox, 100
v. Lamberton, 152, 163
v. Lawrence, 446
v. Lent, 620
v. Maxwell, 262
v. M'Rae's Executors, 265
v. Purviance, 619
v. Smith, 75
Trustee v. Lyon & O'Neall, 101
v. Turner, 389, 392
v. Vinyard, 514
et al. v. Long et al., 84
and others v. Lamb and another, 516
& Sons v. Ferguson, 392, 394
& Co. v. McGran, 669, 674
In the matter of, 362
Brownell v. Curtis, 74, 75
Browning v. Hart, 97
Bruce v. Bruce, 711
v. Wescott, 315
In re, 709
Brugh v. Shanks, 507
Brundred v. Del Hoyo, 707
Brush v. Burt, 218
v. Hays, 378
v. Scribner, 337

Bryant v. Craig, 514
v. Jackson, 204
v. Lofton, 125
v. Moore, 555, 574
v. Sheely, 573
Buchan v. Sumner, 487, 488, 490, 491, 492
Buck v. Fisher, 501
v. Sherman, 84
Buckle v. Mitchell, 77
Buckly, Ex parte, in re Clarke, 604
Buckley v. Packard, 644, 696, 697
Buckmaster v. Eddy, 326
v. Grundy, 510
Buckner v. Greedwood, 326
Buehler v. Gloninger, 75
Buford v. McLuny. 198, 200
Buffum v. Chadwick, 614
Bullard v. Bell, 321
Bullock v. Babcock, 262
v. Boyd et al., 520, 523
v. Koon, 121
Bump v. Betts, 225, 229
v. Smith, 711
Bunton v. Worley, 185
Burdett v. Abbot, 137
Burke v. Miller, 198, 199
Burkens v. Sanford, 224, 226
Burlingame v. Burlingame, 186, 221
Burbridge v. Manners, 394
Burgess v. Atkins, 471, 472
v. Gray, 620
v. Merrill, 253
Burgett v. Burgett, 75
Burgh v. Legge, 375
Burley v. Russell, 252, 263
Burnham v. Tucker, 339
v. Webster, 339
v. Wood, 339
et al. v. Rangeley, 710, 712
Burnside and others v. Merrick and others, 487, 488, 490
Buron v. Denman, 572
Burrall v. Acker, 472
Burrell v. Jones, 604
Burrill v. Phillips, 665, 696
Burrough v. Moss, 339
Burrows & Jennings v. Alter and others, 101
Burt v. Place, 225, 229
Burtch v. Nickerson, 123, 124, 125
Burtis v. Dodge, 515
v. Tisdall, 475
Burton v. Anderson, 519
v. Hawkins, 228
Burwell v. Clark & Springfield, 458
's Ex'rs v. Anderson, Adm'r, 514
Bush v. Peckard, 321, 337
v. Steinman, 620
Bussard v. Levering, 394
Bustard v. Gates and Wife, 265
Butcher v. Norwood, 521
Butler v. Breck & Leavitt, 252
v. Hildreth, 101
v. Van Wyck, 98
Butterfield v. Buffum, 120, 121, 152
v. Kinzie, 368
Buxton v. Jones, 364, 401
Buys and wife v. Gillespie, 115
Byne v. Moore, 216
Byrd v. Bradley, 98
v. Curlin, 75
Byrket v. Monohon, 179, 180
Byrne, Ryan & Co. v. Schwing, 367
Byron v. Elmes, 115

Cabiness v. Martin, 221
Cadogan v. Kennet, 68
Cadwalader v. Howell & Moore, 706, 711, 713
Cady v. Shepherd, 446
Cage v. Iler et al., 301
v. Wilkinson & Miles, 695
Cain v. Spann, 339
Caines and wife v. Marley, 81
Cairns v. Jones, 71, 74
Cairnes et al. v. Bleecker, 671
Cains v. Jones, 78, 80
Caldwell v. Abbey, 118, 155, 158
v. Cassidy, 367
v. Sithens, 445
v. Wentworth, 286, 287, 288, 292
Call v. Foreman, 120
Callan v. Gaylord, 137
Calloway v. Middleton, 199, 201
Cambridge v. Charlestown, 712
Cameron v. Lightfoot, 219
Camp v. Bates, 522
v. Clark, Trustee, 338, 362
Campbell v. Baker, 604
v. Bruen, 500
v. Hodgson, 289, 291
v. Knapp, 326
v. Mumford, 320
v. Nichols, 553
v. Stakes, 262, 263
v. Wallace, 573
and another v. Nicholson and another, 603, 605, 625, 628
's Rep'rs v. Kincaid, 567
Canal Bank v. Cox & Tr., 95, 98, 99
Candler v. Pelit, 217
Canterbury v. Hill, 120, 163
Cannon v. Alsbury, 253
v. Beggs, 499
Capen v. Alden and Trustee, 295, 300
Carew and Coates v. Northrup, 326
Carius v. Moldrum, 226
Carleton v. Brooks, 319, 322
Carley v. Vance, 367, 368
Carlisle v. Dubree, 317
v. Rich, 68, 71, 73
v. Wishart, 337
Bank v. Barnett, 522
Carlock v. Spencer & wife, 122
Carlon v. Kenealey, 317
Carnahant et al. v. Allderdice et al., 251
Carneal et al. v. Streshley, 266
Carnegle and another v. Morrison and another, 327
Carney v. Dennison & Gove, 611
Carr v. Edwards, 510
v. Hood, 187
Carrol, &c. v. Connet, 514
Carroll v. Upton, 401, 404, 405
Carson v. Bank of the St. of Alabama, 402
Carslake v. Mopledoram, 123
Carter v. Andrews, 118, 154, 155, 157
v. Bradley, 382
v. Burley, 391
v. Carter, 499

Carter v. Cunningham and another, 666
Cartmill v. Brown, Adm'r, 503
Cary v. Curtis, 613
Case v. Buckley, 113, 117
v. Marks, 201, 208
Caston v. Cunningham, 78
Cash v. Tozer, 449
Cassiday v. McKenzie, 567
Castle v. Candee, 322
v. Pierce, 504
Cathcart et al. v. Keirnaghen, 568
v. Robinson, 77, 78
Catlin v. Aiken, 505
v. Eagle Bank, 95
v. Gladding, 713
v. Ware, 585
Cato v. Easley, 266
Catskill Bank v. Stall, 405, 452
Cauntt v. Thompson, 375, 378, 381
Cave v. Shelor, 163
Cavendish v. Fleming, 515
Cayuga Co. Bank v. Bennett, 363, 401, 405
v. Hunt, 363
v. Warden, 379
Cefnt v. Birch, 122
Central Bank v. Allen, 361
Chadwick v. Allen, 313
v. Jeffers, 360
Chaddock v. Briggs, 111, 124, 125, 152, 160
Chalmers v. Payne, 162, 180, 204
Chamberlain v. Brown, 518
v. Maitland & Co., 502
Chambers v. George, 320
v. Robinson, 217
Champion v. Lathrop & Griffith, 326
Chandler v. Drew, 339
v. Holloway, 116, 157, 165
v. M'Pherson, 220, 222, 223, 225
v. Vanmeter, 226
Chapin v. Pease, 68, 76
Chaplin v. Canada, 319
Chapman v. Calder, 177, 184, 185, 200
v. Gillet, 121
v. Keane, 382
v. Koops, 476
v. Pickersgill, 219
v. Smith, 122
v. Woods, 228
Chapple v. Cooper, 249
Charlton v. Barrett, 207
Charnley v. Dulles, 313
Chase v. Lockerman, 515
v. Scott, 267
v. Whitlock, 114
Chatham v. Tillotson, 164
Chauncey et al. v. Yeaton, 511
Chazournea v. Edwards et al., 451
Cheatwood v. Mayo, 200
Cheeseborough & Campbell v. Hunter, 510
Chenowith & Co. v. Chamberlin, 451, 568
Cheshire v. Barrett, 247, 257
Chester v. Wheelwright, 294
et al. v. Greer et al., 84
Chesterfield Man. Co. v. Dehon et al., 650
Cheston v. Wheelwright, 292
Chewning et al. v. Gatewood, 381
Chick v. Pittsbury, 393
Chicopee Bank v. Eager, 403
Child v. Devereux, 518
v. Affleck, 180, 182
v. Homer, 203
Childers v. Deane, &c., 523
Childress v. Stuart, 319
Chipman v. Cook, 112
Chitty v. Naish, 289, 292, 295
Chomqua v. Maaon et al., 548
Chonteau v. Webster, 403, 404
Christian v. Ellis et ala., 470
Christie v. Hammond, 518
Christopher v. Covington & Smith, 97
Chubb v. Flanagan, 137, 204
Church v. Barlow, 394
v. Bridgman and wife, 119, 158, 202
v. Clark, 363
v. Knox, 470, 472
v. Sparrow, 441, 446
v. Sterling, 573
at Acquackanonk v. Ex'rs of Ackerman et al., 508
Churchill v. Kemble, 164
City Council v. Duncan, 568, 651
Clamorgan et al. v. Lane, 258
Clap v. Day, 613
Clapp v. Leatherbee, 73, 77, 78, 79
v. Tirrell, 77, 83
Clark v. Barlow, 501
v. Binney, 135, 179
v. Cleaveland, 228
v. Eldridge, 378, 380
v. Ely and others, 337
v. Farmers' Manufacturing Co., 326
v. Flint, 70
v. Foster, 587
v. French, 72, 79
v. Moody et al., 672, 694
v. Munsell, 164, 201
v. Peabody, 572
'a Ex'rs v. Parish'a Ex'rs, 567
v. Van Northwick, 668
v. Van Riemsdyk, 572
& Clark v. Burdett, 289
Clarke v. Gilmanton, 265
v. Gordon, 367
v. Taylor, 178
et al. v. White, 70
Lessee of v. Courtney et al., 580
Clarkson v. Lawson, 178
v. McCarty, 202, 203
Clayton's Case, 299, 301
Clealand v. Walker, 572, 603, 611
Cleaveland v. Stewart & others, 605, 607
Cleaver v. Sarraude, 181
Clegg v. Laffer, 156, 159
Clemens v. Caldwell, 514
Clement v. Brush, 446, 448
v. Chivis, 131, 133, 135
v. Leverett, 337, 555
Clements v. Fisher, 163
Clifford et al. v. Cabineas, 507
Clinton v. Mitchell, 180
Clode v. Bayley, 394
Close v. Fields, 321
Cloud v. Smith & Adriance, 505
Coalter v. Stuart, 179
Coburn v. Howard, 113, 115
Cochran v. Irlam, 696
Cock v. Weatherby, 118, 165
Cockayne v. Hodgkisson, 180, 181, 182
Cocke v. Campbell & Smith, 547, 584, 587
v. The Bank of Tenneasee, 406
v. The Branch Bank at Mobile, 440
Cockrill v. Kirkpatrick, 320, 518

Cockrill v. Kirkpatrick, 326, 623
Coddington v. Davis, 379
Codwise v. Hacker, 671
Coft v. Barnard, 371
Coffin v. Coffin, 167, 186
v. Heath and another, 266
Coggill v. The American Exchange Bank, 321
Cohea v. Hunt et al., 363
Colburn v. Averill, 326
v. Ellenwood, 582
Colby v. Reynolds, 123, 131, 132, 134, 135
Cole v. Briggs, 228
v. Clement, 270
v. Grant, 121, 152, 155, 158
v. Hanks, 227
v. Jessup, 98
v. Pennell, 265
v. Trull, 288
Coleman v. Carpenter, 394, 395
v. Ewing, 395
v. Southwick, 166
Collard v. Gay, 223, 224
's Heirs v. Groom, 266
Collier v. Gray, 499
v. His creditors, 522
Collins v. Everett, 326
v. Fowler, 218
v. Lincoln, 319
v. Warburton & Risley, 401
Collings & Co. v. Hope, 670
Colt v. Barnard, 360, 362
v. Nettervill, 286
Coltraine v. Causey, 75
Colvin v. Holbrook, 620
Combe v. Capron, 228
's Case, 579, 581
Comegys v. The State, 503, 515
Comly v. McBride, 611, 634
Commercial Bank v. Cunningham, 301
v. French, 614
v. Wilkins, 470, 474
of Lake Erie v. Norton, 553, 568
of Natchez v. King and others, 392
and R. R Bank, v. Hamer et al., 363
Commons v. Walters, 119, 122, 165
Commonwealth v. Blanding, 137, 188
v. Bonner, 188
v. Child, 161
v. Clap, 135, 188
v. Crevor, 511
v. Duane, 188
v. Fox, 250
v. Hantz, 250
v. Kneeland, 161
v. Mateer and others, 514
v. Miller's Ad'rs, 299, 502
v. Murray, 250
v. Richardson et al., 74, 75
v. Sanderson, 188
v. Snelling, 160, 161, 188
v. Wheeler, 228
v. Wood, 614
v. Wright, 135, 166
Ins. Co. v. Whitney, 313
Compognon v. Martin, 165
Comparet v. Ewing. 520
Comstock v. Carr. 264
Cone v. Baldwin, 338
Congregational Society in Troy v. Goddard, 319
Conn v. Coburn, 249
v. Gano, 368
et al. v. Penn et al., 518
Connah v. Sedgwick, 97
Connecticut v. Jackson, 298, 523
Connolly v. Assignees of Hull, 248, 253
Conroe v. Birdsall, 252
Consequa v. Fanning, 506, 633
Constable v. Colden, 500
Conway et al., Ex parte, 95
Conwell v. Voorhees, 620, 621
Conyers, Ad'mr of, v. Magrath, 616
Cook v. Barkley, 201
v. Bostwick, 153
v. Cox, 164
v. Field, 205
v. French, 376
v. Hughes, 166
v. Martin, 368
v. Satterlee, 316
v. Stokes, 165
v. Wise, 501
's Heirs v. Totten's Heirs, 265
Cookendorfer v. Preston, 362
Cooley v. Betts, 672
v. Rose, 497
Coolidge v. Ruggles, 315
Coombs v. Rose, 185
Coon v. The Syracuse & Utica R. R. Co., 620
Coons v. Robinson, 119, 121, 122, 152
Cooper v. Barber, 178, 199, 200
v. Greely, 133, 161, 179
v. Marlow, 165
v. Perry, 152
v. Rankin, 587
v. Sandford, 519
v. Stone, 133, 135, 181, 187
v. Turrentine & Freeman, 228
Lessee of, v. Galbraith, 706, 710, 712
Copeland v. Mercantile Ins. Co., 574, 582
Corbin v. Wilson, 508
Cordery v. Zealey, 68
Corlies v. Cumming, 631, 696
Cornelius v. Van Slyck, 152, 155
Corning v. Southland, 671
v. White, 85
Cornwall v. Richardson, 208
Corp v. M'Comb, 394
Corpe v. Overton, 260
Corprew v. Arthur et als., 69, 78
Cosby &c. v. Ross's Adm'r, 64, 69
Costillo & Keho v. Thompson, 68
Cota v. Buck, 316
Cotheal et al. v. Moorehouse et al., 266
Cotton v. Heridekoper, 217
v. James, 219, 223
v. Wilson, 228
Courcier v. Ritter, 669, 670
Covill v. Hill, 645
Cowan v. Adams et als., 545
Coward v. Wellington, 181, 185
Cowden's Estate, 288
Cox v. Adams, 326
v. Hoffman, 553
v. McBarney, 489
& Cox v. Robinson, 545

Coxhead v. Richards, 181, 182
Coyle's Ex'ix v. Satterthwaite's Administrator, 319
Crabtree v. Horton, 225
v. May, 256
Crahdall v. Slade, 266
Craig v. Brown, 126
v. Catlet, 203, 205
Cram v. Mitchell, 97, 102
Cramer v. Riggs, 136
Crandall v. Dawson, 179
Crane v. Douglass, 202
v. Dygert, 511, 513
v. French, 448, 472
Crawford v. Cully, 317
v. Dean, 614
v. The Branch Bank at Mobile, 379, 382
v. Wilson, 115, 133, 160, 707, 709, 710, 711
et al. v. Willing et al., 498, 506
Creamer v. Perry & Tr., 401
Creelman v. Marks, 165
Creevy v. Carr, 201
Cregier v. Brunton, 153, 155
Cressinger v. Lessee of Welch, 251, 258, 259
Crittal v. Horner, 123
Crocker v. Getchell, 379, 382, 394
Crookshank v. Gray, 120, 122
Cropp v. Tilney, 132
Cropper et al. v. Adams et al., 652
Crosby v. Hillyer, 96
v. Ross's Adm'r, 71
v. Wyatt, 498
Cross v. Bryant & Co., 95
& Co. v. Hawkins, 652
Crosthwait v. Ross, 441
Crouch & Emerson v. Bowman, 444, 446
Crowninshield v. Kittridge, 101
Crozier, &c. v. Young, 77
Cruchley v. Clarance, 321
Cruickshank v. Gardner, 265
Culbertson *v. Rose*, 289
v. Stanley, 165
Cullum v. Bank, 516
v. Bloodgood, Ford et als., 442
Culp v. Fisher, 304
Culver v. Ashley, 572
Cumber v. Ware, 345
Cumberland Bank v. Hann, 339
Cummins v. Butler, 120, 163
v. McClain & Badgett, 673
&c. v. Cassily, 446, 584
Cumming v. Forrester, 635
Cummings v. Freeman, 313
Cunningham v. Freeborn, 71, 95
v. Soules, 607
v. Knight, 252
et al. v. Bell et al., 671, 674
Curle v. Beers, 317
Currie v. Hart, 97
Curry v. Walter, 186
Curtin and another v. Patton and another, 252, 254
Curtis v. Curtis, 122
v. Ingham, 587
v. The State Bank, 401
et al. v. Innerarity, 516, 544
Cushman v. Haynes and Trs., 319
Cutts v. Gordon, 253
Cuyler v. Nellis, 403
Cuyler v. Stevens, 390, 406

Dabney v. Campbell et als., 362
v. Stidger, 406
Daggett v. Pratt, 497
Dahlgreen v. Duncan et al., 477
Dair v. Swaine, 218
Dale v. Harrison, 75
v. Birch, 673
Dalrymple v. Lofton, 120, 122, 123
Damon v. Granby, 585
Dana v. Sawyer, 363
v. The Bank of the United States, 95, 97, 100
Ad'mr v. Lull, 98, 443
et al. v. Coombs, 251, 258
& others v. Stearns & others, 256, 257
Dancaster v. Hewson, 166, 186
Danforth v. Williams, 509
Daniel v. Daniel, 449
&c. v. Hannagan, 266
Daniels v. Kyle & Burnett, 362
Darbishire v. Parker, 390, 391
Dargan v. Waring et al., 84
v. Richardson, 96
Darley v. Gaines, 165
Darrel v. Eden & Wife, 514
Darst et al. v. Roth, 446
Davenport v. Runlett, 451
& Co. v. Riley & O'Hear, 609
Davidson v. Stanley, 548
& Simpson v. Graves, 68, 81
Davis v. Beckham, 404
v. Burton et al., 447
v. Clough, 221, 227
v. Davis, 124, 125
v. Farrington, 138
v. Griffith, 203
v. Gully, 219
v. Hardy, 225
v. Herrick, 360
v. Holding, 76
v. Johnson, 152, 156
v. Lane, 567
v. Lewis, 202
v. M'Nus, 186
v. Ruff, 124
v. Shields, 574
v. Smith, 502
's Adm'r v. Wright's Adm'r, 514, 518
and others v. Smith and others, 504
Davison v. Robertson and others, 553
Dawe v. Holdsworth, 290
Dawes v. Jackson, 586
v. Winship et al., 507
Dawson & Co. v. Clay's Heirs, 521
Day v. Bream, 137
v. Buller, 125
v. Noble, 670
et al. v. Lafferty, 446
Dean v. Connelly, 72
v. Hall, 323, 325
v. Williams, 299
Deanes v. Scriba and others, 521
Dearing v. Lightfoot, 549, 572
Dearman v. Radcliffe, 75
Deason & Co. v. Boyd & Co., 257
DeBarante v. Gott, 80
Deberry v. Darnell, 219
Decatur Bank v. Spence, 555
De Bruhl v. Neuffer, 200, 522

Deckard v. Case, 442, 444, 447
De Crespigny v. Wellesley, 203
Deford v. Miller, 132, 154
De Forest v. Bacon, 95
v. Frary, 315
Defries v. Davis, 205
De Hart, &c., v. Wilson, &c., 546
Delacroix v. Thevenot, 137
Delafield v. The State of Illinois, 544, 546, 572, 573, 630
Delano v. Blake, 257
De la Vergne v. Everston, 502
Delaware Ins. Co. v. Delaunie, 504, 511
De Lazardi v. Hewitt, Allinson & Co., 630
Delegal v. Highley, 186, 187, 203, 207, 222, 226
Delius et al. v. Cawthorn, 585, 587, 610
Delmonico v. Guilluame, 488, 491
Deloney v. Hutcheson, 488, 489
Demarest v. Haring, 115, 125, 152
Deminds et al. v. Kirkman, 393
Deming v. Bullitt, 583, 586
Demott v. Starkey, 338
Den v. Monjoy, 75
Denison v. Tyson, 319, 548
Dennett v. Wymans et al., 333
Dennie v. Walker, 361, 395
Dennis v. Pawling, 199
Dennison v. Ely, 75
v. Lee and Wife, 501
Denny v. The Manhattan Co., 620
v. Palmer, 392, 405
Denston v. Perkins et al., 650
Dent v. Dunn, 518
et al. v. The State Bank, 296
Denton v. Noyes, 449
Depcke v. Munn, 510
Depeau v. Waddington, 337
& Co. v. Hyams, 616
De Peyster v. Clarkson, 514
De Ruyter v. St. Peter's Church, 95
Desesbats v. Berquier, 706
De Sobry v. Laistre, 706
Despatch Line of Packets v. Bellamy Man. Co., 448, 549, 552, 568, 573, 574, 582, 587, 588, 604, 611
De Tastett & Co. v. Crousillatt, 670, 675
Detroit, City of, v. Jackson, 606
Devall v. Burbridge, 671
Devaynes v. Noble, &c., 301
Deveau v. Fowler, 475
Devinells v. Aikin, 179
Devore v. Munday, 326
Dewey v. Washburne, 319
Dewit v. Greenfield, 179, 198, 201, 207
De Wolf v. Murray, 363
Dexter v. Taber, 118, 153, 155
et ux. v. Spear, 134, 137, 180
Dibdin v. Swan and Bostock, 187
Dickerson v. Tillinghast, 79
Dickins v. Beal, 400, 403
Dickinson v. Barber, 204
v. Bowes, 368
v. Branch Bank of Mobile, 519
v. Legare and others, 444, 518
College v. Church, 286
Dillard v. Evans, 320
Dillon v. Dudley, 499
Dilworth, Lessee of, v. Sinderling, 505, 509, 516
Dinsmore v. Hand, 497
Divine, &c., v. Mitchum, 490
Dob v. Halsey, 449, 451
Dodd v. McCraw, 69
Dodge v. Griswold, 84
v. Perkins, 498, 499, 503, 510, 513, 672
v. Tileston, 694
et al. v. Bank of Kentucky, 389, 392, 405
Doe d. Grimsby v. Ball, 73
v. James, 77
dem. Otley v. Manning and others, 77
v. Martyr, 77
ex. dem. v. Tupper, 446, 448
d. Thomas v. Roberts, 250
v. Warren, 522
Dohner's Assignees, In re, 79
Doig v. Barkley, 522
Dole v. Gould, 380, 381
v. Lyon, 202, 203
v. Van Rensselaer, 126
Dolloway v. Trenill, 163
Donahoe v. Emery and another, 585
Donaldson v. The Bank of Cape Fear, 84
Donally v. Wilson, 287
Donelson's Adm'rs v. Posey et al., 85
Doner, &c., v. Stauffer, 470, 474
Doniphan, &c., v. Gill, 448
Dorchester & Milton Bank v. N. E. Bank, 568, 667
Doremus v. Lewis, 98, 100
Dorland v. Patterson, 152
Dorsey v. Gassaway, 296
v. Smithson, 74
's Ex'or, &c., v. Dorsey's Adm'r, 706
Doss v. Jones, 179, 180
Doty v. Bates, 451
Douge v. Pearce, 178
Dougherty v. Jack, 78
's Estate, 501
Douglass v. Dunlap and others, 79
v. Tousey, 198
v. Wilkenson, 321
v. Winslow, 471, 474
Dow v. Adam's Adm'rs, 501
v. Sayward, 471, 474
et al. v. Drew, 522
Downer & Co. v. Morrison, 611
Downes v. The Phœnix Bank of Charlestown, 314, 672
Downing v. Backenstoes, 322
Downman v. Williams, 602
Downs v. Planters' Bank, 393
Dox v. Dey, 504
Doyle, &c., v. Sleeper, &c., 68, 72, 76, 77, 78
's Adm'rs v. St. James's Church, 505
Doyley v. Roberts, 125
Drago v. Moso, 264
Drake v. Rogers & Shrewsbury, 100, 442
and Wife, Lessee of, v. Ramsay et al., 251, 258, 259
Dresser Manuf. Co. v. Waterston and others, 544
Drinkwater v. Drinkwater, 74, 75
Drummond v. Leslie, 156
Drury v. Mocauley, 316
Dubois v. Del. & Hudson Canal Co., 585
Dubose v. Wheddon, 248
Duckmanee v. Keckwith, 325
Dudley v. Robinson, 117
Duebler and others v. Fisher, 632

Duffy v. The Insurance Company, 81
Duggan v. King, 389, 392
Dulles v. De Forest, 286, 300
Dulty v. Brownfield, 261
Dumont v. Pope, 362
Duncan v. Clark, 452
v. McCullough, 360
v. Maryland Savings Institution, 322
v. Sparrow, 402
v. Thwaites, 186
Duncombe v. Daniell, 201
Dunham v. Murdock, 472, 474
Dunlap v. Thompson, 403
Dunlop v. Munroe, 621
Dunman v. Bigg, 181
Dunn v. Anderson, 187
v. Withers, 134, 178, 180, 185
Dunnell v. Fiske, 114, 164
Dunshee v. Parmela, Adm'r, 299
Durham v. Manrow, 315
Dusar v. Perit, 669
Dutton v. Morrison, 448
Duval v. Craig, 585
v. Griffith, 205
and others v. Raisin and others, 95
Dwight v. Emerson, 360
v. Whitney, 631, 634
Dyer v. Burnham, 602
v. Homer, 75, 322
v. Morris, 158
Dygert v. Crane, 673
Dyott's Estate, 513

Egan v. Gantt, 199
Eagle Bank v. Chapin, 390, 391
v. Hathaway, 394
v. Smyth, 551
Fire Co. v. Lent, 251
Earl v. Middleton, 504
Earle v. Reed, 248
Early v. McCart, 318, 336
v. Reed, 452
Easley v. Moss, 165, 183
v. Dye, 69
Eastern Bank v. Brown, 401
Easterwood v. Quin, 201, 203
Eastland v. Caldwell, 123
Eastman v. Caldwell, 198
v. Cooper, 440
v. Fifield et al., 367, 368
Eaton et al. v. Whitcomb, 450
Eccles v. Shackleford, 206
v. Shannon, 186
Eckert v. Wilson, 154, 206, 506
Edgar v. Boies, 503
v. Donally, 490
Edgell v. Lowell et al., 72
Edgerton v. Aspinwall, 497
v. Edgerton, 319
Edings v. Brown, 586
Edmeston v. Lyde, 85
Edmond v. Caldwell, 616
Edmondson v. Stephenson et ux., 182
Edsall v. Russell, 114, 116, 178
Edwards v. Golding et al., 616
v. Hasbrook, 368
v. Howell, 124
&c., v. Coleman, 71, 73
Egberts v. Wood, 475
Eigleberger and others v. Kibler, 85
Elbers v. United Ins. Co., 706
Eldred v. Hawes, 367
Elkin v. Perry & Moore, 501
Ellery v. Cunningham and another, 513
Ellicott v. Ellicott, 516
Elliott v. Ailsberry, 112, 114, 115
v. Horn, 71, 77, 250
v. Minott, 505
v. Swartwout, 613
v. Walker, 633, 691
Ellis v. Brown, 326
v. Craig, 498
v. Hilman, 221
v. Kimball, 157
's Administrator v. Commercial Bank of Natchez, 364
Elsee v. Smith, 217
Ely v. Witherspoon, 497
Emblin v. Darnell, 365
Embry & Young v. Robinson and Wife, 82
Emerson v. Harmon, 441
et al. v. The Providence Hat Manufacturing Co., 548
Emery v. Miller, 121, 166
v. Vinall, 69
v. Tichout, 292, 295
Enders v. Board of Public Works et als., 503
Ennis v. Sandige, 61
Englebert v. Blanjot, 74, 75, 76
Enloe v. Hall, 587
Ensminger v. Marvin, 441
Ents v. Mills & Beach, 568
Ep. Church of Macon v. Wiley, 611
Epler v. Funk, 339
Esdaile v. Sowerby, 375
Esterly v. Cole, 505
Estes v. Antrobus, 180
v. Stokes, 672, 673
Etheridge v. Binney, 445, 499
Etter v. Curtis, 267
Etting v. The Schuylkill Bank, 394
Eubanks v. Peake, 253, 257, 261
Evans v. Clark, 519
v. Harlow, 126
v. Potter, 643, 667
v. Smith, 201
v. St. John, 364
v. Terry, 262
v. Wells, 579, 584, 587, 588
Evart's v. Nason's Estate, 515
Evelyn v. Templar, 77
Everit v. Strong, 442, 447
Evernghim v. Ensworth, 450
Everson v. Carpenter, 250
Evertson v. Tappen, 513, 516
Ewer v. Myrick, 497
Ewing v. Cantrell, 76
v. Medlock, 614
's Heirs v. Armstrong, 266
Exeter v. Brighton, 706, 713
Eyre v. Golding, 508
Eyrick & Deppen v. Hetrick, 75
Ezekiel v. Dison, 102

Fabens v. Mercantile Bank, 666, 667
Fairchild v. Holly, 289, 290, 299, 300
Fairfield v. Adams, 613
Fairman v. Ives, 184
Fake v. Eddy's Ex'or, 497, 520
Falkner v. Leith & Jones, 83
Fall v. Simmons and others, 574
Falls & Caldwell v. Gaither, 584

Fanning v. Consequa, 519
Fant v. Cathcart, 252
Faris v. Stark, 183
v. Starke, 222
Farley v. Ranck, 179
Farmer v. Rand, 394
v. Sir Robert Darling, 219
Farmers' Bank et al. v. Douglass et al., 72, 78, 96
Bank of Maryland v. Duvall, 361, 363, 390, 392, 394
Loan & Trust Co. v. Walworth, 572, 573
and M. Bank v. Eddings, 405
v. Battle & Massey, 401, 402, 404
v. Troy City Bank, 588, 606
Farnham v. Campbell, 85
Farquhar v. Morris, 499
Farr v. Farr, 502
v. Sumner, 259, 261
Farwell v. Boston & Worcester R. R. Corporation, 620
v. Kennett, 320
Fash v. Ross, 588
Fassit v. Phillips, 99
Faunce v. Leslie, 98
Fayle v. Bird, 366
Feagle v. Simpson et al., 228, 229
Fear v. Dunlap, 326
Fearing v. Clawson, 265
Feeter v. Heath, 504, 609
Feigley v. Sponeberger, 440, 441
Feise v. Linden, 160
Fellows v. Niver, 264
Fenby v. Pritchard, 337
Fenn v. Harrison, 547, 552
Fenton v. Folger, 474
v. The City of Dublin Steam Packet Co., 621
v. White, 248
Ferguson v. Childress, 555
Fernon v. Farmer's Adm'r, 322
Ferrand v. Bouchell, 502, 506
Ferris v. Saxton, 401
v. Paris, 672
Ferry v. Ferry, 522
Fichthorn v. Boyer, 446
Fidler v. Day, 101
v. Delevan, 178
Field's Estate, 255
Field v. Holland, 293, 294, 295
v. Thornton, 381
Fields v. Mallett, 364
Filley v. Phelps, 470
Finden v. Bear, 118
v. Westlake, 183
Findley v. Cooley, 75
v. Smith, 514
Fine's Adm'r, &c. v. Cockshut et al., 518
Finney v. Shirley and Hoffman, 313
& others v. Fairhaven Ins. Co., 572, 573
Firaz v. Nicholls, 219
Fish v. Jackman, 403
v. Kempton, 616
Firsburne, Ex'or of Snipes v. Sanders, 501 520
Fisher v. Bristow & others, 227
v. Clement, 262
Fisher v. Dudding, 502
v. Ellis, 613
v. Evans, 404, 405
v. Leslie, 313
v. Patterson, 198
v. Rotersan and Wife, 117
v. The State Bank, 402
and Johnson v. Campbell, 544, 554
Ex'rs of, v. Ex'rs of Tucker, 446
Fisk et al. v. Herrick and Trustees, 470
Fiske v. Framingham Man. Co., 621
v. Witt & Tr., 319
Fitchburg R. R. Co. v. The Boston & Maine R. R., 520
Fitler v. Beckley, 367, 369
v. Maitland, 98
v. Morris, 405
Fitts v. Hall, 260, 262
Fitzgerald v. Caldwell's Ex'r, 502, 517
Fitzhugh et al. v. Love's Ex'r, 326
et al. v. McPherson, 523
Fitzpatrick v. School Commissioners, 572
Fitzsimmons v. Cutler, 120, 158
Flack v. Green, 394
Flanagin v. Wetherill, 502
Fleming v. Dunbar, 446
v. Nall, Adm'r, 320
Linn and Co. v. Burge, 313
Ross & Co. v. Lawhorn & Co., 448
Flemming v. Prescott, 452
Fletcher v. Heath, 645
Flint v. Clark, 198
v. *Pike*, 187
v. Rogers, 363, 395
Flitcraft v. Jenks, 180, 181, 208
Flintham's Appeal, 515
Flood v. Yandes, 446
Floyd v. Day, 632
Foard v. Johnson, 405
Fobes and Adams v. Cantfield, 522
Fogg v. Virgin, 605
Foley v. Hill, 314, 651
Folger v. Chase, 365
Follain & others v. Dupre & others, 382, 404
v. Orillon, 278
Folsom v. Mussey, 691
Fonda v. Van Horne, 247, 250, 251
Fonville v. McNease, 132, 134, 137
Foot v. Brown, 125
v. Sabin, 451
Forbes v. King, 133
v. Myers, 206
Force v. Craig, 326
Ford v. Phillips, 254
v. Primrose, 116
v. Stewart, 665
Forde v. Herron, 490
Forkner v. Stuart, &c., 447
Forrestier v. Boardman, 634, 670, 671
Forster v. Fuller, 604
Forsyth et al. v. Baxter et al., 519
Fortner v. Parkam & Gibson et al., 363, 401
Fortune v. Brazier, 613
Forward v. Adams, 126
Foshay v. Ferguson, 220, 221
Foster v. Andrews, 451
v. Floyd, 326
v. Hall and Eaton, 446
v. McDonald, 389, 394, 402
v. Pointer, 180
v. Shattuck et al., 321

Foster v. Sineath, 401
v. Small, 125, 165
v. Walton, 78, 79
Fountain v. Boodle, 181, 182
Fowke v. Bowie, 286
Fowle v. Robbins, 119, 158
Fowler v. Brentley et al., 338
v. Shearer, 585
v. Dodney, 122, 123
and wife v. Homer, 183
Fox v. Adams et al., 101
v. Drake, 586
v. Fisk, 544
v. Hills, 73
v. Pray, 652
v. Vanderbeck, 120, 165
v. Wilcocks, 514
et al. v. Cosby et al., 265
Foxcraft & Galloway v. Nagle, 518
Francis v. Castleman, 499
v. Roofe, 122
Frankland v. M'Gusty, 452
Franklin v. March, 313
Fraser v. Berkeley, 187, 203
Frazer v. Bunn, 289, 291
Frazier v. Hyland, 299
v. Rowan, 253
v. The Erie Bank, 662
Frederitze v. Odenwalder, 178
Freeman v. Bradford, 251
v. Eatman, 78
v. Price, 116, 198, 200
et al. v. Boynton, 363
's Bank v. Perkins, 394
French v. Kennedy, 299
v. Reed et al., 670
v. Small et al., 221
v. Smith et al., 225
et al. v. Chase, 470
Frevall v. Fitch, 326
Fridge v. The State, use of Kirk, 247
Frierson v. Hewitt, 216
Fries v. Watson, 502
Frink v. Branch, 488, 489, 490, 491
Fripp v. Talbird, 85
Frisby v. Fowles, 116
Frith v. Leroux, 520, 521
Frontin v. Small, 584, 585
Frost v. Wood, 549, 604
Frothingham v. Everton, 668, 674
Frow and Ferguson v. Downman, 79
Frowman v. Smith & Wife, 224
Fruhling v. Schroeder, 498, 510
Frye v. Lockwood, 613
Fuller v. Cook, 217
Jr. v. Sears et al., 72
Fullerton et al. v. The Bank of U. S., 390
Fulmer v. Harmon, 223
Fulton v. Rosevelt, 265
Bank, The v. The Phœnix Bank, 339, 363
Funes y Carillo v. Bank of the United States, 368
Furze v. Sharwood, 376, 377, 378, 389

Gage v. Allison & Clark, 568, 651
v. Robinson, 178
v. Shelton, 113, 115, 160
Gahn v. Niemcewiez, 497
Gaines v. McKinley, 547
Gale v. Hayes, 158
Gale v. Tappan, 567
Gall v. Comber, 635
Gallagher v. Roberts, 364
Galloway v. Hughes et al., 440
Galt & others v. Galloway & others, 567
Galway, Lord v. Mathew & Smithson, 440
Gammell v. Skinner, 504
Gammon v. Everett, 367
Gano & Thomas v. Samuel, 452
Gansevoort v. Williams, 452
Garbett v. Veale, 477, 472, 474
Gardiner Bank v. Wheaton et al., 69
Gardner v. Heartt, 621
Garland v. Reynolds, 614
Ex'r v. Rowan, 706
Garrard v. Willett, 223, 224, 226
Garrett v. Butler, 326
v. Handley, 615
Ex'or, &c. v. Carr et ux., 513
Gaskins v. Gaskins & others, 501, 509
Gass v. Stinson, 299
Gassett & others v. Grout & Trustee, 81, 82
Gathercole v. Miall, 187
Gaw v. Selden, 125
Gay v. Ballou, 248, 254
Gazzam v. Poyntz, 97, 101
Geill v. Jeremy and another, 389
Gelback's Appeal, case of. 250
Gelston v. Hoyt, 521
George v. Kimball, 83
v. Radford, 227
Georgia Ins. & Trust Co. v. Oliver, 517
Gerard v. Basse et al., 448
v. La Costa, 322
Getting v. Foss, 184
Geyer v. Decker, 631, 667, 671
Ghent v. Adams, 587, 606
Gibb v. Mather, 366, 368
Gibbens v. Peeler, 75
Gibbs v. Bois & Linsley, 552
v. Bryant, 510
v. Cannon, 375
v. Chisolm, 522
v. Dewey, 115
Gibson v. Chaters, 227
v. Colt & others, 547
v. Crehore, 523
v. Governor, &c., 507
v. Minet, 321
v. Stephens, 472, 474
v. Waterhouse, 220
v. Williams, 154, 155, 158
et al. v. Conner, 337
Giddens v. Mirk, 113, 117, 152, 156, 158
Gidney v. Blake, 157
Gilbert v. Dennis, 360, 364, 375, 379, 381, 406
v. The People, 186
Giles v. The State of Georgia, 137
Gill v. Bright, 117, 155
v. Brown, 587
's Appeal, 508
Gillespie v. Gillespie's Heirs, 75
v. Mather, 317, 325
v. The Mayor, &c., of New York, 517, 520
et al. v. Wesson, 610
Gillet v. Averill, 374
v. Maynard, 365, 512
v. Stanley, 251
Gillon v. Turnbull, 508

Gilman v. Lowell, 119, 198, 199, 200, 201, 204, 208
Gilmore v. Pope, 614
v. Spiea, 364
v. The N. A. Land Co., 72
Gilpins v. Consequa, 504
Gindrat et al. v. The Mechanics' Bank of Augusta, 394, 401, 402
Girard v. Taggart, 616
Gist v. Lybrand, 361, 402
Glasgow v. Pratte, 368, 382, 406
Glass & another v. Stewart, 185
Glasscock v. Bank of Missouri, 382, 403
Gleason v. Dodd, Administrator, 567
Glenn v. Thistle, 402
Goad v. Hart, 558
Goddard v. Bulows, 511
Goddard v. *Cox*, 287, 290
v. Lyman, 406
Godfrey v. *Saunders*, 630
Godley et al. v. Goodloe, 401, 405
Godson v. Horne, 182
Goff v. The Inhabitants of Rehoboth, 505,506
Goldstein v. *Foss*, 158, 161
Goldthwaite v. Tarlton & M'Whorter, 631
Good v. Bennett, 228
v. Hart's Adm'rs, 574
Goodale v. Wheeler, 547
Goodbread v. Ledbetter, 198, 203
Goodburn & Wife v. Stevens, 492
Goode v. Linecum & Nash, 440
Goodenow v. Tappan, 116
Goodloe v. Clay, 510
v. Taylor, 316
Goodman v. Norton, 392
Goodrich v. Davis, 161, 162
v. Downs, 97, 98, 100, 101
v. Woolcott, 115, 153, 158, 159
Goodridge and another v. Ross, 254
Goodsell v. Myers, 252, 254
Goodwin v. McCoy, 404, 555, 710
v. Richardson, Adm'r, 491
Gordon v. Buchanan, 441, 546
v. Bulkeley, 587
v. Haywood, 83
v. Potter, 249
v. *Swan*, 502
Gorham v. Ives, 155
v. Springfield, 711
Gorton v. De Angelis, 223, 224, 225, 229
Goshen Turnpike Co. v. Hurtin, 322
Goslin v. Wilcock, 218
Gough v. Staats, 362
Gould v. Barratt, 227
v. *Hume*, 166
v. Rich, 574
v. Weed, 204
Governor, the use of, &c. v. Campbell et als., 95
Gower v. Emery, 693
v. Moore, 361
Gowing v. Rich, 77
Grace v. Hale, 248, 251, 261
Graeff v. Hitchman, 445
Graham v. Noble, 224
Grainger v. Hill, 229
Gram v. Cadwell, 450
v. Seton & Bunker, 446
Granberry's Ex'r v. Granberry, 514
Granby v. Amhurst, 711, 712
Grand Bank v. Blanchard, 389
Grand Gulf R. R. and B. Co. v. Barnes, 394, 404
Granite Bank v. Ayers, 364, 401
Grant v. Dalliber, 711
v. Hoover, 203
v. *Vaughan*, 324
et al. v. Healey, 672
in the matter of, 70, 76
Grattan v. Appleton et al., 515, 706
Graves v. *Blanchet*, 115
v. Waller, 156
Gray v. Bell, 350
v. Bowden, 313
v. Donahoe, 319
v. Otis, 613
v. Pentland, 180, 184
v. Van Amringe, 506
v. Wilson, 695
Graybill v. Butts & Warren, 507
Grazebrook v. M'Creedie, 448, 449
Greeley et al. v. Thurston, 395
v. Wyeth, 450
Greely v. Bartlett, 631
v. Hunt, 360
Green v. *Chapman*, 187
v. Darling, 401
v. *Davies*, 320
v. Goings, 367
v. Howell, 510
v. Long, 119
v. Mosher & Beales, 448
v. Tanner & others, 72, 83, 445
v. Windham, 707, 711
Greene v. Greene, 490, 709, 714
and others v. Goddard, 674, 693
Greenfield's Estate, 71
Greenleaf v. Kellogg, 497, 522
Greenlee v. Hays, Administrator, 75
Greenly v. Hopkins, 511
Greenup's Representatives v. Bacon's Executors, 265
Greenwood v. Brodhead, 84
Gregory v. Darby, 216
v. *Lewis*, 159
v. Mack, 611, 694
v. Thomas, 223
v. Williams, 208
Grider v. Graham, 76
Griffin v. Barney, 98
Griffin v. Sellers, 224
Griffith v. Johnson's Adm'r, 613
v. Reed, 367
Griffiths v. *Lewis*, 183
Grimes v. Coyle, 183, 200
Grimshaw & Brown v. Walker, 101
Groff v. Groff, 264
Groavenor & Co. v. Austin's Ad'r, 476, 477
Grove v. Bradenburg, 219
v. *Dubois*, 635
v. Harvey and another, 572
Grover v. Wakeman, 96, 97
Grubba v. Kyzer, 164
v. Wiley, 585
Grugeon v. *Smith*, 377
Guen v. Gouveneur & Kemble, 700
Gully v. Remy, 497
Gunn v. Butler, 69, 80
Gurley v. The Gettysburg Bank, 389
Guthrie v. Gardner, 77
v. Murphy, 248
& Cox v. Wickliffe, 299

Gutsole v. *Mathers*, 128, 164
Guy v. Oakley, 667
Gwinn v. Roberts, 319
v. Whitaker, 287, 296, 297, 299, 501
Gwinnell v. *Herbert*, 323

Habershon v. Troby, 229
Hacon and wife v. Smith, 118
Haddam v. Mills, 227
Hadden v. Spader, 76
Haddock v. Murray, 389
Haddrick v. Hislop, 222
Hafner v. Irwin, 84, 96, 100, 101
Hagar v. Boswell, 404
v. Mounts, 451
Hagthorp et ux. et al. v. Hook's Adm'rs, 83
Haight v. Morris, 122
Haine, Adm'r of, v. Tarrant, 249
Haines v. Oatman, 264
Halbert, &c. v. Grant, 84, 85
Halcombe v. Ray, 82
Hale v. Gerrish, 254
v. Henrie, 491
and Chase v. Peck & Co., 672
v. Woods, 582, 583
Hall v. Blandy, 161
v. Farmer, 327
v. Hale, 338
v. Hall, 475, 502
v. Hawkins, 118
v. Hawkins, 222, 223, 227
v. Huntoon, 607
v. Jackson & Tr., 695
v. Montgomery, 119, 120, 127
v. Newcomb, 324, 325
v. *Smith*, 604
v. Suydam, 221, 222, 223, 225
v. *Weedon*, 120
et al. v. Commonwealth Bank, 555
v. Denison and Tr., 95, 98
et ux. v. Davis et al., 510
& Montross v. Constant, 286
Kirkpatrick & Co. v. Coe, 450
Hallet & Walker, Ex'rs v. Allen, 508, 515
Hallock v. Miller, 127, 128
Hallowell v. Saco, 711
Halsey v. Salmon, 389
et al. v. Whitney et al,, 95, 101, 447
Hamer v. McFarlin, 198
Hamil v. Purvis, 453
Hamilton v. Benbury, 289
v. Dent, 119
v. Myrich & Williamson, 317
v. Russell, 68
v. Smith, 152
v. Smith, 381, 383
Donaldson & Co. v. Cunningham, 630, 631, 666, 674
Hammer's Adm'r v. Rochester, 294
Hammersley et al. v. Knowlys, 287
Hammon & Daniel v. Cottle, 665
Hammond v. Hammond, 74, 496, 521
Hampton et al. v. Matthews & Shaw, 554
Hancock v. Byrne, 567
v. Fairfield, 609
v. Winter, 166
Handley v. Dobson's Adm'r, 299
Handy v. The State, 515
Hanford v. Artcher, 70
v. M'Nair, 587, 588
Hankinson v. Bilby, 155
Hanks v. Deal, 248
Hanly et al. v. Gaines, 268
Hanna v. Spott's Heirs, 266
Hapgood and another, Executors v. Batchelder and another, 631, 633
Hardin v. Borders et al., 227
v. Comstock, 186
Harding v. Brooks, 207
et ux. v. Alden, 714
Hardy v. Scanlan, 264
v. Skinner, 96
Hargrave v. Le Breton, 128
Harker and another v. Conrad and another, 288, 289
v. Orr, 115
Harlan, &c. v. Barnes's Adm'rs, 266
Harland's Accounts, 513
Harney v. Owen, 260
Harp v. Osgood, 614
Harper v. Fox, 448, 449
v. Hampton, 589
v. Kean, 675
v. Ragan, 614
v. Williams, 498
et al. v. Little, 567, 585
Harrington v. Glenn, 501
Harris v. Alexander and another, 402
v. Burley, 158
v. Cannon and another, 259
v. Clark and another, 360
v. Lawrence et al., 166
v Memphis Bank, 404
v. Purdy, 119, 121, 122
v. Robinson, 382, 383, 401, 405
v. Wall, 254
et al. v. Sumner, 80, 90, 101
and others, v. Youman and others, 266
Harrison v. Bevington, 165
v. Crowder, 363
v. Fane, 249
v. Handley, 505
v. Jackson, 446
v. Ruscoe, 383
v. Sterry, 443
et al. v. Long, 513
&c. v. Campbell, &c., 75
v. Carroll, &c., 81
Harshman, Rench and others v. Lowe and others, 102
Hart v. Dewey, 299
v. Dorman, 299
v. M'Farland et al., 96
v. Reed, 156, 180, 182, 199, 200, 201, 202
v. Withers, 446, 448
Harteau v. Harteau, 714
Hartfield v. Roper, 262
Hartford Bank v. Stedman & Godman, 390, 402, 405
Hartley v. Case, 375
v. Herring, 127
v. Wharton, 254
Hartness and another v. Thompson and others, 253
Hartsock v. Reddick, 185
Hartwell v. Candler, 368
Harvard College v. Gore, 706, 710, 711
Harvey v. Boies, 111, 121, 123
v. Coffin, 156
v. French, 157, 160, 161
v. Richards, 706

Harvey v. Turner & Co., 633
Harwood v. Astley, 184
's Ex'rs v. Humes, use, 610
Haselton v. Weare, 164
Haskell v. Bakewell, 62
Haskins v. Torrence, 117
Hasleham v. Young, 453
Hasler v. Hasler, 515
Haslet and others v. Street and others, 449
Hastie & Patrick v. Depeyster and Charlton, 510
Hastings v. Belknap, 76, 100
v. Lovering, 609
v. Lusk, 178, 181, 186
v. Palmer, 127
v. Wiswall, 522
Hatch v. Crawford, 447
v. Potter et ux., 156, 205
v. Taylor, 555, 573
Lessee of Jerusha, v. Barr, 581, 584
Hatfield v. Phillips, 645
Hawes v. Dunton & White, 452
v. Leader, 74
Hawken v. Bourne, 440
Hawkes v. Salter, 390
Hawkins v. Walker, 672
v. Watkins, 319, 326
's Ex'ors v. Minor, &c., 518
Haxtun v. Bishop, 368
Haynes v. Haynes, 203
v. Leland, 203
Hays v. Allen, 111, 118
v. Brierly, 153, 159
v. Mitchell, 158, 159
v. Stone, 667, 671, 673
v. The Western R. R. Corporation, 626
v. Waller, 224
v. Younglove, 217
& Wick v. Lynn, 545
& Wife v. Hays, 116, 153, 154
Hayward v. Ellis, 516
Hazleton Coal Co. v. Ryerson, 404
Healy v. Gorman, 519
et als. v. Rowan et als., 250
Hearn v. Stowell, 158, 162, 181, 184
Hearsey v. Pruyn, 613
Heath v. Gay, 500, 521
Hedger v. Steavenson, 375, 376, 377
Hedley v. Bainbridge, 441
Hefferman v. Adams, 545, 579
Heft v. McGill, 264
Hege and others v. Hege and others, 250
Heilbron v. Bissill & Warner, 291, 292
Heister, Lessee of, v. Fortner, 78
Hemenway v. Hemenway, 672
Heming v. Power, 114, 154
Hemphill v. The Bank of Alabama, 555
Henderson v. Barbee, 446
v. Dodd, 72
v. Shannon, 336
& Dial v. Irby, 338
Hendricks v. Robinson, 95
Hennessey v. The Western Bank, 99, 444, 447
Henniker v. Wigg, 300
Henning v. Van Tyne & McGowan, 520
Henry v. Flagg, 522
v. Hazen, 315
v. Norwood, 198, 199, 201, 206
v. Risk, 505
et al. v. State, &c., 515
Henry & Winston v. Thompson, 497
Henschel v. Mahler, 316
Henshaw v. Sumner, 102
Henson v. Veatch, 178, 198, 207
Hepburn & Dundas v. Dunlop & Co., 516
Herman v. Brookerhoff, 219, 225
Herndon v. Venable, 504
Heriot v. Stuart, 187
Hersh v. Ringwalt, 202
Hesser v. Steiner, 252
Hester v. Hapgood, 228
et als. v. Wilkinson et als., 71, 72
, Wilson, White & Co. v. Lumpkin, 450
Hewer v. Dawson, 182
Hewes v. Doddridge, 549, 643
Hewlett v. Cruchley, 223, 227
Heyward's Case, 301
Heyward v. Cuthbert, 185, 217, 227, 228
v. Lomax, 297
Heywood v. Collinge, 227, 229
v. Perrin, 316
Hiatt v. Wade, 78
Hibbler & Pearson v. De Forest, Morris & Wilkins, 451
Hickinbotham v. Leach, 179
Hickley v. Grosjean, 164
Hickman v. Griffin 222, 224
v. Hall's Adm'rs, 249
v. Reineking, 449
v. Ryan, 392
Hicks v. Bingham, 287
Hiestand v. Kuns, 250
Higdon v. Thomas, 616
Higgins v. Morrison's Executor, 380, 406
v. Senior, 609, 615
High et al. v. Nelms, 69
Hildeburn v. Turner, 365
Hill v. Anderson, 259, 261
v. Miles, 164, 185
v. The Bishop of Exeter, 77
v. The Planters' Bank, 394
v. Varrell, 404
v. Ward, 128, 223
and another v. Southerland's Ex'rs, 290
et al. v. Lewis, 324
Hillhouse v. Dunning, 131, 135
v. Peck, 113, 114
Hills v. Bannister, 605
et als. v. Ross, 449
Hillyer v. Bennett, 261
v. Vaughan, 287, 292
Hilton v. Burley, 289, 290, 291, 295
Hilyard's Estate, 508
Hinchman v. Lawson, 180
Hindc's Lessee v. Longworth, 70
Hindman v. Dill & Co., 95, 97, 98
Hinely v. Margaritz, 252, 254
Hinsdale v. Miles, 363
Hitchcock v. Cloutier, 313
et al., v. St. John et al. 442
Hite v. Kendall, 610
Hix v. Drury, 180
Hoagland v. Ex'rs of Schenck, 508
Hoar v. Wood, 186
Hoare v. Allen, 518
Hodgdon v. Hodgdon, 501, 520
Hodge v. Wyatt and Houston, 97
Hodges v. Clinton, 319
v. Hall, 316

Hodges v. Holeman, 500
v. Stewart, 324
v. The State, 138
et al. v. Parker et al., 507
Hodgson v. Dexter, 586
v. Paxson & Lorman, 695
v. Scarlett, 186
Hoffman and another v. Noble and another, 643
Hogatt v. Bingaman, 402
Hogg v. Dorral, 126, 152
v. Wilson, 165
v. Zanesville C. & M. Co., 507
Holt v. Underhill, 254
Hoke v. Henderson, 71, 83
Holbrook v. Wight, 695
Holburn v. Neil, 226
Holland v. Cruft, 75, 79, 80
Holley v. Burgess, 156, 208
Hollimsn, Heirs of, v. Peebles, 707, 710
Hollister v. Barkley, 507
Holly v. Huggeford, 696
Holmes v. Blogg, 260
v. Burton et al., 445
v. Misroon, 504, 667
Holt v. Scholefield, 112, 120
v. Ward, Clarencieux, 253
Holton v. Smith, 643
Holyoke v. Haskins et ux., 714
Home v. Bentinck, 186
Homer v. Thwing et al., 263
Holmes v. Smith, 337
Honore v. Colmesmil, 507
v. Murray, 501
Hood v. Fahnestock, 83
et al. v. Sorrell et al., 81
Hooe et al. v. Oxley & Hancock, 550
Hook v. Hackney, 124, 126
Hoopes v. Brinton, 515, 521
& Bogart v. Newman, Ex'r, 393, 404
Hopkins v. Beedle, 119, 120
v. Blane, 546
v. Conrad & Lancaster, 290
v. Mehaffy, 585
v. Smith, 179
v. The Railroad Co., 326
v. Towns, &c., 74
et als. v. The Gallatin Turnpike Co., 25
Hopkirk v. Randolph et al., 69, 76, 80, 82, 83
Horn v. Boon, 225, 226
Hornby v. Lacy, 635
Horne v. Horne, 707, 710
v. Redfearne, 315
Horner v. Hunt, 497
Horton v. Smelser, 226
Hortons & Hutton v. Towns, 546, 573
Hortsman v. Henshaw et al., 321
Hosack v. Rogers, 523
Hosford v. Nichols, 519
Hotchkiss v. Lothrop, 203
Houghtaling v. Kilderhouse, 208
v. Marvin, 567
Houghton v. Houghton, 491
Houlditch v. Cauty, 376, 377
House v. Fort, 615
v. House, 117
Houston v. Cooper, 252
v. Frazier, 613, 673
v. Jamison's Adm'r, 509
v. Nowland, 95
Hovy v. Magill, 604
v. Newton, 504
Howard v. Ames, 338
v. Ives, 390, 391
v. Stephenson, 113, 119
v. Thompson, 178, 184, 185, 204
v. Williams, 68, 78
& others v. Priest and another, 488
Howe v. Bradley, 361, 379, 401, 497, 520, 522
v. Perry, 204
v. Ward, 69, 72, 73
Howell v. Edwards, 227
v. Howell, 203
et al, v. Edgar et al., 100
Howland, Ward & Spring v. Dews, 74
Hoxie v. Carr et al., 487, 488, 490, 491
Hoye v. Penn, 69
Hoyle v. Young, 124, 125
Hoyt v. Chapin et al., 251
v. Gelston, 521
v. Hilton, 265
v. Seeley, 362, 555
Hubbard v. Elmer, 545
v. Troy, 392
and others v. Charleston Branch Railroad Co., 512
et al. Ex'rs v. Cummings, 251, 258
Hubbert v. Borden, 615
Hudnal v. Wilder, 68, 72, 78, 79
Hudson v. Tenney et al., 511
v. Wilkins, 607
et al., v. Maze, 97
Hoffman v. Shumate, 195
Huger and others v. Huger and others, 267
Hughes v. Ellison, 442
v. Large, 339
v. Rees, 157, 160, 162, 163, 164
v. Ross, 228
v. Watson, 252
&c. v. Smith, 574
Hugley v. Hugley, 154
Haling v. Hugg, 321
Hull v. Caldwell, 504
Hulls v. Jeffrey et al., 102
Hulse, Montellius & Fuller v. S. Wright, 96
Hume v. Arrasmith, 165
Humphrey v. Douglass, 262
Hunn v. Norton, 521
Hunt & Co. v. Benson, 489
v. Brown, 315
v. Fish, 403
v. Nevers, 499
v. Nugent, 404
v. Peake, 253
v. Sandford, 338
v. Thompson, 249
Hunter v. Humble, 615
v. Parker, 584, 588
's Adm'rs v. Miller's Ex'rs, 583, 589
Hunters v. Waite, 69
Hurd v. Silsby & Trustees, 100
Hussey v. Freeman, 389
v. Manuf. & Mech. Bank, 286
et al. v. Jewett, Ex'r, 248, 253
Huston's Appeal, 507, 508
Adm'r v. Cantril et al., 69, 82, 567
Hutchings v. Low, 321
Hutchins v. Blood, 121, 122
v. Flintge et al., 339
v. Sprague et al., 101
v. Turner, 453

Hutchison v. Bell, 289
et al. v. Kelly, 69, 71, 72, 73
v. Smith, 475
Huzzey v. Field, 619
Hyde v. Bailey, 198
v. Stone, 507
Hylton, Lessee of, v. Brown, 707, 711
Hyslop v. Clarke, 99

Igams & Carr v. Rice, 592
Idol v. Jones, 118, 155
Iley v. Niswanger, 72, 73
Ilsley v. Jewett, 516
Imeson, Ex parte, 319, 320
Incledon v. Berry, 223
Indian Chief, The, 713
Ingham v. Vaden et als., 337
Inglish et al. v. Watkins, 497
Ingraham v. Postell's Ex'ors, 508
v. Wheeler, 100
Ingram v. Lawson, 124, 125
v. Morgan, Garrett et al., 337
v. Phillips et al., 64, 68, 71, 73
Inhabitants of Webster v. Larned, 633
Inman v. Foster, 201, 202, 206, 208
Insurance Co. v. Smith, 612
of Pa. v. Smith, 611
Irby v. Wilson, 714
Ireland v. Kip, 402
Irish v. Webster et al., 614
Irons, Ex'r, v. Crist, 266
Irvine v. Lowry, 319
v. Withers, 368
Irwin v. Keen, 74, 101
Isaacs v. Boyd et al., 264
Isenhart v. Brown, 509
Isley v. Lovejoy, 155, 203
Isham v. Gibbons, 706, 707, 710, 711, 712
Ives v. Davenport, 546, 630
Izard v. Izard, 68, 72

Jackson v. Adams, 118
v. Baker, 632
v. Burchin, 259
v. Burleigh, 227
v. Campbell, 523
v. Carpenter, 259
v. Cornell and others, 475
v. Dutton, 76
v. Garnsey, 75
v. Ham, 78
v. Myers, 73
v. Packer, 365, 367
v. Parker, 97
v. Peek's Heirs, 80
v. Russell, 126
v. Seward, 73
v. Stetson et ux. 180
v. Union Bank, 667
v. Weisiger, 119
ex dem. Bigelow v. Timmerman, 63
ex dem. Peck & Mabee v. Peck, 70
ex dem. Van Wyck v. Seward, 70
's Heirs v. Jackson's Adm'r, 514
Jacobs v. Adams, 499, 512
v. Tyler, 119, 121, 122
J'Anson v. Stuart, 178
Jacot v. Corbett et al., 99, 100
Jamaica v. Townshend, 713
James v. Bird's Administrator, 76
v. Phelps, 225
Jameson, &c. v. Mosely, 266
Jamieson v. Farr, 320
Jaques v. Marquand, 446
v. Todd, 553, 554
Jarvis v. Hathaway, 166, 183, 204
v. St. Croix Man. Co., 403
Jeffers v. Oliver, 326
Jefferies v. Sheppard, 673
Jefford's Adm'r v. Ringgold & Co., 252, 253, 260
Jekyll v. Moore, 186
Jellison v. Lafonta, 672
Jencks v. Alexander, 209
Jenkins v. Atkins, 567, 587
v. Cockerman, 179
Jenks v. The Doylestown Bank, 365
Jennings v. Merrill, 646
v. Rundall, 262, 263
Jennison v. Hapgood, 513, 516, 711, 713
Johnson v. Bennett, 505
v. Chambers, 220, 223, 226
v. Eicke, 510
v. Evans, 186, 472
v. Farmers' Bank, 314, 672
v. Haggin, 510
v. Johnson, 313
v. Jones, 550, 551, 573
v. King, 470
v. Lines, 249
v. Pie, 262
v. Robertson and Wife, 116, 122, 124, 125
v. Sanford, 474
v. Small, 619
v. Sumner, 507
v. Wingate, 544, 553, 671, 672
&c. v. Johnson's Heirs, 585
use, &c. v. Blasdale and Grubbs, 555
& Co. v. Bryan, 619
& Duggan v. O'Hara, 633
's Heirs v. Harvey, 80, 83, 98
Johnston v. Martin, 220, 223
v. Morrow, 113, 115
v. Tait, 165
Johnstone v. Sutton, 219
Joliffee v. Higgins, 319
Jolly v. Blanchard, 669
Jones v. Booth, 451
v. Bryant, 76
v. Chapman, 118, 165, 183, 202
v. Crawford, 76, 78
v. Croucher and others, 79
v. Danforth & Colvin, 248
v. Downman, 610
v. Fales, 319
v. Farley, 549
v. Gwynn, 216, 217, 220, 228
v. Henry, 81
v. Herne, 118
v. Hungerford, 117
v. Jones, 74
v. Kilgore, 295
v. Lewis, 402, 403
v. Littler, 123, 124
v. McGowell, 117, 152
v. Nicholls, 219, 226
v. Pie, 267
v. Rives, 451
v. Rivers, 152
v. Sinclair, 696

Jones v. Spear & Tr., 69
v. *Stevens*, 179, 198
v. The Ætna Ins. Co., 611
v. United States. 291, 299, 300
v. Ward, 299, 507, 515
v. Wardell, 389
v. Warner, 553
's case, 450
Devisees v. Carter, 580
Heirs v. Adair, 266
and Danforth v. Colvin, 253
et ux. v. Brewer, 250
Joralemon v. Pomeroy, 158
Jordan v. Ford & Dickinson, 383
Jordan v. Trice, 585
et al. v. James, 695
Joseph, The Brig, 706
Joyce v. Sims, 612
v. Williams, 450
Judah v. Dyott, 673
v. Harris, 319
Judge of Probate v. Heydock et als., 499
Judkins v. Walker, 260
Judson v. Blanchard, 264
v. Storer, 265
Juniata Bank v. Hale & another, 360, 383

Kane v. Smith, 506
Karr's Adm'r v. Karr, 514, 515
Karthuns v. Ferrer et al., 449
v. Owings, 503
Kay v. Fredigall, 198, 200
Kean v. Davis, 607
v. McLaughlin, 121, 186, 206
Keeler v. Fassett, 265
Keen v. Sprague, 609
Keenholts v. Becker, 127, 128, 165, 205, 206
Keeran v. Clowser, 264
Keith v. Jones, 319
Kelley v. Greenleaf et al., 450
v. Mayor, &c., of Brooklyn, 317
Kellogg v. Hickok, 522
& Kennett v. Miller & Rogers, 572
Kelly v. Munson, 651
Kemington v. Harrington, 400, 403
Kenan, Ex'x, v. Care, 521
Kendall v. Hughes, 72
v. Galvin, 322
v. Stone, 128
Kennedy v. Dear, 203
v. Gifford, 153, 155, 158, 159, 201, 206
v. Gregory, 201
v. Lowry, 164
v. Manship and others, 339
v. Strong, 643
v. Whitwell et al., 507
Kennon v. Dickens, 522, 523
Kent v. David, 178
Kerns v. Piper, 554
Kerr v. Sheddon, 182
v. Williamson, 226
v. Workman, 224
Kester v. Rockel, 516
Ketchell v. Burns, 315
Ketchum & others v. Durkee and others, 445
Kevana et als. v. Branch, 98, 100
Key v. Knott & Wife, 339, 363
v. Parnham, 603, 604
Kid v. Mitchell, 264
Kidd v. King, 631, 633, 673
Kilburn v. Bennett, 712, 713
Kilgore v. Bulkley, 313, 382
Killinger v. Reidenhauer, Adm'r of Smith, 74
Kimball v. Fenner, 83
v. Huntington, 313
v. Lamson, 253
Kime v. Brooke, 587
Kimmel v. M'Right, 69, 77
Kinder et al. v. Shaw et al., 643
Kine v. Sewell, 182, 183
King v. Amphilit, 137
v. *Bickley*, 377, 381
v. *Box*, 322
v. *Burdett*, 138
v. Butler, 587
v. *Carlisle*, 186
v. *Creevy*, 186, 187
v. Holmes, 364, 394
v. *J. Wright*, 186
v. *Lake*, 131
v. Root, 137, 164, 180, 198, 202, 204
v. *Shipley*, 162
v. *The Alme and Nott*, 157
v. *Topham*, 136, 137, 162
v. *Waring et ux.*, 183, 207
and another v. Diehl and another, 512
Kingman v. Kelsie, 610
Kingston v. Kincaid et al., 545, 667, 670
Kinnard v. Thompson, 95
Kinney v. Hosea, 113, 123, 204, 205
v. Nash, 124, 158
Kipp v. Hanna, 69, 71, 73, 85
Kirby v. Carpenter, 475
v. Ingersoll, 444
v. *The Duke of Marlborough*, 289, 291
Kirk v. Blurton, 444
Adm'rs of, v. Ex'rs of Richbourg, 502
Kirkman et al. v. Vanlier, 510
Kirkpatrick v. M'Cullough, 319, 360
v. Stainer, 612
Kissam v. Edmundson et al., 68, 97, 101
Kitchen v. Lee, 260
Klapp's Assignees v. Shirk, 95
Kline v. Beebe, 247, 251, 258
v. L'Amoureux, 248
Klock v. Robinson, 501
Knapp v. Alvord, 567
v. Crosby, 265
v. McBride & Norman, 451
Knettle v. Crouse, 509
Knight v. Gibbs, 127
v. Loomis, 514
v. Mitchell, 506
v. Reese, 510
Knobell v. Fuller, 199
Knowles v. Lord, 78
v. Parker, 338
Knox v. Schepler, 471
v. Waldoborough, 711
et al. v. Jones, 506
v. Summers, 470, 472
Kollock and others v. Jackson, 695
Koons v. Miller, 498, 506
Koster v. Eason, 635
Kramer v. Arthurs, 491
v. M'Dowell, 401
Krauae v. Dorrance, 673
Kylea v. Roberts's Executor, 501

Ladd v. Griswold, 469, 475, 476
Laine v. Wells, 153

La Farge v. Kneeland, 607
Laflin v. Pomeroy, 326
Lafont v. Ricard, 514
Laget et al. v. Gano, 548
Lagow v. Patterson, 546
Laidley v. Merrifield, 522
Lake v. King, 132
Administrator v. Park, 514
Lamb v. Lamb. 514
et al. v. Durant, 441
Lambdin v. Sharp, 447
Lambe v. Smith, 707
Lambert et al. v. Ghiselin, 404
Lamos v. Snell, 198
Lamourieux v. Howit, 327
Lamprell v. Bollericay Union, 287
Lampton v. Haggard, 320
Lancaster v. Dolan, 78
Bank v. Myley, 491
Lance v. Barrett, 546
Lane v. Cotton, 621
Lang v. Brailsford, 500
's Heirs v. Waring, 451, 492
Lange v. Kohne, 319
Langford v. Fly, 73
Administrator v. Frey, Ex'r, 247
Langley v. Palmer, 365
Lansing v. Gaine & Ten Eyck, 421
v. Rattoone, 500
Lanter v. M'Ewen, 179, 206
Lapham v. Green, 616
Laporte v. Landry, 402
Larned v. Buffington, 203, 204, 208
Lassiter v. Cole, 75
Lathan v. Berry, 155
Lathrop v. Hyde, 186
Laussat v. Lippincott and another, 552
Laverty v. Burr, 451
Law v. Nunn, 613
v. Scott, 182
v. Franks, 228
's Ex'ors v. Sutherland et als., 287
Lawler v. Keaquick, 665
Lawrence v. McArter, 251
v. Murray, 511
v. Stonington Bank, 338, 695
v. Taylor, 447, 487, 492, 573, 574
Lawson v. Lovejoy, 247, 257
Lay v. Lawson, 184
Layton v. Harris, 124, 137, 180
Lazarus, use, &c. v. Shearer, 606, 607, 610
Lea and wife v. Robertson, 119, 179
's Appeal, 102
Leach v. Blow, 605
Leadman v. Harris, 98
Leaird v. Davis, 223
Leake v. Gilchrist, 706
Leavenworth v. Brockway, 519
Leavitt v. Peck, 440
v. Simes, 361
Le Bleu v. Rutterford & others, 278
Le Branthwait v. Halsey, 517
Ledyard v. Butler, 78, 83
Lee v. Braxton, 266
v. Huson, 205
Adm. v. Fontaine & Freeman, 573
Bank v. Spencer & another, 364, 365
& Rector v. Onstott, Adm'r, 446
Leech v. Hill, 326
Leeds v. Freeport, 714
Legget v. Simmons, 620
Leggett v. Blount, 225
Legrand v. Page, 226
Le Guen v. Gouverneur & Kemble, 674, 695
Lehman v. Jones, 360
Leicester v. Walter, 200
Leidig v. Rawson, 217, 220
Leidy v. Tammany, 323
Leigh v. Webb, 217
Leland v. Douglass, 546, 630, 668
Lemon, Guardian, v. Hansbarger, 265
Lent v. Butler, 180
Leonard v. Mason, 316
Le Prince v. Guillemot, 99, 100
Le Roy v. Beard, 547
Bayard & Co. v. Johnson, 440, 441
Lester v. Frazer, 247, 250, 251
Letcher's Heirs v. Letcher, 266
Lever v. Lever, 513, 672, 694
Leverick v. Meigs, 631, 635, 636, 665
Lewis v. Bradford, 509
v. Burr, 361
v. Clement, 186
v. Dwight, 429
v. Few, 137, 180, 184
v. Gompertz, 376, 377
v. Hawley, 124
v. Littlefield, 263
v. Love's Heirs, 71, 77, 78
v. Niles, 201
v. Planters' Bank, 365
v. Walter, 187
v. Wilson, 326
Liddel v. M'Vicar, 516
Lightner v. Will, 364
Lillard v. M'Gee, 73, 84
Lillie v. Hoyt, 672
v. Price, 178
Lime Rock Bank v. Plimpton, 651
Lincoln v. Christman, 198, 206
v. Hapgood et al., 710
Lindenberger v. Beall, 394
Lindsay v. Larned, 218
Lindsey v. Smith, 161
v. Stevens, 288, 291
Linville v. Earlywine, 122, 164
Liotard v. Graves, 498, 505
Lipford v. M'Collum, 225, 226
Lippencott v. Barker, 95, 100
Little v. Phœnix Bank, 319, 362
Livingston v. Bell, 100
v. Hastie & Patrick, 451
& Gilchrist v. Maryland Ins. Co., 706
Lobdell v. Baker, 552
Locke v. Alexander, 579, 584
v. Stearnes & another, 441, 619
Lockhart v. Wyatt, 97
Lockwood v. Crawford, 362
v. Nelson, 81
Logan v. Mason, 288, 291, 300
v. Steele, 152, 156
Long v. Brougher, 198, 201
v. Colburn, 604
v. Fleming, 164, 165
v. Rodgers, 228
Longbottom v. Rogers, 607, 612
Longstreth & Cook v. Gray, 497
Longwell & Enge v. Ridinger, 500
Longworth v. Connell, 545, 556
Loomis v. Swick, 163, 166
Loraine v. Cartwright, 667, 668, 671

Lord v. Appleton, 401
v. Baldwin, 470
v. Mayor, &c. of New York, 501, 521
Lovejoy v. Bowers, 474
Louisiana State Bank v. Rowel, 402
Lowell v. Boston & Lowell R. R. Corporation, 621
Lowry v. Pinson, 72
v. Scott, 405
& Bruce v. Beckner, 615
Lucas v. Bank of Darien, 447
v. Sanders & M'Alilly, 446
Luckenback v. Brickenstein, 78
Ludlow v. Simond, 446
Ludwick v. Huntzinger, 437
Luff v. Pope, 367
Lumby v. Allday, 123, 124
Lunt v. Adams, 363
Lupton v. Lupton, 508
Luqueer v. Prosser, 313, 327
Lush v. Druse, 501
Lutz v. Linthicum, 586
Lyles v. Hatton et ux., 515
Lyman v. Fisk, 706, 712
v. Wetmore, 121
et al. v. Sherwood et al., 606
Lynch v. De Viar, 151
v. Sanders, 75
Lynde v. Budd, 252, 258
Lyndon v. Gorham, 470
Lyon v. Fox, 220, 226
v. Jerome, 568
v. Williamson, 367, 368
Lysaght v. Walker, 286

McAllister v. Marshall, 97
v. Montgomery, 432
v. Reab, 506
Alexander v. Harris, 200, 203
Almont v. McClelland, 206, 208
Bean v. Morrison, 589
Beath v. Haldimand, 382, 586
Brayer v. Hill, 116, 152, 202
Bride v. Hagan, 447, 448
Broom et al. v. The Governor, 673
Cabe v. Platter, 198, 208
Call v. Turner, 518
et al. v. Hinckley & Woodward, 101
Cart v. Lewis, 446
Carty v. Emlen, 471
Cauley, &c. v. Rodes, Macklin, &c., 82
Causland's Administrators v. Bell, 521
Caw v. Blewit, 515
Chord v. Ford, &c., 359
Claughry v. Wetmore, 121
Clain v. Waters, 404
Clane v. Fitch, &c., 364, 394
Clay, Administrator, v. Norris, 266
Clung v. Beirne, 502
Clure v. Bennett, 586
v. Richardson, 551
Clurg v. Lecky, 98, 101
v. Ross, 113, 114, 118, 132, 158, 159
Comb v. Wright, 609
Combs v. Town Council of Akron, 622
Conihe v. Sawyer, 71
Connel v. Thomas, 614
Connell v. McCoy, 165
Connico, et al., Executors v. Curzen, 630
Coombs v. Tuttle, 138, 166
Corkle v. Binns, 131, 133

McCormick v. Crall, 516
v. Sutton, 223, 225, 228
v. Trotter, 326
Coy v. Huffman, 260
Cracken's Heirs v. McCracken's Ex'rs, 516
Crillis v. How, 248
Cuen v. Ludlum, 112, 113, 114, 126
Cullough v. Hutchinson, 98
et al. v. Sommerville, 95, 443, 447
Daniel v. Emanuel, 619, 620
v. Nicholson, 264
Dermot v. Lawrence, 488, 490
Doal v. Yeomans, 327
Donald v. Murchison, 120
v. Pickett, 286
v. Rooke, 225
Donough v. Delassus and another, 673
v. Templeman, 585
Dougall v. Claridge, 181
Dowell v. Blackstone Canal Co., 287
v. Jefferson, 511
Elwain v. Willis, 84
Elwee v. Sutton, 68, 73
Erwin v. Benning, 73
Farland v. Wheeler, 696
&c. v. McKnight, 610, 620
et al. v. Lewis et al., 287
Gan v. Marshall, 247, 252, 259
Gary v. The City of Layfayette, 620
Gee v. Sodusky, 198, 199, 200, 201
v. Wilson, 112, 134
Giffin v. Stout, 264
Gill v. Woodward, 259
Gillicuddy v. Forsythe, 264
Ginn v. Shaeffer, 253
Glemery v. Keller, 179, 206
Gregor v. Gregory, 158, 178
v. Thwaites, 131, 133, 186, 202
Guire, Adm'r v. Miller, 75
Henry v. Ridgely, 614
Ilvaine v. Wilkins, 496, 504
Intire v. McLanrin, 445
v. Young, 206
Intosh v. Myherleta, 137
Kay v. Bloodgood, 446
v. Holland, 338
Kee v. Gilchrist, 76
v. Ingalls, 203
& McElhenny v. Stroup, 441, 450
's Heirs v. Hann, &c. and McKee, &c., 267
Kennan v. Steirett, 516
Kenney v. Whipple, 368
Kennon v. Grew, 117, 156, 159
Kenzie v. Nevius, 299, 612, 694, 695, 696
v. Scott, 634
Kie v. Cairns, 97, 98, 101
Kiel et al. v. The Real Estate Bank, 368
Kinley v. Robb, 120, 153
&c. v. Combs, &c., 80, 84
Kinney v. Rhoads, 96
Kinster v. Bank of Utica, 666
Knight v. Morgan, 75
v. Hogg, 253
v. Lewis, 381
v. Wheeler, 336
Lanahan et al. v. Brandon, 405
Lane v. Fitch, 374, 406
Laughlin v. Bank of Potomac et al., 73

McLaughlin v. Russell, 154
Leod v. Wakley, 187
Mahan v. Armstrong, 224
Meekin v. Edmonds & Wife and others, 80
Millan v. Birch, 121, 123, 125, 186
Minn v. Richmonds, 247
Morris v. Simpson, 675
Murtrie v. Jones, 404
Murtry & Peeblea v. Frank, 587
Nair v. Ragland et al., 513
Nairy v. Bell, 367
v. Eastland, 84
Naughten and others v. Partridge and others, 446, 448
Naughton, surviving partner of, v. Moore, 567
Neely v. Driscoll, 217
Neill v. M'Donald, 338
's Ex'rs v. Reynolds, 441
Nutt v. Young, 198, 204
Pherson v. Daniells, 202
Rae v. O'Neal, 223, 224
Whorter v. Wright, Nichols & Co., 95, 102
Madden v. Day, 71, 73
Maddox v. Jackson, 224
v. M'Ginnis, 221
Madison County Bank, The v. Gould, 487
Magee v. Stark, 119, 122
Magill v. Merrie and Bullin, 441, 580
Maginn v. Hinsdale, 600
Magnay v. Burt, 219
Magniac & Co. v. Thompson, 80, 81
Magoffin, adm'r v. Patton and others, 508
Magruder v. The Union Bank of Georgetown, 360
v. Bank of Washington, 363
Mahan v. Berry, 119
Mahurin v. Bickford, 501
Maine Bank v. Smith, 364
Mainer v. Spurlock and another, 379, 382
Maitland v. Goldney, 165, 202
Malachy v. Soper, 128
Malone v. Stewart, 116
Mallory v. Aspinwall, 523
Manchester et al. v. McKee's Ex'r, 84
Manella, Pujals & Co. v. Barry, 667
Manlove v. McHatton et al., 613
Mann v. Forrester and another, 696
v. Marsh, 287
Manning v. Clement, 178
v. *Westerne*, 297
Manrow v. Durham, 315
Maples v. Wightman, 251
March v. Davidson, 179
Marcum et al. v. Hereford, 326
Marden v. Babcock and another, 80
Marfield v. Goodhere, 689
Marr v. Johnston, 404
's Ex'ix v. Southwick, Cannon and Warren, 506
Marryatt v. White, 286
Marshall v. Booker, 78
v. Dudley, 501
v. Maddock, 225, 226
v. *Poole*, 502
Martin v. Dortch, 582
v. Draher, 286, 290
v. Flowers, 582, 584, 585
v. Kilbourne, 502
Martin v. Martin, 508
v. Mayo et al., Ex'rs, 254
v. Mayor, &c. of Brooklyn, 622
v. Melton, 120, 158
v. Moulton, 644, 697
v. Stillwell, 113, 115
v. *Strong*, 184
v. *Temperley*, 619
v. Trumball, 490
v. Walton & Co., 548
Adm'r of, v. Martin, 74
Martini v. Coles and others, 643, 644
Marvin v. McRae, 570
v. Trumbull, 505
Mason v. Dennison, 253, 265, 267
v. Mason, 156
v. Sudam, 501
v. Wait et al., 511, 568
and Wife v. Baker et al., 76, 77, 78
& another v. Wright & another, 249
Massey v. Massey and others, 514
Masten v. Dego, 225, 226
v. Long, 225
Mateer v. Hissim, 83
Matlack v. Hendrickson, 322
Matson v. Buck, 201
Matthews v. Davis and Wife, 178
v. Hall, 321
v. Huntley, 208
v. *West London Water Works Co.*, 620
and Hopkins v. Menedger, 695, 696
Matthewson and Wife v. Johnson and others, 259
Mauldin v. The Branch Bank at Mobile, 450
Mauri v. Heffernan, 609
Maus v. Worthing, 587
Maxim v. Morse, 255
May v. Brown, 203
v. Lansdown, 319
v. Mitchell, 546, 630
Maybee v. Avery, 179
Mayberry, Pollard & Co. v. Bainton & Co., 453
Mayhew et al. v. Prince, 607, 609
Mayo v. Chenoweth, 321
v. Judah, 497
Mayor & Aldermen of Memphis v. Lasser, 622
&c. of New York v. Bailey, 621
v. Furze, 622
Mayrant v. Richardson, 126, 127, 134, 136
Maxwell and Wife v. Allison, 158, 159
Mead v. Daubigny, 205
v. Engs, 391
v. Phillips and others, 97
Meares v. Comm'rs of Wilmington, 622
Meason v. Phillips, 503
's Estate, 502
Mechanics' Bank v. Bank of Columbia, 606, 607
v. Earp, 609, 667
v. Gorman, 100
at Baltimore v. Merchants' Bank at Boston, 375, 666
Medbury v. Watrous, 260
Meech v. Smith, 498, 505, 609
Meggot v. Mills, 290
Mellor v. Baddely, 224, 227
Mercein v. Mack, 442

Mercer v. Watson, 265
Merchants' Bank v. Birch, 405
of Macon v. Central Bank of Georgia, 547, 552, 573, 603, 606, 611
Fire Ins. Co. v. Grant, 254,
Mer. Man. Co. v. Smith, 102
& Mech. Bank v. Griffith, 84
Meriweather's Adm'r v. Herran, &c., 258
Merriam v. Mitchell, 221, 226
et a. v. Wilkins et a. 254
Merrick's Estate, 514, 568, 612, 651
Mertens v. Nottebohms, 696, 723
Merrill v. Bank of Norfolk, 651
Merrills v. Swift, 96
Merrimack Co. Bank v. Brown, 287, 301, 498
Mershon v. Withers, 317
Meserve v. Dyer, 73
Messenger v. Southey, 376, 377, 378
Messier v. Amery, 650
Metcalfe v. Pulvertoft, 77
v. Williams, 136, 166
Meyer et al. v. Barker, 586
Michell v. Williams, 226
Mickle v. Wood, 501
Miers v. Brown, 381
and Coulson v. The Zanesville and Maysville Turnpike Co., 85
Mifflin v. Smith et al., 445
Milam v. Burnsides, 185
Miles v. Boydon, 264
v. Oldfield, 113, 164
v. Wister, 508
&c. v. Bacon, 570
Millard v. Hewlett, 254
Miller v. Bank of Orleans, 500, 509, 518
v. Brown, 217, 223, 225
v. Ford, 605
v. Gaston, 327
v. Howry, 95
v. Ken, 202, 206
v. Livingston, 694
v. Lord, 506
v. Manice, 441
v. Maxwell, 161
v. Miller, 71, 156, 299, 306
v. Parish, 113, 116
v. Pearce, 69
v. Stock, 609
v. Thompson, 68, 71
v. Trevilian, &c., 286, 299
and others v. Wilson and others, 69
et al. v. Davidson, 84
& Co. v. Sims & Ashford, 256
's Estate, Case of, 713
Millicken et als. v. Coombs et als., 587
Milligan v. Wedge, 620
v. Thorn, 163, 164
Mills v. Barber, 442
v. Dennis, 266, 267
v. Fowkes, 289, 291, 292
v. Graham, 262
v. Hunt, 609
v. Kuykendall, 317
v. M'Coy, 228
v. Taylor, 124
and Wife v. Spencer and Wife 202
& Wife v. Wimp, 112, 116
Milne v. Rempublicam, 500, 510
Milton and another v. Mosher, 447
Mllton v. The State, 134
Minard v. Read, 603
Miner v. Downes et al., 445
Minessinger v. Kerr, 200
Minon v. Hoyt, 339
Minor v. Gaw, 450
v. Mead, 75
et al. v. The Mechanics' Bank of Alexandria, 552
Mitchell v. Beal, 97
v. Borden, 179
v. Culver, 321
v. Dall, 286, 289
v. Degrand, 390
v. Gazzam & others, 102
v. Hazen, 504
v. Hewit, 320
v. Jenkins, 219, 226
v. Stiles, 97
's & Davis's Adm'rs v. Sproul, 546, 587
Mix v. Woodward, 160, 161, 178
Moberly v. Preston and wife, 202
Mockey v. Gray, 265
Modisett v. Lindley, 446, 574
Moffett, Lessee of, v. Whitaker, 83
Mohawk Bank v. Broderick, 362
v. Corey, 337
Mohn v. Hiester, 502
Monroe v. Conner, 440
Montgomery v. Boone et al., 447
v. Dorion, 582
v. Elliott, use, &c., 368
Co. Bank v. The Albany City Bank, 361
R. R. Co. use, &c. v. Hurst, 573
Montjoy and wife v. Lashbrook et al., 514
Montross v. Clark, 337
Moody v. Baker, 127
v. Leavitt, 320
v. Payne, 470
v. Webster, 694, 696
Moore v. Bond and wife, 165
v. Coffield, 361
v. Collins, 95, 96
v. Cooper, 588
v. Meagher, 128
v. Patton, Donegan & Co., 506
v. Somerset, 389
v. Spence, 68
v. Wilkins, 706, 707, 708, 713
&c. v. Prendergast's Heirs, 521
& Co. v. Sample, 472
's Ex'or v. Beauchamp, &c., 513, 515
Moorehead v. West Branch Bank, 286
Morehead v. Jones, 166, 204
Moredon v. Wyer, 449
Morford v. Ambrose, 504
Morgan v. His Creditors, 478
v. Hughes, 217, 220, 227, 228
v. Livingston, 121, 154, 165, 206
v. McLelland, 72
v. Stell, 567
v. Watmough, 471
Morrill v. Aden, 256
Morris v. Barkley, 116
v. Cleasby, 635
v. Corson, 226
v. Duane, 201
v. Fisher, 508

Morris v. Jones & Spencer, 446, 448
v. Lee, 315
v. Scott, 217
v. Summerl, 675
v. Wallace, 632
adm'r v. Morris, 478
Morrison v. Blodgett et al., 470, 471, 474
v. Harmer, 178
's Ex'or v. H. Taylor, 545
Morse v. Bellows, 447
v. Godfrey et al., 79
Morton v. Naylor, 317
Moseley v. Moss, 198
Moser v. Libenguth, 448
Moses v. Murgatroyd, 96
v. Stevens, 260
Moss v. Adams, 291, 296, 302
v. The Rossie Lead Mining Co., 573
Mott v. Comstock, 124, 160
v. Hicks, 610
Motteux v. St. Aubin and others, 448
Moultrie v. Jennings, 78
Mountney v. Walton, 178
Mowatt v. McClelan, 613
Mower v. Kip, 500, 501
v. Watson, 186
Mowry v. Bishop, 497, 522, 523
v. Miller, 219, 222
Muir v. Leitch, 469, 470
Mulherrin v. Hannam, 368
Mullen v. Morris, 519
Muller v. Bohlens, 636
Mulliday v. Machir's adm'r, 501
Mullett v. Hulton, 201
Munn v. Commission Co., 551
Munns v. Dupont et al., 225
Munroe v. Cooper et al., 451
v. Douglas, 713, 714
Munson v. Cheeseborough, 338
Murdock and others v. Mills and others, 544
Murphy's Appeal, 516
Murray v. Long, 210, 225, 226
v. M'Clane, 220, 225
v. Murray, 474, 475
v. S. C. R. R. Co., 620
v. Toland, 695
v. Ware's Adm'r, 505
Murrill et al. v. Neill et al., 476
Musgrove v. Newell, 219, 220, 225, 226
Musson et al. v. Lake, 363
Myers v. Entriken, 633
v. Myers, 573
et al. v. Sanders' Heirs, 83, 259
Myrick v. Hasey, 327

Napier v. Catron et al., 447
Nash v. Harrington, 389
v. Orr, 225
Naylor v. Stanley, 288
Nazro v. Fuller, 367
Neal v. Williams, 83
v. Lewis, 166
Neale v. Hagthrop, 75, 80
Neilson v. Emerson, 166
Nellis v. Clark, 76
Nelson v. Cartmel's Adm'r, 499
v. Cowing, 338, 547
v. Evans, 201
Neponset Bank v. Leland, 694
Nesbit v. Bradford, 326
Nestle v. Van Slyck, 163, 165
Nettles v. Harrison, 167
Nevins v. Townsend, 338
Newbold v. Wright & Sheldon, 632, 643, 644, 696
Newcomb v. Clark, 614
Newell v. Downs, 126
v. Ex'r of Keith, 504
v. Griswold, 506
v. Hulburt et al., 573
New England Bank v. Lewis et al., 96, 395
Ins. Co. v. De Wolf, 588
Newhall v. Dunlap, 695
New Jersey Steam Co. v. The Merchants' Bank, 616
Newland v. Oakley, 556
Newman v. Bagley & Tr., 469
v. Meek, 287
Newmarch v. Clay and others, 286, 290
New Orleans Canal & B. Co. v. Briggs, 404
& Carrolton R. R. Co. v. Robert, 403
R. R. Co. v. Kerr and another, 403, 405
Newport v. Cook, 508
Newsam v. Carr, 223
Newson's Adm'r v. Douglass, 503
Newten v. Nunnally, 301
v. Wilson, 501
New York F. Ins. Co. v. Bennett, 450, 451
Niagara Bank v. Rosevelt, 287
Nichol v. Bate, 337, 404
Nichols v. Hughes, 440
v. Hayes, 118, 165, 166
v. State Bank, 549
Nicholson v. Coghill, 220, 223, 224
v. Sedgwick, 324
Nickerson v. Easton, 352
Nickson v. Brohan, 552
Nicoll v. Mumford, 95, 96, 469
Nightingale v. Withington, 252, 261
Nigram v. Lawson, 208
Niles v. The Board of Com'rs of the Sinking Fund, 523
Niolon v. Douglass and others, 95, 100
Nisbet v. Lawson, 513, 673
Niven v. Munn, 122
Nixon v. English, 339
v. Hyserott, 547
Noble v. M'Clintock, 450
et al. v. Bank of Kentucky, 389
Noe v. Hodges, 504
Noland v. Ringgold, 322
Norcross, The Matter of, 474
Norris v. Barker, 201
v. Nance, 252, 258
v. Norris's Adm'r, 76
v. Wait, 258
Norrish v. Richards, 224, 227, 228
Northampton's case, 202
North Bank v. Abbott, 364, 365
River Bank v. Aymar, 544, 549, 556
Norton v. Waite, 337
Norwood v. Manning, 501, 520
Nostrand v. Attwood, 99, 100
Nott's Executor v. Beard, 380
Nunnely v. Doherty, 446, 448
Nye v. Otis, 164

Oakey, ex parte, 510
& Co. v. Rabb's Ex'ors, 475
Oakley v. Boorman, 325

Oakley v. Farrington, 126
v. Greenshaw, 633
Obaugh v. Finn, 131
Obermyer v. Nichols, 498, 501, 503, 506, 519
O'Brien v. Bryant, 178
v. Clement, 158, 163, 177, 179
v. Coulter, 84
O'Daniel v. Crawford, 68
O'Donaghue v. McGovern, 184, 185, 186
Odiorne v. Sargent, 320
et al. v. Maxey et al., 549, 553, 643
v. Odiorne, 319
O'Driscoll v. M'Burney, 216, 228
Offut v. Earlywine, 122, 179
v. Stout's Ad'rs, 361
Ogden v. Riley, 118
v. Slade, 320
v. Turner, 111
Adm'r of Cornell v. King, 518
Ferguson & Co. v. Gillingham, Mitchell & Co., 568
Oldham v. Sale et al., 252
Oliver v. Phelps, 287
et al. v. Houdlet, 251, 253
's Ex'or v. Hallam's Adm'r, 516
Olmstead v. Miller, 128, 164
Olney v. Wicks, 586
O'Neall v. Sims, 522
Onondaga Co. Bank v. Bates, 568
v. Depuy, 441, 446
Onslow v. Horne, 110, 111, 123, 155
Ontario Bank v. Petrie, 382
Opie v. Serrill, 632
Oram v. Franklin, 126
Ordinary, The, v. McCollum, 294
Oridge v. Sherborne, 316
Oriental Bank v. Blake, 405
v. Haskins, 83
v. Tremont Ins. Co., 503, 517
Orlabar v. Harwar, 74
Ormsby v. Castleman and Johnson, 507
Orpwood v. Barker, 165
Orvis v. Kimball, 256
Osborn v. Hawley, 327
v. U. S. Bank, 517
Osborne v. Kerr, 607
v. Mifflin, 518
v. Moncure, 395
v. Moss, 74
Osgood v. Breed's Heirs, 510
Ostrom v. Jacob and another, 445
Ostrum v. Calkins, 124
Otis v. Barton, 367
v. Hussey, 361
Overseers of Pittstown v. Overseers of Plattaburgh, 547
the Poor v. Bank of Va., 651
Overstreet v. Potts and Wife, 575
Overton v. Tozer, 446, 449
Owen v. Dixon, 76
v. Sharp et ux., 76
Owings v. Grubb's Administrator, 589
v. Hull, 514

Pace v. Burton, 514
Padgett v. Lawrence, 79
Paddock v. Salisbury, 198, 201
Padmore v. Lawrence, 181, 183
Page v. Newman, 498, 502, 510
v. Webster, 365
v. Wiple, 220, 227
Page and Stivers v. Prentice and Weisinger, 405
Paige v. Stone and another, 548, 611
Palen v. Shurtleff, 394
Palmer v. Hunter, 122, 159
v. *Reiffenstein*, 567
v. Stephens, 445, 610
& Southmayd v. Ashley & Ringo, 673
Pangburn v. Bull, 218, 225, 226, 229
Panton v. Williams, 225
Paris v. Waddell, 225
Parke v. Blackiston, 122, 179, 180, 198, 199, 204, 205, 208
v. Lowrie, 666
Parker v. Baker and another, 253
v. Brancker, 668
v. Kennedy, 326
v. McQueen, 160, 201
v. Pistor, 473
v. Riddle, 321, 322
v. Spangler and Wife, 120, 159
v. The Boston & Maine R. R. Co., 520
Appellant v. Mercer, 301
Parkerson v. Dinkins, 613
v. Wightman, 627
Parkhill v. Imlay, 667
Parkman v. Welch, 71
Parks v. Duke, 326
v. Langley, 227
v. Ross, 586
v. S. & L. Turnpike Co., 574, 589
Parmere v. Respass, 580
Parmiter v. Coupland, 133, 162
Parr and others v. Howlin, 300
Parrot v. Fisheich, 226
Parsons v. Bellowe, 164
v. Hill, 253
v. McKnight, 67, 68
v. Webb, 545
Partridge v. Brittain, 573
v. Davis, 315
Passmore v. Mott, 606
's Heirs v. Moore, 266
Patchin v. Cromach, 252, 267
Paterson v. Tash, 643
Patrick v. Beasley, 402
v. Clay, 499
Patterson v. Nichol, 515
v. Poindexter, 313, 326
v. Stewart, 504
et al. v. Edwards et al., 116, 158, 165, 323
&c. v. Henry, 589
Pattison v. Hull, 290, 295, 296, 302
v. Jones, 181, 182
v. Stewart, 80
Patton v. Brittain, 573
Paul et ux. v. Christie, 518
Pavret et al. v. Perot et al., 694
Pawlet v. Sandgate, 500
Pawling's Adm'r v. Sartain, 519, 520
Ex'rs v. Adm'rs of Pawling, 496, 522
Payne v. Matthews, 475
v. Smith, 573
Payson v. Caswell, 224
v. Whitcomb, 367
Peacock v. Tompkins, 98, 102
Peake v. Oldham, 160

Pearce v. Ormsby, 205
Pearpoint and Lord v. Graham, 100, 442
Pearson v. Crosby, 100
v. Le Maitre, 205, 207
and Anderson, &c. v. Rockhill and Co., 95, 96, 98
& Co. v. Duckam, 389
Pease v. Barker, 510
v. Dwight, 445
Peaslee v. Barney, 74
Peay v. Pickett, 319
Peck & another v. Harriott & another, 546, 547
Pechey v. Harrison, 264
Pecks et al. v. Mayo, Follett et al., 519
Peele v. Northcote, 635
Pegram v. Styron, 155
Peigne v. Sutcliffe, 262
Peirce v. Tobey and another, 258
and another v. Pendar, 401
et al. Ex'rs v. Rowe, 496, 522
Peisch v. Dickson, 696
Pelton v. Ward, 119
Penfold v. Westcote, 117, 160
Penn., Del. & Md. Steam Nav. Co. v. Dandridge, 574
v. Hungerford, 619
Penrose v. Curren, 263
People, The, v. Canal Commissioners, 500
v. Croswell, 133, 162
v. Gaine, 520
v. Gasherie, 511
v. Kendall, 262, 264
v. Moore, 250
v. New York, 498, 520
Perdue v. Burnett, 111, 115
v. Connerly, 219
Perit v. Wallis, 499
Perkins v. Catlin, 322, 326
Perris v. Roberts, 301
Perry v. Green, 362
v. Hide, 586
v. Mays, 339
v. Nixon, 84
Peters v. Anderson, 289, 290
v. Farnsworth, 547
Petrie v. Clark and others, 337
v. Rose, 199, 200
Pettingill v. McGregor, 610
Peyton et al. v. Smith, 514
Phelps v. Sinclair, 696
v. Worcester, 249
Phenix v. Prindle, 506
Philips v. McCurdy, 389
et als. v. Williams, &c., 501, 509
Phillips v. Alderson, 401
v. Barber, 155
v. Cook, 470, 472
v. Holfer, 124
v. Huth, 645
v. Jansen, 125, 137
v. Wiley, 116
et ux. v. Green, 248, 252, 259, 267
&c. v. Green, 258
Phillpott v. Jones, 289, 290
Phipps and others v. Chase, 365, 401, 404
Piatt v. Eads, 361
Heirs of, v. The Heirs of McCullough, 587
Pickering v. Busk, 552, 553
Pickett v. Pearsons, 670
Picquet v. Curtis, 367
v. Swan et al., 82
Pierce v. Jackson, 470, 474
v. McKeehan, 79
v. Street, 228
v. Thompson, 229
v. Tobey and another, 254
's Adm'r, &c. v. Trigg's Heirs, 267, 488, 491
and Baldwin v. Pass & Co., 450
another v. Pendar, 402
Piersons v. Hooker, 447
Pigott v. Thompson, 637
Pike v. Bacon, 102, 446
Pillow v. Hardeman, 405
Pinckney, Adm'r of, v. Singleton, Ex'r, 501, 520
Pindall's Ex'x, &c. v. Bank of Marietta, 286, 299, 522
Pingree v. Comstock, 96
Pinkham, Ex'r v. Macy, 316, 380
Pinnel's Case, 286
Pippet v. Hearn, 217
Pitcher v. Livingston, 504
Pitman v. Breckenridge, 319
v. Kintner, 582
Pitt v. Donovan, 128
Pitts v. Mower, 616, 651
v. Shortridge's Adm'r, 339
v. Waugh et al., 492
Planck v. Schermerhorn, 97
Planters' Bank v. Bradford, 402
v. Cameron et al., 549
v. Sharp et al., 548
v. Stockman, 295
v. White, 405
and Merchants' Bank of Mobile v. Clarke, 98
Platte v. Drake, 379, 382
Pledge and Wife v. Hathcock, 116
Plets v. Johnson, 321
Plimley v. Westley, 325
Plomer and others v. Long, 294
Plummer v. Dennet, 229
v. Gheen, 223, 225, 226
v. Noble, 220
Plunkett v. Cobbett, 207
Poag, Ex'r, v. Poag, 694
Polhemus v. Annin, 505
Pollard v. Yoder, 499
Pon's Ex'rs v. Kelly, 389
Pond v. Hartwell, 164
et al. v. Lockwood et al., 337
Pool v. Adkisson et al., 613
v. McCrary, 317
v. Pratt, 248, 253
Pope v. Armstrong, 695
&c. v. Le Master, &c., 266
Poppenheim v. Wilkes, 165, 200, 201
Porter v. Blood, 665
v. Nash, 510
v. Nckervis, 613
v. Patter, 669, 671
's Heirs v. Robinson, 252
et ux. v. Hughey, 118
Portland Bank v. Brown, 287, 292, 301
Posey v. Bullitt, 446
Posten v. Posten, 69
Postmaster-General v. Furber, 299
v. Norvell, 300

Pott v. Clegg, 314
Potter v. Sturges, 673
v. Tyler and another, 338
v. Yale College, 613
Potts v. Imlay, 216, 218
v. Lazarus, 586
v. Rider, 585
Pourie and Dawson v. Fraser, 553, 574
Powell v. Bucle, 546
v. Finch, 587
v. Powell, 81
v. Trustees of Newburgh, 692
Adm'r v. Guy, 499
Powells v. Thomas, 326
Power v. Miller, 120
v. Price, 121, 122
Powers v. Dubois, 136
Prather v. McEvoy, 326
Pratt v. Price, 120
and Moore v. Thomas, 322, 326
Prentiss v. Danielson, 322
Presbyterian Church v. Manson, &c., 607
Corporation v. Wallace, 78
Prescott v. Hubbell, 81
v. Parker, 517
Preaton v. Crowfut, 83
Prettyman v. Shockley, 127
Prewit v. Graves, &c., 252, 267
Prewitt v. Chapman, 321
Price v. Ralston, 650
Priest and others v. Hamilton, 265
Priestley v. Fowler, 620
and others v. Bisland and others, 403
Pritchett v. Ex'rs of Newbold et al., 516
Probate, Judge of v. Heydock et als. 514
Proper v. Luce, 115
Proscus v. M'Intyre, 76
Prough v. Entriken, 229
Prowse v. Worthinge, 296
Prutzman v. Pritsell, 266
Pryor v. Coulter, 585
Public Administrator, The v. Hughes, 706
Pugh, Heirs of, et als. v. Currie, 490
Pullen v. Chase, 499
Pultney v. Keymer et al., 643
Pulvertoft v. Pulvertoft, 77
Purcell v. Macnamosa, 223
Purdy v. Powers, 450
Purple v. Horton, 165, 200, 204
Penton v. Honnor, 224
Putnam v. Johnson et al., 707, 709, 710, 712
et al. v. Sullivan et al., 360, 555
Pyle, &c. v. Cravens, 251

Quackenbush v. Leonard, 523
Quarman v. Burnett, 620
Quinby v. Duncan, 707
Quiner v. Marblehead Social Ins. Co., 441

Rackley v. Pearce, 288
Rahn v. M'Elrath, 98
Ralls v. Graham, &c., 74, 75
Ralph v. Brown, 519
Ramsdell et al. v. Sigerson et al., 100
Ramsey v. Gardiner, 692
v. Thornberry, 121
's Appeal, 522
Ramsour v. Thomas, 292, 296
Rand v. Reynolds, 403
Randall v. Henry, 217
Randall v. Holsenbake, 198, 200, 205, 206
v. Parramore and Smith, 286
v. Phillips et al., 75
v. Randall, 491
v. Sweet, 249
v. Van Vechten, 585
Randleston v. Murray, 620, 621
Ranger v. Cary and others, 338, 339
Ransom v. Mack, 361, 380, 381, 382, 402, 405
Rantin v. Robertson, 584
Rapalje et al. v. Northworthy's Ex'rs, 513
Rapp v. Palmer, 553
Rappelie et al. v. Emory, 509, 511
Rapson v. Cubitt, 620
Rathbon v. Budlong, 586, 587, 604
v. Emigh, 125, 164
v. Ingalls, 673
Ravenga v. M'Intosh, 223
Rawdon v. Redfield, 404
Ray v. Law, 218, 227
Raymond v. Isham, 506
and another v. Crown and Eagle Mills, 611
and others v. Bearnard, 518
Read v. Ambridge, 153, 160
v. Bertrand, 706, 710
v. Robinson, 96
and others v. Wheeler, 313
Reade v. Livingston, 68, 72, 73, 81
Reed v. Batchelder, 251, 252
v. Boardman, 286
v. Emery, 97
v. Howard, 471
v. Murphy, 321, 322, 326
v. Reed, 509, 511
v. Smith, 83
v. Taylor, 217
et al. v. Shepardson, 471, 472
's Appeal, 78
Rector v. Mark, 518
Redfield v. Davis, 665
Reese and Heylin v. Bradford et al., 84, 477
Reeside v. Knox, 318
Regina v. Lovett, 137
Regnier v. Cabot, 116, 198, 199
Reichart v. Castator, 75
Reid v. Delorne, 184
v. Morrison, 361
v. Payne, 403
v. Renaselaer Glass Factory, 496, 503, 505, 506, 510
Remer v. Downer, 380, 382, 401, 403
Remick v. O'Kyle et al., 368
Remington v. Congdon et al., 185
v. Harrington, 389, 392
Renss. Glass Factory v. Reid, 506
Respublica v. Davis, 137
v. Dennie, 188
v. Mitchell, 500
Rex v. Almon, 137
v. Gutch, &c., 137
v. Horne, 161
v. Lord Abingdon, 187
v. Randall, 321
v. Richards, 321
v. Walter, 137
Reynolds v. Cleveland, 445
v. Dothard et al., 572
v. Kennedy, 234
v. Richards, 319
v. Ward, 497

Reynolds & McFarlane v. McFarlane, 287
et al. v. The Heirs & Adm'r of Mardis, 507
Rhett v. Poe, 401
Rhode v. Lowthian, 587
Rhodes v. Cleveland, 622
v. James, 209
Rice v. Barnard et al., 475
v. Gove, 604
v. Porter's Adm'rs, 317
v. Simmons, 131, 134
v. Werson, 362
Rich v. Basterfield, 621
Richards et ux. v. Folsom, 573
v. Hazzard, 98
Richardson v. Boright, 258
v. Lincoln, 326
v. Richardson and Spann, 500
v. Washington Bank, 289
Richmond Turnpike Co. v. Vanderbilt, 619
v. Vassalborough, 711
Ricker v. Ham et al., 77, 79
Ricket v. Stanley, 159, 178
Ricketson et al. v. Wright et al., 507
Ridgeley v. Carey, 475
Ridgeway v. Underwood, 69, 71, 72, 78
Ridley v. Perry, 198, 201
v. Taylor, 450, 453
Rigden v. Wolcott, 197, 199
Riggs v. Murray, 97, 98
Rigs et als. v. Cage, 567
Riney v. Vanlandirgham, 224
Ring v. Wheeler, 186
Ripley v. Gelston, 613
Rix v. Smith, 515
Roach v. Johnston, 366
v. Quick, 252
Robbins v. Cooper, 475
v. Eaton, 258, 260
v. Haywood et al., 513
v. Treadway, &c., 126
Robbs and others v. Stevens and others, 475
Robert W. and Wife v. E. S., 115
and others v. Garnie, 286
Roberts v. Anderson, 83
v. Austin, 609
v. Brown, 188
v. Button et al., 587, 604, 610
v. Camden, 152, 157, 160
v. Mason, 360, 365, 368
v. Short, 320
v. Wiggin, 252, 253, 259
's Will, In the matter of Catherine, 706, 710, 712
Robertson v. Breedlove, 339
v. Lea and Wife, 120
v. Livingston, 633
v. McDougall, 183
v. Pope, 588, 604, 606
et als. v. Sublett et al., 96
Robins et al. v. Embry et al., 95, 96, 100
Robinson v. Abell & others, 326
v. Ames, 362
v. Jermyn and others, 136
v. Lyman, 339
v. Rapelye and Smith, 101
v. Willis, 166
& Co. v. Crowder, Clough & Co., 444, 447
& Davenport v. Hamilton, 405
Robinson & Wiggin v. Doolittle et al., 290, 292, 296
Robson v. Curlevis, 377
Rochelle v. Harrison, 76
Rochester v. Trotter et al., 441
White Lead Co. v. The City of Rochester, 622
Rockwell v. Charles, 336
Rodriguez v. Tadmire, 223
Roella v. Follon, 120, 163
Roffey v. Greenwell, 497
Rogers v. Clifton, 182
v. Coit, 445, 612
v. Colt, 499
v. Dill, 267
v. Hall, 81, 83
v. White, 631, 634
& Wife v. Cruger and others, 549
Roland v. Martindale, 513, 672
Rollman, Adm'r v. Baker, &c., 499
Rolston v. Click et al., 451
Roof v. Stafford, 248, 250
Root v. French, 79
v. King, 180, 184, 199, 201
v. Lowndes, 205, 207
Rootes v. Stone, 507
Roper v. M'Cook & Robertson's Adm'r, 84
Rose v. City of Bridgport, 522
Ross et als. v. Planters' Bank, 382
v. Rouse, 121
Rossiter v. Rossiter, 548, 610
Rousseau et al. v. Cull et al., 287
Routh et al. v. Robertson, 382
Rowan et al. v. Odenheimer et al., 382
Rowcliffe v. Edmonds and Wife, 118
Rowe v. Roach, 164
v. Young, 365, 369
Rowlands v. Springett, 377
Rowler v. Bigelow, 83
Rucker, &c., v. Abell et al., 73
v. M'Neely, 264
Rue High, app., 706, 709, 714
v. Mitchell, 120, 152
Rumsey, &c. v. Matthews, 497
Rundell v. Butler, 155, 205
Rundle v. Moore, 667
v. Murgatroyd's Assignees, 82
Rundlett v. Dole and Trustee, 96
v. Small, 292
Runkle v. Mayer et al., 132, 133, 203
Rush v. Cavanaugh, 125, 179
Russell v. Clark's Ex'rs, 84
v. Haddock, 337
v. Lasher, 96
v. Whipple, 313
v. Wilson, 118
v. Woodward, 96
et al. v. Wiggin et al., 327
Rustell v. Macquister, 205
Rutherford v. Evans, 166
Rutledge v. Smith and others, 516
Ryan v. Baldrick, 502
v. Blount et al., 514
v. Seymour, 377
and wife v. Madden, 158
Ryckman v. Delavan, 136, 157
v. Parkins, 522
Ryder, In the matter of, 249

Sadock v. Burton, 630
Safford v. Wyckoff, 338, 405

Sage v. Sherman, 440
Sailly v. Cleveland, 613
Sale v. Dishman's Ex'rs, 448
Salmon v. Bennett, 69, 77
Sally's Adm'r v. Cappa, 673
Salter v. Burt, 361
Saltmarsh v. Tutthill, 337, 379, 382
Sanborn v. Little, 322
v. Southard, 362
Sanches et al. v. Davenport et al., 670
Sandback v. Thomas, 227
Sanders v. Bacon, 317
v. Rollinson, 185
Sanderson v. Bowes, 365, 368
v. Hubbard, 121
Sandford v. Handy, 547, 552
v. Norton, 326
Sandilands v. Marsh, 453
Sands and others v. Codwise and others, 80, 85
Sanford v. McLean, 252
Sanger v. Eastwood, 78, 79
Sappington v. Pulliam, 326
Sargeant et a. v. French, 265
Sargent v. Salmond, 73, 76
et al. v. Southgate, 339
Satterwhite v. M'Kie, 497
Sauerwin v. Brunner, 336
Saunders v. Ferrill, 80, 81
v. Mills, 187, 198, 201, 202
Savage v. Brewer, 218, 226
v. Rix et a., 548, 604, 605, 607
Savil v. Roberts, 216, 219
Saville v. Jardine, 114
Savings Bank v. Bates, 95
v. Davis & Centre, 580, 582
Sayre v. Austin, 501, 502
v. Frick, 406
v. Jewett, 163
v. Lucas, 326
Sawyer v. Eifert, 154, 156, 198
v. Hopkins, 204, 205
v. Tappan, 287
Saxon v. Castle, 220
Sayles v. Briggs, 228
Scarborough v. Reynolds, 548, 549
Schaeffer's Estate, 518
Schatzill & Co. v. Bolton, 471
Schee v. Hassinger, 632, 672, 675
Scheibel v. Fairbairn, 227
Schenck v. Schenck, 137, 156
Schencks v. Strong, 262
Schermerhorn v. Jenkins, 264
Schieffelin v. Stewart, 513
Schimmelpennich et al. v. Bayard et al., 551
Schmidt v. Limehouse, 499
Schnell v. Schroder, 286, 514
Schoonover v. Rowe, 206
Schroyer v. Lynch, 621
Schultz's Appeal, 516
Scofield v. Day, 519
Scott v. Fisher, &c. 286
v. M'Kinnish & Wife, 165, 199, 201, 206
v. Messick, 607
v. Mortsinger, 205, 220
v. Peebles, 138, 202, 207
v. Ray & Trs., 288
v. Surman, 630
v. Wells, 547
Scovill v. Kingsley, 206
Screven v. Bostick, 84
Scrugham v. Carter, 472
Scudder v. Woodbridge, 628
et al. v. Morris, 499
Scarcey's Heirs v. Morgan, 266
Seabury v. Hungerford, 325
Seacord v. Burling, 315
Sears v. City of Boston, 711
v. Patrick, 672
Searson v. Heyward & Co., 506
Seaver v. Lincoln, 362, 363
Seaving v. Brinkerhoff, 78, 99
Sedgwick v. Aahburner, 706
Seibut v. Price, 221
Seidel v. Peckworth and wife, 613
Selby v. Eden, 366
Selden v. Jamea, &c., 516
et al. v. Beal, 675
Selleck v. The Sugar Hollow Turnpike Co., 288
Sellers v. Till, 160
Seventh Ward Bank v. Hanrick, 394
Sewall v. Catlin, 124, 127, 184
v. Glidden, 79
v. Russell, 391, 394
Seward v. Jackson, 71, 80
Sexton v. Todd, 116
v. Wheaton, 60
v. Wood, 320
Seymour v. Van Slyck, 300, 322
Shackleford v. Helm, 518
Shaefer v. Gates & wife, 265
Shaffer v. Kintzer, 112, 113, 119, 120, 158
v. Watkins, 97
Shagart v. Carter, 154
Shankland v. The Corporation of Washington, 568
Shanks et als. v. Lancaster, 584
Sharp v. Caldwell & Hunter, 75
v. Emmet, 609, 636
v. Pike's Adm'r, 512
Shattuck v. Freeman, 96, 98
v. Maynard, 706, 711
Adm'rs of v. Wilder, 548
Shaver v. White & Dougherty, 472
Shaw v. Methodist E. S. in Lowell, 317
v. Picton, 286, 510, 633
v. Pratt, 287
v. Reed, 365, 619
& another v. Levy, 83
& wife v. Boyd, 250
et al. v. Br. Bank at Decatur, 292
Shears v. Rogers, 75
Shecut v. McDowell, 114, 155
Shed v. Brett, 364, 403
Sheehy v. Mandeville, 499
Sheely v. Biggs, 114, 119, 158
Sheerer v. Lantzerheizer, 97
Sheffield v. Watson, 587
Sheldon v. Benham, 361, 394, 401
v. Dodge, 96, 97
et al. v. Dunlap, 579
Shelton v. Braithwaite, 377, 381, 404
v. Bruce, 315
v. Nance, &c., 131, 134, 136
v. Simmons, 180, 201, 204
's Ex'ors v. Welsh's Adm'rs, 520
Shenton v. James, 314
Shepard v. Hall, 401

Shepard v. Hawley, 406
v. Merrill, 179
v. Miller, 198
Shepherd v. Bliss ond wife, 166
v. Lincoln, 622
v. M'Evers, 96
Shepley v. Lytle, 545
Sherk v. Endress, 75, 76
Sherwood v. Chace, 120, 122
v. Marwick, 69, 441
Sheton v. Tiffin et al., 712
Shewell v. Givan, 505
Shields v. Cunningham, 116
&c. v. Craig, 266
Adm'r, &c. v. Anderson, Adm'r, 75
's Heirs v. Bryant, 265
Ship v. McCraw, 112, 122, 123
Shipley v. Keymer, 632, 644
v. Todhunter, 132, 137, 153, 155, 184
Shipman v. Horton, 259
v. Miller, &c., 511
Shirley v. Hagan, 264
Shirtliff & Austin v. Whitfield & Brown, 670
Shobe v. Carr, 508, 518
Shock v. M'Chesney, 185, 206, 228
Shone v. Wiley, 364
Short v. Skipwith, 507, 513, 674
Shrieve & Combs v. Duckham, 380, 389
Shuber & Bunting v. Winding, 96
Shultz v. Chambers, 160, 163
Sibley v. Tomlins, 124
Sibree v. Tripp, 312, 314
Sice v. Cunningham, 362, 363
Sickman v. Lapsley, 517
Sigourney v. Munn, 487, 488, 489
Sikes v. Johnson & others, 262
Silversides v. Bowlby, 227
Simms v. Norris & Co., 249
Simonds v. Heard, 604
Simons v. Walter, 512
Simpson v. Pitman, 166
v. Robinson, 504
v. Simpson et als., 74, 85
v. Turney, 394
v. Wiley et al., 138
et al. v. Feltz, 511
& Davidson v. Graves, 75
Sims v. Kinder, 199
v. M'Lendon, 221
v. Willing & others, 509, 510
Simson v. Ingham, 289, 291, 300
Sinclair v. Eldred, 224
v. Lynah, 380
Singleton v. Lewis, 522
Sitler & Johnson v. Walker, 470
Skinner v. Grant, 178, 202
v. Gunn, 547, 574, 582
v. Gunton, 223
v. Powers, 178
v. White, 112, 572
Skipwith v. Clinch, 501
's Executor v. Cunningham, 96, 98, 99, 100, 101
Skirving v. Stobo, 505
Slade, Adm'rs of, v. Heirs of Slade, 515
Slingerland v. Swart, 511
Sliver v. Shelback, 267
Slocumb v. Kuykendall, 165
Sloo v. The State Bank of Illinois, 448, 449
Slowman v. Dutton, 117, 118
Small v. Gray, 218
Small v. Smith, 337, 338
Smalley v. Anderson and wife, 156
Smart v. Sandart, 669
Smedes v. Utica Bank, 391, 404, 666
Smethurst v. Woolston, 503
Smetz v. Kennedy, 510
Smith v. Adm'rs of Shaw, 299
v. Ashley, 137
v. Berwick and another, 619
v. Buckecker and wife, 198
v. Canfield, 521
v. Carey, 160
v. Cranshaw, 228
v. Evans, 261
v. Floyd, 266
v. Garland, 77
v. Gibson, 548
v. Greer et al., 72, 81
v. Hiscock, 339
v. Jackson, 488, 489, 490
v. Janes, 362
v. Kendall, 322
v. Kennedy, 76
v. Knoweldon, 165
v. Lampton and wife, 515
v. Lascelles, 670
v. Leavitts, 95, 191
v. Little, 364, 379, 394
v. Lowell, 69, 71, 98
v. Loyd, 292, 294, 299
v. Lusher, 440
v. Macdonald, 224
v. Mayo et al., Ex'rs, 254
v. McMickin, 572
v. Minor, 116
v. Olippant, 249
v. Parker, 178
v. Pitkin, 504
v. Pollard, &c., 75
v. Redus and wife, 264
v. Rice, 567
v. Roach's Ex'r, 394
v. Rockwell, 363
v. Screven, 289
v. Shackford, 228
v. Smith, 68, 80, 98, 178, 198
v. Spooner, 128
v. Stewart, 122, 156, 166, 201, 202
v. Strong, 338
v. Tarlton, 488
v. The Bank of Washington, 395
v. Thomas, 177, 181, 182
v. Vanderhorst and wife, 501
v. Vanhouten, 264
v. Van Nostrand, 586
v. Whiteside, 673
v. Whiting, 378, 380, 381, 382
v. Wigley, 299
v. Wood, 137
v. Wyman, 206
v. Yell, 69
v. Youmans, 180
& others v. Kelly, 254, 257
et al. v. Dickinson, 587
v. Hubbs, 76
v. White, 567
v. Wood, 317, 492
et ux. v. Miles, 154, 155
Matter of, 469, 472
Wright & Co. v. C. C. Campbell & Co., 95

Smout v. Ilbery, 610
Smyser v. Smyser, 509
Smyth v. Strader et al., 389, 451
Snead v. Barringer & Rhoades, 445
Sneed v. Ewing et ux., 706
Snell v. Snow, 154, 158
Snevily v. Eckel, 327
Snodgrass's Appeal, 446, 470, 475, 478
Snow v. Allen, 223
v. Perry, 345
v. Witcher, 178
Snyder v. Andrews, 163
v. Riley, 339
Soane v. Knight, 187
So. Car. Bank v. Case, 445
Solarte v. Palmer, 375
Solly v. Rathbone, 696
v. Weiss, 694
Solomon v. Lawson, 161, 166
v. Solomon, 506
Somerville v. Somerville, 707, 709
Somes v. Brewer, 83
Sommer v. Wilt, 223, 226, 229
South v. Leavy, 505
Southard & Starr v. Steele, 449
Southee v. Denny, 123, 125
Southern Loan Co. v. Morris, 314
Southwick v. Stevens, 203
Spack v. Long, 514
Spangler's Estate, 508, 509
Sparhawk and others v. Adm'r of Buell & others, 513, 515
Sparka v. Garrigues, 497, 522
Spear v. Myers, 337
Speise v. M'Coy, 78
Spencer v. Amerton, 184
v. Field, 579, 585, 586, 613
v. Jacob & another, 227
v. The Bank of Salina, 401, 405
Sperry v. Wilcox, 180
's Estate, 476, 477
Spies v. Gilmore, 326, 364
v. Newberry, 379
Spindler v. Grellett, 365
Spires v. Hammot, 299
Sprague and another v. Gillett and another, 548
Sproule, &c. v. Botts, 266
Stackpole v. Arnold, 603
Stafford v. Roof, 250, 251, 259
v. Green, 120
v. Yates, 382
Stainer v. Tysen, 549, 556
Stalker v. M'Donald, 337
Stall v. Catskill Bank, 450, 452
Stamford Bank, The, v. Benedict, 289, 292, 294, 301
Stampa v. Graves, 317, 319
Stanfield v. Boyer, 115
Stannard v. Harper, 165
Stantley v. Britt, 158
Stanton v. Camp, 582, 585, 602, 605, 607
Staples and another v. Franklin Bank, 361, 395
Starbrid et al. v. Moore, 265, 267
Stark's Adm'r v. Price, 504
Starke's Ex'rs v. Littlepage, 74
Starrett v. Barber, 288, 291, 301
State v. Bird, 500
v. Brownlow et al., 163, 166
v. Burnham, 188
State v. Corpening, 319
v. Dimick, 252, 256
v. Farley, 134
v. Hallett, 706, 711, 712, 713
v. Henderson, 134, 161
v. Layton et al., 514
v. Lehre, 188
v. Mayhew, 514
v. M'Intosh, 672
v. Real Estate Bank, 95
Bank v. Hurd, 364
v. Napier, 365
v. Robards, 613
v. Slaughter, 401, 406
of Elizabeth v. Ayres, 403
Maryland v. The Bank of Maryland, 95
The, v. Avery, 135, 137
St. Clair, Heirs of, v. Smith and Milliken, 266
Stead v. Salt, 449
Stearns v. Cox, 205
et al. v. Brown et ux., 497, 514, 515, 520
Stebbins & Mason, Ex parte, 470
Stedman v. Jilson, 339
Steel v. Jennings & Beatty, 441
v. Taylor, 298
Steever v. Beehler, 167
Steinman v. McWilliams, 179, 198
v. Wilkins, 694
Stephens v. Beal, 84
's Administrator v. Barnett, Adm'r, 75
Stephenson v. Axon & Mitchell, 507, 509
v. Primrose, 380, 401
Sterling v. Adams, 220
v. Peet, 504, 586
v. Sherwood, 178
Sterry v. Arden, 78, 82
Stetson v. Patton et al., 585, 587
Stevens v. Barringer, 517
v. Blunt, 316
v. Fassett, 223
v. Hartwell, 128, 202
v. Robins, 695
v. Wilson, 646
Adm'r v. Goodel, 512
et al. v. Bell, 95, 96
Stevenson v. Hayden, 114
v. Maxwell, 516, 694
Stewart v. Cleaner, 119
v. Donnelly, 545, 556
v. Eden, 404, 405
v. Ellice, 519
v. Iglehart, 76
v. Kearney, 75
v. Martin, 509
v. McMinn, 101
v. Stewart, 155
v. Stocker, 511
Stiles v. Lay, 712
v. Nokes, 186
Still v. Hall, 505
Stillwell v. Barter, 136, 178
Stirnermann v. Cowing, 567
Stivers & Page v. Prentiss & Weissenger, 364, 392
St. John v. Redmond, 549, 550, 551, 555
Witherill v. Holmes, 448
Stockdale v. Hansard, 187

Stockdale v. Tarte, 186
Stocking v. Sage, 692
v. Toulmin, 339
Stockley v. Clement, 183
v. Hornidge, 219, 226
Stockman v. Parr, 381
Stoddart v. Linville, 152
Stokes v. Stuckey, 117
Stone v. Bennett, 520, 522
v. Cartwright, 620
v. Clark, 121, 154
v. Codman, 621
v. Cooper, 131, 132, 133, 136
v. Crocker, 220, 223, 225, 226
v. Seymour, 286, 287, 299, 300
v. Swift, 223, 226
v. Varney, 198, 208
v. Wood, 586
et al. v. Manning, 84
Stoney v. Beaubien, 324, 326
Stoolfoos and another v. Jenkins, 252
Storer v. Storer, 515
Storey v. Challands, 127, 182
Storm v. Davenport, 74
v. Waddell, 76, 84
Storr v. Wise, 549
Story v. Livingston, 299
Stothard v. Aull & Morehead, 551
Stoughton v. Lynch, 299, 506
Stout v. Wood, 122
Stracy v. Sanders, 302
Strader v. Batchelor, 317
Strange v. Price, 376, 377, 378
Streeper v. Eckart, 72
Strike v. McDonald & Son, 85
Stringfellow & Hobson v. Mariott, 583
Strohecker v. The Farmers' Bank, 521, 579
Strong v. Fish, 450
v. Skinner, 97, 98
Stow v. Converse, 132, 136, 166, 178, 208
Stuart v. Lovell, 187, 205, 208
Stucker v. Davis, 157
Stuckert v. Anderson, 363, 404
Sturtevant v. Ford, 360
Sturdivant v. Davis, 69, 74
Sturgenegger v. Taylor, 118
Sturges et al. v. Robbins, 288
Suarez v. Mayor, &c., 706
Suckley v. Tenno & Cox, 549
Suffold Bank v. Worcester Bank, 518
Summer v. Utley, 125
Sumner v. Buel, 157
v. Ford & Co., 368
v. Hampson and others, 490
Adm'r, v. Williams et al., 585, 586
Supervisors of Albany Co. v. Dorr, &c., 621
Sussex Bank v. Baldwin & Shipman, 364, 381, 389, 392, 394
Sutcliffe v. Dohrman, 480
Sutton v. Johnstone, 219
& M'Nickle v. Irwine and another, 453
Suydam & Jackson v. Martin, &c., 98
Swaim v. Stafford, 221, 226
Swan v. Nesmyth, 685
v. Stedman and others, 446
Swann v. Rary, 178, 203
Swasey v. Adm'r of Vanderheyden, 248
Swearingen v. Bush, 167, 203
Swearinger v. Slicer, 100
Sweet et al. v. Brown & Tr., 546
Sweetapple v. Jesse, 117, 158
Sweetland v. Creigh and others, 320, 326
Sweetzer v. French & others, 451, 452
Swift v. Tyson, 344
& Hopkins, 587
& Nichols v. Holdridge and others, 85
Sylvester v. Crapo, 338, 339
Ex'r v. Downes, 326
Syme v. Butler, Ex'r, 587
Symington v. M'Lin, 631, 632
Symmons v. Blake, 179, 205

Tabart v. Tipper, 166, 187
Taber v. Cannon & others, 548, 603, 609, 611
v. Perot et al., 652
Taft v. Brewster, 586
& Co. v. Pike, 261, 519
Taggart v. Stanbery, 547
Taintor v. Prendergast, 612, 616
Talbot v. Clark, 391
v. Peeples et al., 519
Talcott v. Dudley, 474
Talliaferro's Ex'rs v. King's Adm'r, 522
Tandy v. Masterton's Adm'r, 252
Tanner v. Hall & Easton, 450, 451, 452
Tapley v. Butterfield, 442, 447, 492
Tappan v. Bailey and others, 548
v. Ely, 317
v. Evans, 76, 84
et al. v. Austin, 520
Tappenden and others v. Randall, 510
Tarpley v. Blabey, 203
Tarver's Ex'rs v. Boykin, 389
Tate & Hopkins v. Evans, 545
Tatlow v. Jacquett, 202
Tauls v. Winn, &c., 580
Tayloe v. Sandiford, 286
Taylor v. Bates, 673
v. Casey, 116, 119
v. Hillyer, 451
v. Kneeland, 113, 118, 158, 164, 206
v. Knox's Ex'rs, 507, 510, 521
v. Kymer, 300, 645
v. M'Cue, 326
v. M'Lean, 588
v. Perkins, 123
v. Robinson, 178, 198
v. Snyder, 364
v. Spears, 673
v. Sturgingger, 206
v. The Executor of Heriot, 68, 72, 77, 81
& Fitzsimmons v. Henderson, 469
& others v. Coryell and others, 449
& another v. Trueman & others, 644
Teagle v. Deboy, 206
Teague v. Williams, 165, 206, 227, 228
Tempest v. Chambers, 166
Templeman v. Fauntleroy, 517
Tenney v. Clemment, 114, 121, 154
Tevebaugh v. Reed, 694
Tharp v. Farquar, 613
Thayer v. Boston, 622
v. Wendell, 586
Thing v. Libbey, 254, 257
Thirman v. Matthews, 119, 157
Thomas v. Beekman, 519
v. Croswell, 186
v. De Graffenreid, 69, 71, 227, 228

Thomas v. Dike, 260, 264
v. Harding, 449
v. *Hewes*, 610
v. *Jackson*, 125
v. Rouse, 225
v. Shoemaker, 395
v. Smith, 80
v. Weed, 507
v. Wilson, 502
et al. v. Jennings et al., 326
& Ashby v. Jeter & Abney, 72
& Wife v. Tanner, 706
Thomasson v. Boyd, 257
Thompson v. Bernard, 118, 155
v. Bowers, 178, 179, 199, 202, 203
v. Boyd, 203
v. Brown, 74, 84
v. *Dominy*, 327
v. Dougherty, 72, 73
v. *Farmer*, 645
v. Gaylsrd, 320
v. Hale, 338
v. Lee, 83
v. Lusk, 157, 159
v. Massey, 221, 224, 227
v. Perkins et al., 635, 651
v. *Shackell*, 187
v. Sloan, 319
v. Stevens, 570
v. Stewart, 507, 544
In the Matter of, 706
's Ex'r v. Guthrie's Adm'r, 504
v. Sanders, &c., 515
et al. v. Lay et ux., 254
and another v. Brown & Weston, 300
and Rawles v. The Real Estate Bank, 368
Thomson v. Palmer, 75
v. *The Advocate-General*, 706
v. The Bank of the State, 666
Thorley v. Kerry, 131, 132
Thorn v. Blanchard, 184
v. Moser, 181, 182
v. Rice, 403
v. Smith, 445
Thorndike v. City of Boston, 708, 709, 711, 712, 713
v. Godfrey, 546, 574
Thorne v. Deas, 670
Thorp, In re, 513
Thortons v. Fitzhugh, 520
Throgmorton v. Davis, 206
Thurmond and others v. Reese, 84
Thurston v. Mauro, 603
Ticknor & Day v. Wiswall, 96
Tiernan v. Andrews, 611
et al. v. Com. Bank, 666
Tillman et al. v. Ailles, 321
Tillotson v. Cheetham, 161, 166
v. McCrillis, 672
Timms v. Delisle, 402
Tindal v. Brown, 375, 389, 390
Tindell's Ex'rs v. Johnston, 319, 320
Tinsley v. Beal, 339
Tippets v. Walker et al., 579
Tipton v. Kahle, 159, 164
Titcomb et al. v. Seayer and Trustee, 636, 651
Titus v. Follet, 163
Tobey v. Lennig, 381, 382
Tobias v. Harland, 125, 127
Todd v. Buckman, 100
v. Hawkins, 182
v. Rough, 113, 115
Toland v. Murray, 652, 695
Tomlinson v. Brittlebank, 118
Tompkins v. Ashby, 313
v. Wheeler, 95
Toogood v. Spyring, 181, 183
Topham v. Roche, 554
Torbet's Heirs v. McReynolds et al., 514
Torrey v. Field, 177, 178, 179, 186, 201, 202
Torry v. Bryant, 672
v. Holmes, 607
Tower v. Bank of River Raisin, 95
Towle & Jackson v. Stevenson, 696
Towles v. Turner, 616
Townes v. Birchet, 631
Townsend v. Corning, 581, 585, 588
v. Devaynes, 491
v. Hubbard, 580, 581, 585, 588
Townsley et al. v. Springer, 392
Tracy v. Hopkins, 165
Tradesmen's Bank v. Astor, 440, 551
Trask v. Roberts et al., 604, 605
v. Stone, 264
Travis v. Barr, 225
v. Smith, 221
Treat v. Browning, 156, 166, 199, 201
v. Stanton, 613
Tredick v. Wendell, 363
Trenholm v. Bumpfield, 501
Trimble v. Coons, 446
v. Ratcliff, 69
Triplett et sl. v. Gill et al., 504
Trippe & Slade & others v. Lowe's sdm'r & others, 84
Trotman v. Dunn, 186
Trotter v. Grant, 505
v. Watson, 72
Troubat v. Hunter, 496, 500
Trowbridge v. Cushman, 474
True v. Fuller, 327
Truluck & others v. Peeples & others, 83
Trustees &c., v. Parks et al., 614
Tuam, Archbishop of, v. Robeson, 132, 135
Tubb v. Williams et sls., 85
Tucker v. English, 326
v. Ives, 505
v. Oxley, 475
v. Randall, 316
v. Smith, 338
Tunno v. Trezevant, 81, 475
Tunstsll v. Walker, 404
Tupper v. Cadwell, 248, 249
Turbeville v. Ryan, 447
Turner v. Leech, 394
v. *Ogden*, 111
v. Patridge, 264
v. Walker, 220, 223, 226, 229
Turney v. Williams, 514
Turrill v. Dollaway, 136, 160, 161
Tuscumbis &c. R. R. Co. et al. v. Rhodes, 339
Tuson v. Evans, 183
Tuten v. Ryan, 326
Tutt v. Brown, 639
v. Lewis's Ex'rs, 587
Tuttle v. Bartholomew, 315, 327
v. Cooper, 253
v. Executors of Ayres, 604

Tuttle v. Mayo, 675
Twelves v. Williams, 78
Tyson and others v. Pollock, 441
v. State Bank, 666

Uhland v. Uhland, 504
Ulmer v. Leland, 220, 221, 225, 226
Underhill et al. v. Gibson et al., 585, 607, 610, 613
Underwood v. Parks, 178
Union Bank v. Euton, 446
v. Toomer, 72
at Weymouth and Braintree v. Willis, 326, 360
of Louisiana v. Kindrick, 299
Tennessee v. Govan, 404
United States v. Arnold et al., 499
v. Bainbridge, 250
v. Bradbury et al., 286, 288, 299
v. Barker, 394
v. Barker's adm'x, 390, 394
v. Blakeney, 250
v. Hack et al., 469
v. January and Patterson, 300
v. Kirkpatrick, 290, 299
v. Lipscombe, 250
v. McLemore, 299
v. The Bank of the U S., 318
v. Wardwell et al., 299
v. White, 321
Bank v. Burke, 74, 85
Unwin v. Wolseley, 586
Updegrove v. Zimmerman, 200, 204
Upham and others v. Lefavour, 287, 288, 294, 696
Upton et al. v. Gray, 611
Urquhart v. McIver, 696
Usher v. Huzeltine, 73
v. Severance, 162, 184, 202

Vail v. Nickerson, 520
Valentine v. Piper, 547
Valk v. Gaillard, 546
Vallett v. Parker, 336, 451
Vanada's Heirs v. Hopkins' Adm'rs, &c., 547, 585
Van Alen and another v. Vanderpool and others, 630
Amringe v. Peabody et al., 643
Ankim v. Westfall, 122, 123, 198
Benschooten v. Lawson, 523
Beuren v. Van Gaasbeck, 505
Vance v. Munroe, 294
v. Phillips, 71
's Adm'r v. Vance's Distributees, 510
Vanderheyden v. Vanderheyden, 514
Van Derzee v. M'Gregor, 184
Van Deusen v. Blun, 446
Vanduzor v. Linderman, 220
Vandyke v. Christ, 74
Van Ness v. Hamilton, 113, 131, 179
Van Ostand v. Reed, 588
Van Rensselaer v. Dole, 155
v. Jones, 501
Ex'ors of, v. Adm'r of Platnor, 501
's Ex'ors v. Roberts, 289
v. Jewett, 501
Vanspike v. Cleyson, 182
Van Staphorst et al. v. Pearce, 613
Van Tassel v. Capron, 126
Vacter v. Flack, 317
Winkle v. Ketcham, 252
Wyck v. Norvell et al., 337
Van Wyck v. Seward, 70
Varner, Ex'r v. Bevil et al., 706
Varney v. Young, 249
Varnum v. Camp, 102
Fuller & Co. v. Evans, 584
Varrell v. Holmes, 225
Vasse v. Smith, 262
Fuller & Co. v. Evans, 604
Vaughan v. Goode, 499
v. Havens, 120
and others v. Evans and others, 101
Vausse v. Lee, 185
Venafra v. Johnson, 226
Vent v. Osgood, 247, 248, 252, 259, 260
Venus, The, 706, 711, 713
Vermont Central R. R. Co. v. Cloyes, 614
Verner's Estate, 514
Vernon &c. v. Morton & Smith, 95, 98, 101
Verplank v. Sterry, 78
Verree and Paul v. Hughes, 519
Vessee v. Pike, 199
Vianna v. Barclay, 670, 671
Vicars v. Wilcocks, 127
Vick v. Whitfield, 198
Vigours v. Palmer, 186
Violett v. Powell's Adm'r, 611
Villers v. Monsley, 123, 131, 132, 135
Von Hemert v. Porter, 593
Voorhees v. Stoothoff, 514
v. Wait, 260
Vredenberg v. Hallett & Browne, 503, 513, 520

Waddell v. Cook, 472
v. Mordecai, 609, 613
Wadsworth v. Havens, 71, 78, 79
Wagnor and others v. Clay, 451
Waggstaff v. Ashton, 119, 178, 199, 200
Wailing v. Toll, 248, 253
Waithman v. Weaver, 200
Wakley v. Johnson, 203
Wakeman v. Grover, 96, 97, 99, 101
Walcott v. Canfield, 440
Walden v. Sherburne, 505
Waldo v. Peck, 615
Bank v. Greely, 451
v. Lumbert, 452
Walke and others v. The Bank of Circleville, 579, 710
Walker v. Bank of the State of Missouri, 383
v. Bradley, 512
v. Constable, 510
v. Ferrin, 261
v. M'Conico, 76
v. Simpson, 249
v. Smith, 691, 693, 700
v. Swartwout, 586
v. Wills, 499
and others v. Bank of Augusta, 381, 402
et al. v. Miller et al., 79
v. Robert Smith, 665, 667, 674, 694
's Estate, 516
Wall v. Hoskins, 112, 122

Wallace v. Dyson, 320
v. M'Connell, 367
v. Morss, 262
v. The Branch Bank at Mobile, 549
v. Young, 117
& Co. v. Bradshaw & Co., 666
's Lessee v. Lewis, 251, 258
Waller v. Cralle, 77
v. Keyes, 441
v. Lacy, 287, 301
v. Long, 497
v. Mills, 80
Wallis v. Alpine, 223
v. Mease, 206
Walradt v. Maynard, 673
Walrath v. Thompson, 672
Walsh v. Adams, 472
v. The State, 166
et al. v. Pierce, 551
Walter et al. v. Ross et al., 652
Walters v. Mace, 165
Walton v. Singleton, 116, 152, 155
Walmsley v. Lindenberger & Co., 253
Waples v. Hastings, 251
Ward v. Clark, 120, 164
v. Smith, 137, 182
v. Weeks, 128, 205
et al. v. Lewis et al., 96
&c. v. Trotter, 72, 80, 97
Wardlaw et al. v. Ad'rs and Heirs of Gray, 476, 513, 673
Waring v. Crane, 266
v. Mason, 609
Warne v. Chadwell, 206
Warner v. Bridges, 673
v. Paine, 186
et al. v. Martin, 568, 643
Warr v. Jolly, 180, 182
Warren v. Gilman, 381
v. Hall, 75
v. Warren, 137
and Wife v. Norman and Wife, 114, 138
In re, 445, 475
Washburn v. Cooke, 180, 181
et al. v. Bank of Bellows Falls et al., 475
Washington Bank v. Lewis, 553
v. Prescott, 289
v. Shurtleff, 499
Watchman, The, 100
Waterborough v. Newfield, 708, 711, 712
Waters v. Jones, 117, 156, 198
Watkins v. Crouch & Co., 368
v. Lee, 227
Watkinson v. Laughton, 504
v. Root, 522
Watson v. Frazer, 264
v. Fuller, 501
v. Hampton, 120, 158
v. Hunt, 326
v. McCarty, 123
v. Musick, 165
v. Nicholas, 152, 154
v. Phœnix Bank, 314, 672
and Wife v. Moore, 205
's Ex'rs v. McLaren, 327
Watts v. Frazer, 203
v. Greenlee, 116, 158
Waugh & Finley v. Carriger, 448
Weatherstone v. Hawkins, 182
Weaver v. Lloyd, 178
v. Townsend, 225
Webb v. Burke, 509, 605
v. Daggett, 97, 102
v. Hall, 224, 227
Webber v. Williams College, 548
Webster v. Clark, 84
v. Withey, 84
Inhabitants of, v. Larned, 610
Weed v. Beebe et al., 261
v. Carpenter, 551
v. Jackson, 82
v. Pierce, 84, 85
v. Van Houten, 367
Weeks v. Hasty, 510
v. Leighton, 260
Weidler & Carpenter v. Kauffman, 315
Weinberger v. Shelly, 220, 225, 227
Weir v. Hoss & Wife, 136, 166
& another v. Tannehill & others, 96
Weirbach v. Trone, 111, 114
Welch v. Clark, 472
Welles v. Cole et als., 82
Wells v. Abernethy, 499, 503, 504
v. Evans, 447, 451, 579, 587
v. Noyes, 220, 222, 223
Welsh v. Bekey, 75
v. Dusar, 694
v. Eakle, 153
v. Parish et al., 579
v. Usher & others, 585
Wemple v. Dangerfield, 393
Wengert v. Beashore, 219, 225
West v. Moore, 262
v. McCabe, 449, 451
v. Penney, 247, 256
v. Pritchard, 503
Oliver & Co. v. Snodgrass, 101
Branch Bank v. Moorehead, 286
Boylston v. Sterling, 712
Man. Co. v. Searle, 616, 631, 651
Westwood v. Bell and another, 696
Wetherhead v. Armitage, 116
Wethey v. Andrews, 336
Whaley v. Moody, 451
Whallon v. Scott, 95, 97, 100
Wharton v. Mackenzie, 249
& another v. Hudson, 613
Wheatley v. Wallis, 117
v. Williams, 313
's Heirs v. Calhoun, 489
Wheaton v. East, 247, 251, 258
v. Wilmarth, 379
Wheeler v. Guild, 386
v. Robb, 165, 180
v. Shields, 208
and another v. Field, 360, 361, 401
Whettington v. Gladwin, 124
Whipple v. Fuller, 218
Whitaker v. Brown, 441, 446
v. Carter, 185
White v. Brown, 707, 713, 714
v. Camp. 339
v. Chapman, 694
v. City Council, 622
v. Delavan, 136, 157
v. Dougherty et al., 477
v. Fox, 225
v. Owen, 615
v. Skinner, 586

White v. Springfield Bank, 337
v. Toles & Dunlap, 459
v. Trumbull, 290
v. Union Ins. Co., 444
v. Woodward & Rand, 470, 472
Whitehead v. Potter, 616
v. Tuckett, 550
v. Walker, 339
Whitehurst v. Ward, 226
Whiteman v. Childress, 319, 321, 322
Whitemarch v. Hall, 260
Whiteworth v. Hall, 219
Whiting v. Smith, 164
Whitfield v. Lord Despencer, 621
Whitman & Hubbard v. The Farmers' Bank at Chattahoochie, 394
Whitney v. Ladd, 472
v. Peckham, 224
et al. v. Dutch et al., 250, 253, 254
Whittaker v. Freeman, 166
Whittier v. Graffam, 361
Whittlesey v. McMahon, 68, 77, 82
& Stone v. Dean, 389, 391
Whitton & Hulbert et al. v. Smith et al., 444
Whitwell v. Brigham, 363
et al. v. Johnson, 364, 389, 390, 391
v. Warner et al., 573
Whitworth v. Hall, 227
Wickam v. Miller, 72
Wickes v. Clarke, 80, 82
Wickliffe v. Payne, 218
Wicks v. Fentham, 217
Widrig v. Oyer, 113, 115
Widgery et al. v. Haskell, 96
Wiggin v. Damrell, 322
Wiggins v. Armstrong, 84
v. Hathaway, 621
v. Vaught, 317
Wiggle et al. v. Thomason, 395
Wilburn v. Greer, 320
v. Larkin, 582
Wilcox v. Edwards, 114, 115
v. Howland, 497, 522
v. Roath, 254
v. Webb, 116
& Fearn v. M'Nutt, 401
Gamble v. Singletary, 449
Welch v. Kellogg & others, 102
Wilder v. Holden, 220, 223, 225
v. Keeler, 475
et al. v. Eldridge, 265
Wildes et al. v. Parker, 706
Wiley v. Campbell, 122, 155, 156
Wilkes & Fontaine v. Ferris, 95
Wilkins v. The Commercial Bank of Natchez, 551, 552, 553
&c. v. Duncan, 607
and Wife v. Bryant, 112, 164
Wilkinson v. Adam, 376
v. Howell, 227, 228
v. Sterne, 290, 295
Wilks & another v. Back, 582
Willans v. Taylor, 219, 220, 223, 224, 225, 227
Willard v. Stone, 253
Williams v. Craig, 498, 505, 506
v. Gardner, 156
v. Griffith, 289, 291
v. Haig. 198, 207
v. Harrison, 165
v. Hill, 128
Williams v. Houghtaling, 299
v. Karnes, 111, 112, 131, 134
v. Little, 337
v. Littlefield, 695
v. Mayer, 200
v. Millington, 616
v. Miner, 154, 165, 199, 205
v. Moor, 252
v. Moseley, 220
v. Norris, 261
v. Norwood, 223, 225
v. Rawlinson, 300
v. Sherman, 505
v. Smith, 337, 390
v. Storrs, 513, 672, 673
v. Stott, 155, 160
v. The Bank of the U. S., 401
v. Vanmeter, 220, 223, 225, 226
v. Walbridge, 451
v. Waring, 365
v. Whiting, 712
v. Wilson, 521
v. Woodhouse, 224
Adm'r v. American Bank and others, 501, 504, 514, 516, 520
and Wife v. Bryant and Wife, 116, 165
et al. v. Mitchell, 550, 554
v. Tipton et al., 84
Williamson v. Harrison, 206
v. Williamson, 508, 509
's Heirs v. Johnston's & Nash's Heirs, 266
Willings et al. v. Consequa, 504
& Francis et al. v. Consequa, 517
Willis v. Green, 405, 406
v. Twambly, 259, 261
et al. v. Henderson, 79
Wills v. Brown, 506
Wilmarth v. Mountford et al., 220, 221, 225, 226
Wilson v. Apple, 199, 205
v. Collins, 186
v. Harding, 120, 121, 122, 152
v. Mullen, 322
v. Runyan, 116, 199
v. Spencer, 504
v. The Mayor, &c., of N. Y., 622
v. Troup, 547
v. Tumman, 572
v. Vandyke, 264
v. Williams, 451, 452
v. Williman, 395
v. Wilson, 514
v. York & Maryland R. R. Co., 568
& Co. v. Smith, 667
In re, 99
Wilt v. Franklin, 68, 96
v. Welsh, 263
Winans v. Davis, 364, 404
Winchester v. Hackley, 633, 674
Winebiddle v. Porterfield, 220, 222
Wineland v. Coonce, 83
Winn v. Alden, 390
v. Young, 497
Winship et al. v. The Bank of the U. S., 440, 441
Winslow v. Anderson, 264
v. Chiffelle, 490
v. Hathaway et al., 511
Winsor v. Savage, 507

Winsor, Ex parte Henry, 568
Winston v. Ewing, 470
Winter v. Sumvalt, 114
Winthrop v. Carleton 519
Wiswall v. Brinson, 621
v. Ticknor & Day, 101
Witham v. Gowan, 224
Withington v. Herring, 554
Witter v. Richards, 470
et al. v. McNeil, 447
Wittingham's Cose, 253
Woddrop v. Ex'r of John Price, 475
Wolcott v. Hall, 198, 201
v. Van Santvoord, 367
Wolf v. Rodifer, 165
Wolff v. Koppel, 635
Wolmer v. Latimer, 200
Wonderly v. Nokes, 179
Wonson v. Sayward, 117
Wood v. Brown, 164, 166
v. *Dixie*, 72
v. Gray's Ex'ors, 512
v. Hickok, 505
v. McCain, 548, 549, 572
v. Mann et al., 83
v. Robbins, 510, 511
v. Savage, 71, 81
v. Warren, 339
v. Weir and Sayre, 219, 220, 223
v. Wood & Wood, 406
and others v. Corl, 405, 519
's Ex'or v. Garnett, 515
Woodbridge et al. v. Brigham et al., 389
Woodcock v. Houldsworth, 403
Woodbeck v. Keller, 179
Woodbury v. Thompson, 115, 128
Woodford v. McClanachan, 547
Woodes v. Dennett, 610
Woodruff v. Daggett, 404
v. Logan, 250
Woods v. Anderson, 198
v. M'Gavock, 84
Woodthorpe v. Laws, 382, 383
Woodward v. Dowsing, 133
v. *Lander*, 177, 184
v. Suydam & Bladenburg, 671
v. Newhall et al., 253
v. Winship, 440, 441
v. Woodward, 509
Wooldridge v. Wilkins et al., 489
Wooley v. Clements, 362
Woolley v. Sergeant, 315
Woolnoth v. Meadows, 152, 157, 158, 202
Woolsey v. Urner, 100
Worcester, Inhabitants of v. Eaton, 259
Word v. Vance, 262
Worden v. Dodge, 317
Wormley v. Lowry, 337
Wormouth v. Cramer, 164, 199
Worth v. Butler, 116, 157
v. Northam, 75
Worthington and Alderson v. Shepley, 69
Wright v. Clements, 166
v. *Laing*, 289
v. Miller, 266
v. *Shawcross*, 389
v. Steele, 252
v. Wilcox, 619
v. *Woodgate*, 180, 181, 204
v. Wright, 513
and Cook v. Stanard, 80, 81
& Co. v. Roberts, 589
Wrigley, In the Matter of, 706, 713
Wylie v. Lewis, 326
Wyman v. Gray, 606, 607
v. Hubbard et al., 514
Wynn v. Alden, 380, 382

Yale v. Yale, 449
Yates and M'Intire v. Curtis, 650
et al. v. Brown et al. 619
Yearley v. Ashley, 118
Yeatman v. Woods, 492
Yeates v. Reed, 165, 183. 204
Yocum v. Polly, 220, 223
Young v. Adams, 319
v. Bennett, 198, 201
v. Gregorie, 221, 228
v. Miller, 113, 115
v. Pate, 71
&c. v. Whitaker, 265
's Ex'rs v. Singleton, 504
Younger v. Givens, 503
Youqua v. Nixon et al., 518
Yrisarri v. Clement, 166
Yundt v. Yundt, 164
's Appeal, 510

Zachrisson v. Akman, 646, 647
Zenobio v. Axtell, 164
Zouch v. Parsons, 254

AMERICAN

LEADING CASES.

Of the validity of voluntary conveyances, as against creditors and subsequent purchasers, under the statutes 13 *Eliz. c.* 5, *and* 27 *Eliz. c.* 4.

SEXTON *v.* WHEATON AND WIFE.

In the Supreme Court of the United States.

FEBRUARY TERM, 1823.

[REPORTED, 8 WHEATON, 229–252.]

A post-nuptial voluntary settlement, made by a man, who is not indebted at the time, upon his wife, is valid against subsequent creditors.

The statute 13 *Eliz. c.* 5, *avoids all conveyances not made on a consideration deemed valuable in law, as against* previous *creditors.*

But it does not apply to subsequent *creditors, if the conveyance is not made with a fraudulent intent.*

What circumstances will constitute evidence of such a fraudulent intent.

APPEAL from the Circuit Court for the District of Columbia and county of Washington. This was a bill brought by the appellant, Sexton, in the Court below, to subject a house and lot in the city of Washington, the legal title of which was in the defendant, Sally Wheaton, to the payment of a debt for which the plaintiff had obtained a judgment against her husband, Joseph Wheaton, the other defendant.

The lot was conveyed to John P. Van Ness, and Maria, his wife,

and Clotworthy Stephenson, to the defendant, Sally Wheaton, by deed, bearing date the 21st day of March, 1807, for a valuable consideration, acknowledged to be received from the said Sally. And the plaintiff claimed to subject this property to the payment of his debt, upon the ground that the conveyance was fraudulent, and therefore, void as to creditors.

The circumstances on which the plaintiff relied, in his bill, to support the allegation of fraud, were, that the said house and lot were purchased by the defendant, Joseph, who, contemplating at the time carrying on the business of a merchant in the said city of Washington, procured the same to be conveyed to his wife; and obtained goods on the credit of the apparent ownership of valuable real property. That for the purpose of obtaining credit with the commercial house of the plaintiff, in New York, he represented himself in his letters, as a man possessing real estate to the value of 20,000 dollars, comprehending the house in question, besides 100 bank shares and other personal estate. That the defendant, Sally, knew, and permitted these representations to be made. That the defendant, Joseph, in the presence of the defendant, Sally, applied to General Dayton, the friend of the plaintiff, to be recommended to a commercial house in New York, and in the statement of his property, as an inducement to make such recommendation, he included the premises. That the defendant, Sally, permitted this misrepresentation, and did not undeceive General Dayton, although she had many opportunities of doing so.

In support of these allegations the plaintiff annexed to his bill several letters written by the defendant, Joseph, in the city of Washington, to the plaintiff, in the city of New York, soliciting a commercial connexion and advances of goods on credit. The first of these letters was dated the 2d of September, 1809. The letters stated that the plaintiff's house had been recommended to the defendant by their mutual friend, General Dayton; represented the defendant's fortune as considerable, spoke of the house in which he was to carry on business as his own, and held out the prospect of regular and ample remittances.

The bill farther stated, that upon the faith of these letters, and on the recommendation of General Dayton, the plaintiff advanced goods to the defendant, Joseph, to a considerable amount, who failed in making the promised remittances; and on the plaintiff's withholding farther supplies of goods, and pressing for payment, he avowed his inability to pay, declared himself to be insolvent, and then stated, that the house in controversy was the property of his wife.

Some arrangements were made, by which the goods in the store, and

the books of the defendant Joseph, were delivered to the plaintiff; but, after paying some creditors who were preferred, a very small sum remained to be applied in discharge of a judgment which the plaintiff had obtained in January, 1812, for the sum of 8,249 dollars and 29 cents. On this judgment, an execution was issued, by which the life estate of Joseph Wheaton was taken and sold for 300 dollars, the plaintiff being the purchaser.

The bill prayed, that the property, subject to the plaintiff's interest therein under the said purchase, might be sold, and the proceeds of the sale applied to the payment of his judgment. It further stated, that improvements to a great amount had been made since the conveyance to Sally Wheaton, and prayed, that, should the court sustain the said conveyance, the defendant, Sally, might be decreed to account for the value of those improvements.

The answers denied that the house and lot in contest were purchased in the first instance by Joseph Wheaton, or conveyed to his wife with a view to his entering into commerce; and averred, that they were purchased for Sally Wheaton, and chiefly paid for out of the profits made by her industry, and saved by her economy in the management of the affairs of the family while her husband was absent executing the duties of his office as serjeant-at-arms to the House of Representatives. The answers, also stated, that in January, 1807, when the conveyance was made, Joseph Wheaton was serjeant-at-arms to the House of Representatives, expected to continue in that office, had no intention of going into trade, and had no knowledge of the plaintiff. The design of going into commerce was first formed in the year 1809, when, being removed from his office, and having no hope of being reinstated in it, he turned his attention to that object as a means of supporting his family. He, then, in a letter dated the 24th of August, applied to General Dayton, as a friend, to recommend him to a house in New York, and received from that gentleman a letter dated the 29th of the same month, which is annexed to the answer. In this letter, General Dayton says, "pursuant to your request I recommend to you the house of Messrs. Sexton & Williamson, with which to form the sort of connexion which you propose in New York. They have sufficient capital," &c. "The proper course will be for you to write very particularly to them, stating your present advantageous situation, your prospects and plans of business, and describing the nature and extent of the connexion which you propose to form with them, and then refer them to me for my knowledge of your capacity, industry, probity," &c. &c. &c.

The defendant, Joseph, in his answer, stated, that in consequence of this letter, he wrote to the said house of Sexton & Williamson. He admitted that his account of his property was too favourable, but denied

having made the statement for the purposes of fraud, but from having been himself deceived respecting its value. He denied having ever told General Dayton that the house was his, and thinks he declared it to be the property of his wife. Sally Wheaton denied that she ever heard her husband tell General Dayton, that the house was his property; that she ever in any manner contributed to impose on others the opinion that her husband was more opulent than he really was; or ever admitted, that the house she claims was his. She admitted, that she saw a letter prepared by him to be sent to Sexton & Williamson, in the autumn of 1809, which she thought made too flattering a representation of his property, and which she, therefore, dissuaded him from sending in its then form. She then hoped, that her persuasions had been successful.

The answer of both defendants stated, that Joseph Wheaton was free from debt when the conveyance was made, and insisted, that it was made bona fide.

The Court below dismissed the bill, and from this decree the plaintiff appealed to this Court.

Mr. *Key*, for the appellants, argued, 1. That the evidence in the cause was insufficient to prove the fact alleged, that the house in question was purchased with the funds of the wife. The case of Slanning v. Style (3 P. Wms. 335–337), which is the stronger, as it excepts creditors from the operation of the right where it exists, goes to show, that it was not bought with funds which could be considered as hers. The fund accruing from the thrift and economy of the wife, does not constitute her separate estate. (1 Cas. in Ch. 117.) Still less could such an accumulation for her separate use, from the presents of her friends, or as a compensation for services rendered her husband, be warranted by any case or principle.

2. If, then, the purchase was not made with the separate property of the wife, were the circumstances of the husband such, at the time this settlement was made, as to justify him in making it, to the prejudice of subsequent creditors? All the cases concur in showing that he cannot do so, and that the subsequent creditors may impeach it. (*a*.) And it makes no difference that it is the case of a settlement by a purchase, and the deed taken to the wife. This notion of certain elementary writers (Fonbl. 275; Sudg. 424; Roberts, 463), has been exploded, and the authorities are decisive against it. (Peacock v. Monk, 1 Ves. 127. Stillman v. Ashdown, 2 Atk, 481. 2 Vern. 683. 4 Munf. 251.

(*a*) Fletcher v. Sidney, 2 Vern. 490. Taylor v. Jones, 2 Atk. 600. Fitzer v. Fitzer, 2 Atk. 50. Stillman v. Ashdown, 2 Atk. 481; Hungerford v. Earle, 2 Vern. 261. Roberts on Fraud Convey. 21–30. Atherley's Fam. Settlem. 212, 230–236.

Partridge v. Goss, Ambl. 596. Atherley's Fam. Settlem. 481.) Nor is there any difference between a deed to defraud subsequent creditors, and one to defraud purchasers. (Anderson v. Roberts, 18 Johns. Rep. 515.) And a subsequent sale, after a voluntary settlement, creates the presumption of fraudulent intent in the previous settlement under the statute 27 Eliz. (Roberts on Fraud. Convey. 34.) If so, there is the same ground for similar presumption, where debts are contracted after a previous voluntary settlement. This must especially apply where the settlement is of all the settler's property, and the debts are large, and contracted almost immediately after the settlement.

3. But, supposing the settlement was fairly made, here is evidence of the collusion of the wife in the misrepresentation which was made to the prejudice of creditors, and she is bound by it. The principle is well established, that the property of a married woman, or that of an infant, may be rendered liable to creditors by their concurrence in acts of fraud. (Roberts, 522. Sudg. 480. Fonbl. 161. 1 Bro. Ch. 358. 2 Eq. Cas. Abr. 488.)

Mr. *Jones*, for the respondents, contra, insisted, that many of the cases cited on the other side, might be disposed of upon their peculiar circumstances, without touching upon the general doctrine for which he contended. He admitted, that whether a settlement was within the letter of the statutes relating to fraudulent conveyances or not, if there was actual fraud, a Court of equity would lay hold upon it, and redress the injured party. But the settler must be indebted at the time of the execution of the deed, in order to set it aside on that ground. And there must be an allegation and proof of that fact, or the bill will be dismissed. (Lush v. Wilkinson, 3 Ves. 384. Battersbee v. Farrington, Swanst. Rep. 106. Stevens v. Olive, 1 Bro. Ch. Cas. 90.) According to the original rudeness of the feudal system, the husband and wife were considered as one person, and all her rights of property were merged in his. But this is a doctrine wholly unknown to the civilized countries governed by the Roman Code; and Courts of equity have constantly struggled to mitigate its rigour. For this purpose, they consider the husband as a trustee for the wife, in order to preserve her property to her separate use. It does not follow, that because voluntary settlements are void against subsequent *purchasers*, that they are, therefore, void against subsequent creditors. There is a well-established and well-known distinction in this respect between the statute 13 Eliz. and the statute 27 Eliz. Taking the present case, then, as a mere voluntary conveyance on good consideration, independent of actual fraud, it must stand. Whatever discrepancy there may be in some of the old cases, this is now the settled doctrine in England.

Thus, in the case of a voluntary bond, and arrears under it, a conveyance to secure those arrears was sustained against creditors. (Gillam v. Locke, 9 Ves. 612.) So, also, the substitution of a voluntary bond by another is good. (Ex parte Barry, 19 Ves. 218.) And a post-nuptial settlement is only void as against creditors *at the time*. (Williams v. Kidney, 12 Ves. 136.) A voluntary conveyance in favour of strangers is valid against subsequent creditors, the party making it not being indebted at the time. (Holloway v. Millard, 1 Madd. Rep. 414. Hobbs v. Hull, 1 Cox, 445. Jones v. Bolter, id. 288.) And in a very recent case, a voluntary settlement by a husband, not indebted at the time, was established against subsequent creditors. (Battersbee v. Farrington, 1 Swanst. Rep. 106. See, also, Jones v. Bolter, 1 Cox, 288.) But this is not a mere voluntary conveyance on a moral obligation; it is for a valuable consideration in the wife's services. (3 P. Wms. 337.) The case cited from 1 Cas. in Ch. 117, has no bearing on the present question, and has been overruled since. Besides, the case of Slanning v. Style (3 P. Wms. 337), is better vouched, more modern, and of greater authority in every respect. The pretext of collusion in actual fraud between the husband and wife in the present case, is utterly devoid of any foundation in the evidence.

Mr. Chief Justice MARSHALL delivered the opinion of the Court, and, after stating the case, proceeded as follows:

The allegation, that the house in question was purchased with a view to engaging in mercantile speculations, and conveyed to the wife for the purpose of protecting it from the debts which might be contracted in trade, being positively denied, and neither proved by testimony, nor circumstances, may be put out of the case.

The allegation, that the defendant, Sally, aided in practising a fraud on the plaintiff, or in creating or giving countenance to the opinion, that the defendant, Joseph, was more wealthy than in truth he was, is also expressly denied, nor is there any evidence in support of it, other than the admission in her answer, that she had seen a letter written by him to the plaintiff, in the autumn of 1809, in which he gave, she thought, too flattering a picture of his circumstances. This admission is, however, to be taken with the accompanying explanation, in which she says, that she had dissuaded him, she had hoped successfully, from sending the letter in its then form.

This fact does not, we think, fix upon the wife such a fraud as ought to impair her rights, whatever they may be.

The plaintiff could not know that this letter was seen by the wife, or in any manner sanctioned by, or known to her. He had, therefore, no right to suppose that there was any waiver of her interest, whatever it

might be, nor had he right to assume anything against her, or her claims, in consequence of his receiving this letter. The case is very different from one in which the wife herself makes a misrepresentation, or hears and countenances the misrepresentation of her husband. The person who acts under such a misrepresentation, acts under his confidence in the good faith of the wife herself. He has a right to consider that faith as pledged; and if he is deceived, he may complain that she has herself deceived him. But, in this case, the plaintiff acted solely on his confidence in the husband. If he was deceived, the wife was not accessary to the deception. She contributed nothing towards it. When she saw and disapproved the letter written by her husband, what more could be required from her than to dissuade him from sending it in that form? Believing, as we are bound to suppose she did, that the letter would be altered, what was it incumbent on her to do? All know and feel, the plaintiff as well as others, the sacredness of the connexion between husband and wife. All know, that the sweetness of social intercourse, the harmony of society, the happiness of families, depend upon that mutual partiality which they feel, or that delicate forbearance which they manifest towards each other. Will any man say, that Mrs. Wheaton seeing this letter, remonstrating against it, and believing that it would be altered before sending it, ought to have written to this stranger in New York, to inform him that her husband had misrepresented his circumstances, and that credit ought not be given to his letters? No man will say so. Confiding, as it was natural and amiable in her to confide, in his integrity, and believing that he had imposed on himself, and meant no imposition on another, it was natural for her to suppose, that his conduct would be influenced by her representations, and that his letter would be so modified as to give a less sanguine description of his circumstances. We cannot condemn her conduct.

A wife who is herself the instrument of deception, or who contributes to its success, by countenancing it, may, with justice, be charged with the consequences of her conduct. But this is not such a case; and we consider the rights of Mrs. Wheaton as unimpaired by anything she is shown to have done.

Had the plaintiff heard this whole conversation, as stated in the answer; had he heard her express her disapprobation of the statements made in the letter, and dissuade her husband from sending it without changing its language; had he seen them separate, with a belief on her part, that the proper alterations would be made in it, he would have felt the injustice of charging her with participating in a fraud. That act cannot be criminal in a wife, because it was not communicated, which, if communicated, would be innocent. Admitting the representations of this letter to be

untrue, they cannot be charged on the wife, since she disapproved of them, and believed that it would not be sent in its exceptionable form.

So much is a wife supposed to be under the control of her husband, that the law in this District will not permit her estate to pass by a conveyance executed by herself, until she has been examined apart from her husband by persons in whom the law confides, and has declared to them that she has executed the deed freely, and without constraint. It would be a strange inconsistency, if a Court of Chancery were to decree, that the mere knowledge of a letter containing a misrepresentation respecting her property, should produce a forfeiture of it, although she had not concurred in its statements, had dissuaded her husband from sending it, and believed he had not sent it.

Without discussing the conduct of Mr. Wheaton in this transaction, it is sufficient to say, that it cannot affect the estate previously vested in his wife. The cause, therefore, must depend on the fairness and legality of the conveyance to her.

The allegation that the purchase-money was derived from her private individual funds, is supported by circumstances which may disclose fair motives for the conveyance, but which are not sufficient to prove that the consideration in point of law, moved from her. It must, therefore, be considered as a voluntary conveyance; and if sustained, must be sustained on the principle, that it was made under circumstances which do not impeach its validity when so considered.

The bill does not charge Mr. Wheaton with having been indebted in January, 1807, when this conveyance was made. The fact, that he was indebted, cannot be assumed. Indeed, there is no ground in the record for assuming it. The answers aver, that he was not indebted, and they are not contradicted by any testimony in the cause. His inability to pay his debts in 1811, or 1812, is no proof of his having been in the same situation in January, 1807. The debts with which he was then overwhelmed, were contracted after that date. This conveyance, therefore, must be considered as a voluntary settlement made on his wife, by a man who was not indebted at the time. Can it be sustained against subsequent creditors?

It would seem to be a consequence of that absolute power which a man possesses over his own property, that he may make any disposition of it in which he does not interfere with the existing rights of others, and such disposition, if it be fair and real, will be valid. The limitations on this power are those only which are prescribed by law.

The law which is considered by the plaintiff's counsel as limiting this power in the case at bar, is the statute of 13 Eliz. ch. 5, against fraudulent conveyances, which is understood to be in force in the county of Washington. That statute enacts, that "for the avoiding and abolish-

ing of feigned, covenous, and fraudulent feoffments," &c. "which feoffments," &c. "are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent, to delay, hinder, or defraud creditors, and others, of their just and lawful actions," &c., "not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all plain dealing, bargaining, and chevisance between man and man. Be it, therefore declared," &c. "that all and every feoffment," &c. "made to, or for, any intent or purpose before declared and expressed, shall be from henceforth deemed and taken, (only as against that person," &c. "whose actions," &c. "shall or might be in any wise disturbed," &c.) "to be clearly and utterly void."

In construing this statute, the Courts have considered every conveyance not made on consideration deemed valuable in law, as void against previous creditors. With respect to subsequent creditors, the application of this statute appears to have admitted of some doubt.

In the case of Shaw v. Standish (2 Vern. 326), which was decided in 1695, it is said by counsel, in argument, "that there was a difference between purchasers and creditors, for the statute of 13 Eliz. makes not every voluntary conveyance, but only fraudulent conveyances, void as against creditors; so that, as to creditors, it is not sufficient to say the conveyance was voluntary, but must show they were creditors at the time of the conveyance made, or, by some other circumstances, make it appear, that the conveyance was made with intent to deceive or defraud a creditor."

Although this distinction was taken in the case of a subsequent purchaser, and was, therefore, not essential in the cause which was before the Court, and is advanced only by counsel in argument, yet it shows that the opinion, that a voluntary conveyance was not absolutely void as to subsequent creditors, prevailed extensively.

In the case of Taylor v. Jones (2 Atk. 600), a bill was brought by creditors to be paid their debts out of stock vested by the husband, in trustees, for the benefit of himself for life, of his wife for life, and, afterwards, for the benefit of children. Lord Hardwicke decreed the deed of trust to be void against subsequent as well as preceding creditors.

There are circumstances in this case which appear to have influenced the Chancellor, and to diminish its bearing, on the naked question of a voluntary deed being absolutely void, merely because it is voluntary.

Lord Hardwicke said, "now, in the present case, here is a trust left to the husband in the first place, under this deed; and his continuing in possession is fraudulent as to the creditors, the plaintiffs."

His lordship, afterwards, says, "and it is very probable, that the creditors, after the settlement, trusted Edward Jones, the debtor, upon

the supposition, that he was the owner of this stock, upon seeing him in possession."

This case, undoubtedly, if standing alone, would go far in showing the opinion of Lord Hardwicke to have been, that a voluntary conveyance would be void against subsequent, as well as preceding creditors; but the circumstances, that the settler was indebted at the time, and remained in possession of the property as its apparent owner, were certainly material; and, although they do not appear to have decided the cause, leave some doubt how far this opinion should apply to cases not attended by those circumstances.

This doubt is strengthened by observing Lord Hardwicke's language, in the case of Russell v. Hammond. His lordship said, "though he had hardly known one case, where the person conveying was indebted at the time of the conveyance, that the conveyance had not been fraudulent, yet that, to be sure, there were cases of voluntary settlements that were not fraudulent, and those were, where the persons making them were not indebted at the time, in which case, subsequent debts would not shake such settlements."

It would seem, from the opinion expressed in this case, that Taylor v. Jones must have been decided on its circumstances.

The cases of Stillman v. Ashdown, and of Fitzer v. Fitzer and Stephens, reported in 2 Atk. have been much relied on by the appellant; but neither is thought to establish the principle for which he contends. In Stillman v. Ashdown, the father had purchased an estate, which was conveyed jointly to himself and his son, and of which he remained in possession. After the death of the father, the son entered on the estate, and the bill was brought to subject it to the payment of a judgment against the father, in his lifetime. The Chancellor directed the estate to be sold, and one moiety to be paid to the creditor, and the residue to the son.

In giving his opinion, the Chancellor put the case expressly on the ground, that this, from its circumstances, was not to be considered as an advancement to the son. He says, too, "a father, here, was in possession of the whole estate, and must, necessarily, appear to be the visible owner of it; and the creditor too would have had a right, by virtue of an elegit, to have laid hold of a moiety, so that it differs extremely from all the other cases."

In the same case, the Chancellor lays down the rule which he supposed to govern in the case of voluntary settlements. "It is not necessary," he says, "that a man should be actually indebted at the time of a voluntary settlement to make it fraudulent; for, if a man does it with a view to his being indebted at a future time, it is equally fraudulent, and ought to be set aside."

The real principle, then, of this case is, that a voluntary conveyance to a wife or child, made by a person not indebted at the time, is valid, unless it were made with a view to being indebted at a future time.

In the case of Fitzer v. Fitzer and Stephens, the deed was set aside, because it was made for the benefit of the husband, and the principal point discussed was the consideration. The Lord Chancellor said, "it is certain, that every conveyance of the husband that is voluntary, and for his own benefit, is fraudulent against creditors." After stating the operation of the deed, he added, "then consider it as an assignment which the husband himself may make use of to fence against creditors, and, consequently, it is fraudulent."

This case, then, does not decide, that a conveyance to a wife or child, is fraudulent against subsequent creditors because it is voluntary, but because it is made for the benefit of the settler, or with a view to the contracting of future debts.

The case of Peacock v. Monk, in 1 Vesey, turned on two points. The first was, that there was a proviso in the deed which amounted to a power of revocation, which, the Chancellor said, had always been considered as a mark of fraud; and 2. That, being executed on the same day with his will, it was to be considered as a testamentary act.

In the case of Walker v. Burrows (1 Atk. 94), Lord Hardwicke, adverting to the stat. 13 Eliz., said, that it was necessary to prove, that the person conveying was indebted at the time of making the settlement, or *immediately afterwards*, in order to avoid the deed.

Lord Hardwicke maintained the same opinion in the case of Townsend v. Windham, reported in 2 Vesey. In that case, he said, "if there is a voluntary conveyance of real estate, or chattel interest, by one not indebted at the time, though he afterwards become indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good; but if any mark of fraud, collusion, or intent to deceive subsequent creditors, appears, that will make it void; otherwise not, but it will stand, though afterwards he becomes indebted."

A review of all the decisions of Lord Hardwicke, will show his opinion to have been, that a voluntary conveyance to a child by a man not indebted at the time, if a real and *bona fide* conveyance, not made with a fraudulent intent, is good against subsequent creditors.

The decisions made since the time of Lord Hardwicke, maintain the same principle.

In Stephens v. Olive (2 Bro. Ch. Rep. 90), Edward Olive, by deed, dated the 7th of May, 1774, settled his real estate on himself for life, remainder to his wife for life, with remainders over for the benefit of his children. By another deed, of the same date, he mortgaged the same

estate to Philip Mighil, to secure the repayment of 500 pounds, with interest. On the 6th of March, 1775, he became indebted to George Stephens. This suit was brought by the executors of George Stephens to set aside the conveyance, because it was voluntary and fraudulent as to creditors. The Master of the Rolls held, "that a settlement after marriage, in favour of the wife and children, by a person not indebted at the time, was good against subsequent creditors;" "and that, although the settler was indebted, yet, if the debt was secured by mortgage, the settlement was good."

In the case of Lush v. Williamson, the husband conveyed leasehold estate in trust, to pay, after his decease, an annuity to his wife for life, and after her decease, the premises charged with the annuity for himself and his executors. A bill was brought by subsequent creditors to set aside this conveyance. The Master of the Rolls sustained the conveyance, and, after expressing his doubts of the right of the plaintiff to come into Court without proving some antecedent debt, said, "a single debt will not do. Every man must be indebted for the common bills for his house, though he pays them every week. It must depend upon this, whether he was in insolvent circumstances at the time."

In the case of Glaister v. Hewer (8 Ves. 199), where the husband, who was a trader, purchased lands, and took a conveyance to himself and wife, and afterwards became bankrupt and died, a suit was brought by the widow, against the assignees, to establish her interest. Two questions arose: 1. Whether the estate passed to the assignees under the statute of 1 James I. ch. 15; and, if not, 2. Whether the conveyance to the wife was void as to creditors.

The Master of the Rolls decided both points in favour of the widow. Observing on the statute of the 13th of Eliz., he said, that the conveyance would be good, supposing it to be perfectly voluntary; "for," he added, "though it is proved that the husband was a trader at the time of the settlement, there is no evidence that he was indebted at that time; and it is quite settled, that, under that statute, the party must be indebted at the time."

On an appeal to the Lord Chancellor, this decree was reversed, because he was of opinion, that the conveyance was within the statute of James, though not within that of Elizabeth.

In the case of Battersbee v. Farrington and others (1 Swanst. 106), where a bill was brought to establish a voluntary settlement in favour of a wife and children, the Master of the Rolls said, "No doubt can be entertained on this case, if the settler was not indebted at the date of the deed. A voluntary conveyance by a person not indebted, is clearly good against future creditors. That constitutes the distinction between the two statutes. Fraud vitiates the transaction; but a set-

tlement not fraudulent, by a party not indebted, is valid, though voluntary."

From these cases it appears, that the construction of this statute is completely settled in England. We believe, that the same construction has been maintained in the United States. A voluntary settlement in favour of a wife and children, is not to be impeached by subsequent creditors, on the ground of its being voluntary.

We are to inquire, then, whether there are any badges of fraud attending this transaction which vitiate it.

What are those badges?

The appellant contends, that the house and lot contained in this deed, constituted the bulk of Joseph Wheaton's estate, and that the conveyance ought, on that account, to be deemed fraudulent.

This fact is not clearly proved. We do not know the amount of his estate in 1807; but, if it were proved, it does not follow that the conveyance must be fraudulent. If a man, entirely encumbered, has a right to make a voluntary settlement of a part of his estate, it is difficult to say how much of it he may settle. In the case of Stephens v. Olive, the whole real estate appears to have been settled, subject to a mortgage for a debt of 500 pounds; yet, that settlement was sustained. The proportional magnitude of the estate conveyed may awaken suspicion, and strengthen other circumstances; but, taken alone, it cannot be considered as proof of fraud. A man who makes such a conveyance, necessarily impairs his credit, and, if openly done, warns those with whom he deals not to trust him too far; but this is not fraud.

Another circumstance on which the appellant relies, is the short period which intervened between the execution of this conveyance and the failure of Joseph Wheaton.

We admit that these two circumstances ought to be taken into view together; but do not think that, as this case stands, they establish a fraud.

There is no allegation in the bill, nor is there any reason to believe, that any of the debts which pressed upon Wheaton at the time of his failure, were contracted before he entered into commerce in 1809, which was more than two years after the execution of the deed. It appears that, at the date of its execution, he had no view to trade. Although his failure was not very remote from the date of the deed, yet the debts and the deed can in no manner be connected with each other; they are as distinct as if they had been a century apart. In the case of Stephens v. Olive, the debt was contracted in less than twelve months after the settlement was made; yet it could not overreach the settlement.

These circumstances, then, both occurred in the case of Stephens v.

Olive, and were not considered as affecting the validity of that deed. The reasons why they should not be considered in this case as indicating fraud, are stronger than in England. In this District, every deed must be recorded in a place prescribed by law. All titles to land are placed upon the record. The person who trusts another on the faith of his real property knows where he may apply to ascertain the nature of the title held by the person to whom he is about to give credit. In this case, the title never was in Joseph Wheaton. His creditors, therefore, never had a right to trust him on the faith of this house and lot.

A circumstance much relied on by the appellant, is the controversy which appears to have subsisted about that time between the post-office department and Wheaton. This circumstance may have had some influence on the transaction; but the court is not authorized to say that it had. The claim of the post-office department was not a debt. On its adjustment, Wheaton was proved to be the creditor instead of debtor.

It would be going too far to say, that this conveyance was fraudulent to avoid a claim made by a person who was, in truth, the debtor, where there is nothing on which to found the suspicion, but the single fact that such a claim was understood to exist.

The claim for the improvements stands on the same footing with that for the lot. They appear to have been inconsiderable, and to have been made before these debts were contracted.

Decree affirmed.(*a*)

SALMON *v.* BENNETT.

In the Supreme Court of Errors of the State of Connecticut.

JUNE, 1816.

[REPORTED, 1 CONNECTICUT, 525–558.]

Where a conveyance was made to a child, in consideration of natural affection, without any fraudulent intent, at a time when the grantor

(*a*) Mr. Atherley, in his able treatise on the Law of Marriage and other Family Settlements, controverts, on principle, the doctrine that a voluntary settlement is good against subsequent creditors, if the settler was not indebted at the time he made it, although he admits, that it is the law in England, as established by the decisions of the Courts of equity, pp. 230–237. 175, 176. 209–220. See also Reade v. Livingston, 3 Johns. Ch. Rep. 481.—(*Note by Mr. Wheaton.*)

was free from embarrassment, the gift constituting but a small part of his estate, and being a reasonable provision for the child; it was held, that such conveyance was valid against a creditor of the grantor, whose claim existed when the conveyance was made.

THIS was an action of ejectment for three pieces of land in Weston. The general issue was pleaded, and closed to the court by agreement of the parties. The cause was heard at Fairfield, December term, 1815, by Edmond, Smith, and Hosmer, Js.

It was admitted, by both parties, that Stephen Sherwood was formerly the owner of the demanded premises. The plaintiff claimed title thereto, by virtue of the levy of an execution in his favour against Stephen Sherwood in 1814. The defendant claimed title by virtue of a deed from Stephen Sherwood to his son Salmon Sherwood, dated the 17th of December, 1798; and a deed from Salmon Sherwood to the defendant, dated the 6th of March, 1802. The deed from Stephen Sherwood to his son was given for the consideration of natural affection only; and this fact was well known to the defendant when he made the purchase and took the conveyance from Salmon Sherwood. The plaintiff contended, that his demand against Stephen Sherwood, on which said execution was afterwards obtained, arose long before and subsisted at the execution of the first mentioned deed; and in proof of this, the plaintiff introduced the record of a suit in chancery before the superior court, in December, 1809, brought by him against Stephen Sherwood, complaining of false and fraudulent representations, in the sale of Virginia lands, in December, 1794, respecting their situation and value, together with certain defects in the title, and praying for a reimbursement of the purchase-money with interest, which was accordingly decreed. The defendant proved, that Stephen Sherwood, when he executed the deed of gift to his son, was not indebted to any person, except to the plaintiff, in the manner stated; and that the land thus conveyed did not contain more than one-eighth part of his real estate. But it was admitted, that long before the levy of said execution, he had conveyed, by several deeds, all his real estate, and was, at that time, entirely destitute of property. Upon these facts the plaintiff contended, that the deed of Stephen Sherwood to Salmon Sherwood was fraudulent as against the plaintiff; and even if there was no actual fraud, yet being voluntary, it was void. The defendant, on the other hand, insisted that the deed was not made to defraud creditors, and was not void. The court reserved the case for the consideration and advice of the nine Judges.

Daggett and *N. Smith*, for the plaintiff, contended, 1. That a deed

of gift is void against any creditor who is one at the time of the conveyance. In Westminster Hall this proposition would not admit of a doubt. The case of Doe d. Otley v. Manning, 9 East, 59, goes further, and decides that a conveyance made in consideration of natural affection only, the grantor not then being indebted, and there being no fraud in the transaction, is void against a *subsequent* purchaser for a valuable consideration. In the principal case, the grantor was indebted at the time of the conveyance. He then had the plaintiff's money in his hands, which he was liable to refund. The plaintiff's claim existed as soon as he bought and paid for Virginia lands, under false and fraudulent representations, and with a defective title. The decree in chancery afterwards enforced that claim, but did not create it. The plaintiff was an *equitable creditor* before the decree. Can then a father, being indebted in equity, make a gift of land to his son, in consideration of natural affection only, which shall be valid against such equitable creditor? There is the same reason why a conveyance should be void against a claim in equity as at law. If the conveyance in question be not void, all voluntary conveyances, without actual fraud, must be valid. In Parker v. Proctor, 9 Mass. Rep. 390, the conveyance was held good; but there the creditor became such after the conveyance, and with notice of it.

2. That the defendant having purchased the premises of the voluntary grantee, knowing that the conveyance to him was voluntary, had no better title than he had. This point is established by the case of Preston v. Crofut, decided in this court, November term, 1811. That case, indeed, went much farther; for it was there determined, that a bona fide purchaser, under a fraudulent grantee, *without notice of the fraud*, could not hold against the creditors of the fraudulent grantor. In the present case, the conveyance was constructively fraudulent, because it was *voluntary;* of which *the defendant had full knowledge.* This was at least sufficient to put him upon his guard; which is all the notice that chancery requires. With such notice, he must stand on the same ground as the grantee in the voluntary deed.

Sherman and *T. S. Williams*, contra. 1. The plaintiff claims as a *creditor* of Stephen Sherwood, and not as a *purchaser*. The whole class of decisions upon the 27 Eliz. c. 4, which relates to *purchasers*, may, therefore, be laid out of the case. The strong case of Doe d. Otley v. Manning, so much relied on by the plaintiff's counsel, is one of these. The question then is, whether a voluntary conveyance, is, under all circumstances, void, within the 13 Eliz. c. 5, or our statute against fraudulent conveyances derived (tit. 76, s. 1) from it? There is no case to be found in the affirmative of this question. In Sagitary v. Hyde, 2 Vern.

44, it is said by the court, "that every voluntary conveyance is not therefore fraudulent; but a voluntary conveyance, if there was a reasonable cause for the making of it, may be good and valid against a creditor." The circumstance that the conveyance was a *voluntary* one, affords a presumption of fraud. So does the circumstance that the grantor was *indebted* at the time. But in either case, the presumption may be repelled. Newland on Contr. 384 to 388. Russel v. Hammond, 1 Atk. 15. Walker v. Burrows, 1 Atk. 93. Stephen v. Olive, 2 Bro. Ch. Ca. 90. Lush v. Wilkinson, 5 Ves. jun. 384, 387. Parker v. Proctor, 9 Mass. Rep. 390. Bennett v. Bedford Bank, 11 Mass. Rep. 421. Verplank v. Sterry, 12 Johns. Rep. 558.

2. The plaintiff had no *debt* against Stephen Sherwood at the time of the voluntary conveyance. He had at most only a claim for damages arising from a *tort*. This did not constitute him a *creditor*. Lewkner v. Freeman, Prec. Chanc. 105. Fox v. Hills, 1 Con. Rep. 295. 299. 306. 303, et seq. But in fact he had no *legal* claim whatever, as was decided in Sherwood v. Salmon, 3 Day's Ca. 128. If his case was such as would entitle him to relief in chancery, it was only on certain conditions. He had no debt, even after the decree, until he reconveyed the land; and it was optional with him to reconvey or not. He might have sold the land for more than he gave for it; and it might cost him more to get it back than the decree was worth. He might not elect to become a creditor at all.

3. The defendant being a purchaser for a valuable consideration, with notice only of the simple fact that his grantor held under a voluntary conveyance, is to be protected in his title. Andrew Newport's case, Skin. 423. S. C. by the name of Smartle v. Williams, 3 Lev. 387. S. C. by the name of Smart v. Williams, Comb. 247. Prodgers v. Langhan, 1 Sid. 133. Porter v. Clinton, Comb. 222. Kirk v. Clark, Prec. Chan. 275. Doe d. Bothel v. Martyr, 1 New Rep. 332. George v. Milbanke, 9 Ves. jun. 190. Jackson d. Bartlett v. Henry, 10 Johns. Rep. 185. 197. Fletcher v. Peck, 6 Cranch, 87. 133. 135. Hamilton & al. v. Greenwood & al., 1 Bay, 171.

SWIFT, C. J. Fraudulent and voluntary conveyances are void as to creditors; but in the case of a voluntary conveyance, a distinction is made between the children of the grantor and strangers. Mere indebtedness at the time will not, in all cases, render a voluntary conveyance void as to creditors, where it is a provision for a child in consideration of love and affection; for if all gifts by way of settlements to children, by men in affluent and prosperous circumstances, were to be rendered void upon a reverse of fortune, it would involve children in the ruin of their parents, and in many cases might produce a greater evil than that

intended to be remedied. Nor will all such conveyances be valid; for then it would be in the power of parents to provide for their children at the expense of their creditors. Nor is it necessary that an actual or express intent to defraud creditors should be proved; for this would be impracticable in many instances, where the conveyance ought not to be established. It may be collected from the circumstances of the case. But in all cases where such intent can be shown, the conveyance would be void, whether the grantor was indebted or not. In order to enable parents to make a suitable provision for their children, and to prevent them from defrauding creditors, these principles have been adopted, which appear to be founded in good policy. Where there is no actual fraudulent intent, and a voluntary conveyance is made to a child in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift is a reasonable provision for the child according to his state and condition in life, comprehending but a small portion of his estate, leaving ample funds unincumbered for the payment of the grantor's debts; then such conveyance will be valid against conveyances existing at the time. But though there be no fraudulent intent, yet if the grantor was considerably indebted and embarrassed at the time, and on the eve of bankruptcy; or if the value of the gift be unreasonable, considering the condition in life of the grantor, disproportioned to his property, and leaving a scanty provision for the payment of his debts; then such conveyance will be void as to creditors. In the case under consideration, it is manifest there was no fraudulent intent; the gift constituted a small part of his estate; was a reasonable provision by the father for the son, according to their condition and circumstances; and much more than sufficient for the payment of the debt due to the plaintiff remained in the hands of the grantor. I am, therefore, of opinion that the indebtedness of the grantor at the time of the conveyance, the only circumstance that can operate against it, is not such as ought to set it aside, especially as a great length of time has elapsed, and the estate has passed into the hands of a bona fide purchaser, for a valuable consideration.

In this opinion TRUMBULL, EDMOND, SMITH, BRAINARD, BALDWIN, GODDARD, and HOSMER, JS., concurred.

GOULD, J. There is no case, I trust, in which a conveyance to a child, founded upon natural affection, has been adjudged void, as to *creditors*, for the mere want of a valuable consideration; though there are several adjudications the other way. The question in Doe v. Manning, it should be recollected, arose under the statute 27 Eliz.: and it is familiar to the profession, that *purchasers*, for whose protection that statute was made,

have always been more favoured in the construction of it, than *creditors*, under that of the 13 Eliz. The former not having trusted to the personal responsibility of the grantor, but having advanced money only upon a conveyance of the *specific* property in controversy, and in confidence of acquiring an immediate title to it, are regarded as having a higher equity than general creditors. This diversity of construction is agreeable to all analogy. Hence, the construction of the statute 27 Eliz. has always been more rigorous, as against conveyances not founded on valuable consideration, than that of the statute 13 Eliz.

As to *creditors*, the want of a valuable consideration may be, under circumstances, a *badge* of fraud; but does not, *per se*, render the conveyance fraudulent. Whether an actual fraudulent *intent* is necessary, to render it so, is a distinct question. It is sufficient, for the present purpose, that *something more* than the mere absence of a valuable consideration, must appear, in order to invalidate such a grant. Evidence of indebtedness, at the time, at least, and, as I conceive, of indebtedness, amounting, or approximating, to embarrassment, must be shown. For if any degree of indebtedness, however small, would defeat such conveyances; they would, virtually, be *per se* fraudulent: since no individual, perhaps, or at least, hardly any one, in the community, is at any time, *absolutely* free from debt. And as I discover in this case no such evidence, as I suppose, the rule requires, I cannot pronounce the conveyance to Salmon Sherwood, fraudulent. Holding this opinion, it is, of course, unnecessary for me to consider, whether the deed to the defendant would be void, as against creditors, supposing the first conveyance to have been so. Judgment to be given for the defendant.

By the statute, 13 Elizabeth c. 5, it is enacted, that every gift, conveyance, &c. of lands or chattels, or of any profit or charge out of them, by writing or otherwise, and every bond, suit, judgment and execution, had or made to or for the intent or purpose to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, damages, &c., shall be deemed, only as against those persons, their heirs, successors, executors, administrators and assigns, whose actions, &c., are delayed or defrauded, utterly void: with a *proviso*, that this shall not extend to any estate or interest, upon good consideration and *bonâ fide*, lawfully conveyed or assured to any person, not having, at the time, any manner of notice or knowledge of such fraud. By statute, 27 Elizabeth, c. 4, every conveyance, grant, estate, charge, incumbrance and limitation of uses, of, in, or out of lands, had or made for the intent and of purpose to defraud such as have purchased or shall purchase the same, or any rent, profit or commodity in or out of them, is, only as against those persons, their heirs, &c. and all claiming through them who have purchased, or shall so purchase, for money or other good consideration,

utterly void; with a *proviso*, that this shall not defeat any conveyance, &c., made upon good consideration and *bonâ fide*.

At common law, previously to these statutes, every conveyance fraudulent in fact was void as against the interest attempted to be defrauded; but, fraud, then, was always a question of fact for the jury (*Avery* v. *Street*, 6 Watts, 247, 248,) and only, existing and not subsequent creditors and purchasers, could avoid such conveyances; *Doyle, &c.*, v. *Sleeper, &c.*, 1 Dana, 531, 533; *O'Daniel* v. *Crawford*, 4 Devereux, 197, 203.

But it is not to be supposed that, now, in cases of fraud not within these statutes, courts of law or equity are limited by the bounds of the common law as it was understood before these statutes; on the contrary, the same principles essentially are applicable in cases of fraud not within these statutes, as in cases that fall strictly within them; *Taylor* v. *The Executor of Heriot*, 4 Dessaussure, 227, 234; *Whittlesey* v. *McMahon*, 10 Connecticut, 138, 141; *Howard* v. *Williams*, 1 Bailey, 575, 580; and this is what is meant by the remark of Lord Mansfield in *Cadogan* v. *Kennet*, Cowper, 434, that "The principles and rules of the common law, as *now* universally known and understood, are so strong against fraud in every shape, that the common law *would have* attained every end proposed by the statutes 13 El. c. 5, and 27 El. c. 4;" an opinion generally assented to; *Hamilton* v. *Russell*, 1 Cranch, 309, 316; *Wilt* v. *Franklin*, 1 Binney, 502, 514, 523; *Hudnal* v. *Wilder*, 4 M'Cord, 295, 297. See the discussion in *Adams* v. *Broughton, Adm'r*, 13 Alabama, 731, 739.

Under the former of these statutes, the distinction established in *Sexton* v. *Wheaton*, between previous and subsequent creditors, is universally received; and while, as against the latter, a conveyance is not void unless actually fraudulent, it is admitted to be a *general* principle in the courts of this country (except New York, where fraud is always a question of fact), that as against creditors existing at the time of the conveyance, a voluntary conveyance is fraudulent in law, and void; but there is some diversity in the different states, as to the degree of strictness with which this general principle is to be applied. In the celebrated case of *Reade* v. *Livingston*, 3 Johnson's Chancery, 481, 500, it was declared that the rule had no qualifications whatever, and that a voluntary conveyance is fraudulent in respect to existing debts, by presumption of law, without regard to the amount of the debts, the extent of the property in settlement, or the circumstances of the party: and this strict rule, though now abolished in New York, prevails in Alabama and North Carolina; *Miller* v. *Thompson*, 3 Porter, 196; *Moore* v. *Spence*, 6 Judges' Alabama, 506; *Costillo & Keho* v. *Thompson*, 9 Id. 937, 945; *O'Daniel* v. *Crawford*, 4 Devereux, 197; *Kissam* v. *Edmundson et al.*, 1 Iredell's Equity, 180; and apparently in Mississippi; *Bogard* v. *Gardley*, 4 Smedes & Marshall, 302, 310. In South Carolina, some exceptions are admitted to this rule, but the later cases limit them very narrowly; a voluntary conveyance is held to be void against existing creditors, except where the indebtedness is utterly inconsiderable when compared with the donor's property, such as that which is contracted for the current expenses of a family; *Izard* v. *Izard*, 1 Bailey's Equity, 228, 236; *Beckham and Wife* v. *Secrest*, 2 Richardson's Equity, 54; *Davidson & Simpson* v. *Graves*, Riley's Chancery, 219, 234; *McElwee* v. *Sutton*, 2 Bailey, 128, 130; *Cordery* v. *Zealy*, Id. 206, 208, and see *Ingram* v. *Phillips*, 5 Strobhart, 200. Elsewhere, however, though the general principle is admitted, that a voluntary conveyance is void against existing creditors; *Chapin* v. *Pease*, 10 Connecticut, 69, 73; *Parsons* v. *M'Knight*, 8 New Hampshire, 35; *Carlisle* v. *Rich*, Id. 44; *Smith* v. *Smith*, 11 Id.

460, 465; *Hoye* v. *Penn*, 1 Bland, 29, 32; *Bank of U. S.* v. *Ennis & Sandige*, Wright, 605; *Gunn* v. *Butler*, 18 Pickering, 248; *Howe* v. *Ward*, 4 Greenleaf, 195; *Emery* v. *Vinall*, 26 Maine, 295, 305; *Hunters* v. *Waite*, 3 Grattan, 26; *Cosby, &c.* v. *Ross's Adm'r*, 3 J. J. Marshall, 290; *Thomas* v. *De Graffenreid*, 17 Alabama, 603, 611; *Easley* v. *Dye*, 14 Id. 159, 163; *High et al.* v. *Nelms*, Id. 350; *Corprew* v. *Arthur et als.*, 15 Id. 525, 528; and that in all cases of this kind, the question is one of law; *Beers* v. *Botsford*, 13 Connecticut, 146, 154; *Sherwood* v. *Marwick*, 5 Greenleaf, 295, 302; *Gardiner Bank* v. *Wheaton et al.*, 8 Id. 373, 381; see also *Jones* v. *Spear & Tr.*, 21 Vermont, 426, 431; and *Sturdivant* v. *Davis*, 9 Iredell, 365: yet it is subject to the modification established by *Salmon* v. *Bennett;* that a voluntary conveyance to a child by a father who is not at the time in embarrassed circumstances, if the conveyance be not more than a reasonable provision for the child, considering the grantor's circumstances and position, and if other property be retained amply sufficient beyond all doubt to pay all the grantor's debts, is not fraudulent; the matter, in the case of a child, being thus made a question of reasonable tendency, and convenient, practicable justice, and depending on the ability of the debtor, at the time, to withdraw the amount of the donation from his estate, without the least probable hazard to his creditors, or in any material degree lessening their then prospects of payment; *Salmon* v. *Bennett; Abbe* v. *Newton*, 19 Connecticut, 20, 27; *Kipp* v. *Hanna*, 2 Bland, 26 33; *Posten* v. *Posten*, 4 Wharton, 27, 42; *Miller* v. *Pearce*, 6 Watts & Sergeant, 97, 401; (and see *Kimmel* v. *M'Right*, 2 Barr, 38;) *Bracket et ux.* v. *Waite et al.*, 4 Vermont, 389; *Smith* v. *Lowell*, 6 New Hampshire, 67, 69; *Brice* v. *Myers et al.*, 5 Ohio, 121, 125; *Miller & others* v. *Wilson & others*, 14 Id., 108, 114; *Dodd* v. *M'Craw*, 3 English, 84, 105; *Smith* v. *Yell*, Id. 470, 475; *Worthington & Anderson* v. *Shipley*, 5 Gill. 449; *Trimble* v. *Ratcliff*, 9 B. Monroe, 511, 514; *Huston's Adm'r* v. *Cantril et al.*, 11 Leigh, 137, 159; and *Hutchison et al.* v. *Kelly*, 1 Robinson's Virginia, 125, in which cases, Tucker, P., and Baldwin, J., were in favour of this exception, against Stanard, J., who held to the strict rule of *Reade* v. *Livingston*. See, again, the discussions in *Hunters* v. *Waite*, 3 Grattan, 26. In some of the states in which the general rule has been adopted, as Massachusetts and Maine, no occasion has arisen requiring the exception to be defined. In the federal courts, the same exception to the generality of the rule may be considered as established; the *dicta*, indeed in *Sexton* v. *Wheaton*, and in *Ridgeway* v. *Underwood*, 4 Washington, 129, 137, are without limitation, that every voluntary conveyance is fraudulent as against existing creditors, because voluntary, and in *Backhouse's Administrator* v. *Jett's Administrator et al.*, 1 Brockenbrough, 501, 511, it was decided, that a conveyance of half his estate by a father to his son as an advancement, though there was no suspicion whatever of fraud or bad faith, was void in law as against a prior creditor; yet in *Hopkirk* v. *Randolph et al.*, 2 Id. 133, the difference was recognised by Marshall, C. J., between a general principle, and one universal in its application, and so inflexible as to admit no case to be withdrawn from its operation; and he upheld a gift of two slaves and a riding-horse by a father in prosperous circumstances to his daughter, on the ground that a customary and inconsiderable gift from a parent to a child of such slight value as to come under the name of a present, could not be considered as falling within the terms or the reason of the rule against fraudulent conveyances; and the remarks made by this great judge, pp. 137, 138, upon the construction proper to be put upon the statute, were the matter unclogged by authorities, may be regarded as an

unanswerable vindication of the exception or modification above noted, on grounds of reason, convenience and equity, against the stringency of *Reade* v. *Livingston*. See a similar view of fraud, under the bankrupt law, *In the matter of Grant*, 2 Story, 313, 319. The case of *Hinde's Lessee* v. *Longworth*, 11 Wheaton, 199, has been erroneously supposed in some of the discussions in New York, to have laid down a new doctrine, that fraud was, in relation to all creditors, a question of fact for the jury: in that case, the creditor relied upon evidence of *fraud in fact*, and did so, either because, as there was evidence to show, the conveyance was not voluntary, but upon a consideration of indebtedness, or because, as was stated by counsel, the statute 13 El. c. 5, was not in force in the state in which this transaction took place, or because the creditor was a subsequent one, for though copies of accounts spread upon the record and brought into the Supreme Court, showed that the cause of action had arisen before the conveyance, yet, below, these accounts were not in evidence, and nothing was exhibited but the record of the subsequent judgment: it was in reference solely to the admissibility of evidence of the grantor's condition, for the purpose of rebutting evidence of *actual* fraud, that the court said, per Thompson, J., that a voluntary deed to a child is only a presumption and badge of fraud, which may be rebutted by evidence to the jury of the grantor's circumstances; and in another part of the opinion the principle of *Sexton* v. *Wheaton* is assented to as the law of the court: the case in fact has no bearing whatever upon the validity of voluntary conveyances in point of law as against previous creditors:—See also, *Clarke et al.* v. *White*, 12 Peters, 179, 198.—In New York, in *Jackson ex. dem. Van Wyck* v. *Seward*, 5 Cowen, 67, the principle of *Reade* v. *Livingston*, was approved and applied by the Supreme Court, and a conveyance to children, which the court considered voluntary, was adjudged fraudulent in law and void against a prior creditor; but this decision was reversed almost unanimously in the Court of Errors, 8 Cowen, 407; two of the Senators, Spencer and Allen, maintaining that fraud is always a matter of *fact*, and that there is no such thing as fraud in law. This point being complicated with some others in that case, there has been some dispute as to what principle was settled by that decision of the Court of Errors; but, notwithstanding the doubts of Bronson, J., and Tracy, Senator, in *Van Wyck* v. *Seward*, 18 Wendell, 375, 393, 405, and of Walworth, C., in *Hanford* v. *Artcher*, 4 Hill's N. Y. 273, 280, as to what was adjudicated in that case, it has been agreed in all the courts of that state, that by that decision, the distinction between fraud in fact and in law was exploded, and that the question is in all cases one of fact for the jury, the circumstance that the deed is voluntary being merely *primâ facie* evidence of fraud. This was the principle and practice adopted by the Supreme Court, afterwards in *Jackson ex. dem. Peck* and *Mabee* v. *Peck*, 4 Wendell, 301, and *Jackson ex. dem. Bigelow* v. *Timmerman*, 7 Id. 436; S. C. 12 Id. 299; by the Vice-Chancellor and Chancellor, in *Van Wyck* v. *Seward*, 1 Edwards, 327; S. C. 6 Paige, 62, upon a bill filed after the decision in the Court of Errors, to set aside the conveyance as voluntary and fraudulent; and by the Court of Errors in S. C. on appeal, 18 Wendell, 375, notwithstanding the earnest arguments of Bronson, J., to the contrary. The principle that fraudulent intent in conveyances is in all cases a question of fact, and that no conveyance is to be adjudged fraudulent solely on the ground that it is not founded on a valuable consideration, is now enacted by the Revised Statutes, vol. 2, p. 137, tit. 3, s. 4; but it is evident that it had previously been established as a

common law rule, by the first decision of the Court of Errors in *Seward* v. *Jackson*, 8 Cowen, 407. These attempts, however, to reduce fraud in all cases to a matter of actual intention, are not only opposed to all principle and authority, to common justice and to common sense, but have been frustrated by the very forms and constitution of the courts, and cannot be successful until the respective functions of the judge and jury are changed; for the court obviously possesses the same control over the subject in the form of a direction to the jury as to the force of presumptions on a question of fraudulent intent, as they formerly exercised through the medium of a peculiar definition of fraud, and to prevent irregularity and injustice, this control must be exercised. And this practice is established by *Vance* v. *Phillips*, 6 Hill, 433, where it is decided that though the question of fraudulent intent is now one of fact for the jury, yet if the jury come to a wrong conclusion on the subject, the verdict will be set aside as against the weight of evidence; so that after all the discussions and legislation on the subject in New York, the result, according to Bronson, J. (whose conduct, on this whole subject, is deserving of high commendation), is, that "the road to justice may be longer, and consequently more expensive than it was before, but it ends in the same place." In equity, also, since the Revised Statutes, though the answer deny a fraudulent intent, fraud may be legally inferred from the circumstances of the case; *Cunningham* v. *Freeborn*, 3 Paige, 557; S. C. on error, 11 Wendell, 241.

Against *subsequent* creditors, as is decided in *Sexton* v. *Wheaton*, a conveyance is not void unless actually fraudulent; *Bennett* v. *Bedford Bank*, 11 Massachusetts, 421; *Benton* v. *Jones*, 8 Connecticut, 186; *Carlisle* v. *Rich*, 8 New Hampshire, 44, 50; *Blake* v. *Jones*, 1 Bailey's Equity, 142, 143; *Crosby, &c.* v. *Ross's Ad'r*, 3 J. J. Marshall, 290; *Miller* v. *Thompson*, 3 Porter, 196; *Bogard* v. *Gardley*, 4 Smedes & Marshall, 302, 310; *Wood* v. *Savage*, 2 Douglass, 317, 325; *Ingram* v. *Phillips et al.*, 3 Strobhart, 565; *Greenfield's Estate*, 2 Harris, 489, 502; *Thomas* v. *Degraffenreid*, 17 Alabama, 603, 611. But there is a little obscurity as to what are the frauds of which they may take advantage. If the fraud be directed specifically against subsequent creditors, that is, if a voluntary settlement be made with a view to becoming subsequently indebted, which may be inferred from the fact of debts being contracted immediately after, there is no doubt that the settlement may be avoided by subsequent creditors; *Sexton* v. *Wheaton; Wood* v. *Savage; Ridgeway* v. *Underwood*, 4 Washington, 129, 137; *Maulden* v. *Day*, 1 Bailey, 337, 340; *Hutchison et al.* v. *Kelly*, 1 Robinson's Virginia, 125, 134; *Miller* v. *Miller*, 23 Maine, 22, 24; *Kipp* v. *Hanna*, 2 Bland, 26, 34. But that is not the only sort of fraud that may be taken advantage of by subsequent creditors; for it is clear, that if a conveyance be made colourably with actual intent to defraud any existing creditor or creditors, it may be avoided by subsequent creditors; in other words, that evidence of collusion against existing creditors is sufficient evidence of fraud against subsequent creditors; *Wadsworth* v. *Havens*, 3 Wendell, 411; *Parkman* v. *Welsh*, 19 Pickering, 231, 237; *Smith* v. *Lowell*, 6 New Hampshire, 67, 69; *M'Conihe* v. *Sawyer*, 12 Id. 397, 403; *Young* v. *Pate*, 4 Yerger, 164; *Hester et als.* v. *Wilkinson et als.*, 6 Humphreys, 215, 218; *Hoke* v. *Henderson*, 3 Devereux, 12, 14; *Edwards, &c.* v. *Coleman*, 2 Bibb, 204, 205; *Lewis* v. *Love's Heirs*, 2 Ben Monroe, 345, 347; *Hutchinson et al.* v. *Kelly*, 1 Robinson's Virginia, 125; *Elliott* v. *Horn*, 10 Alabama, 348, 352; but probably this is limited to voluntary and colourable conveyances, which are accompanied in law by the

presumption of a secret trust for the grantor; according to the distinction stated in *Clark* v. *French*, 23 Maine, 221, that a conveyance made on a secret trust for the grantor, for the purpose of defrauding present creditors, is void also against subsequent creditors, because such a fraud is a continuing one; but that an absolute conveyance on valuable consideration and without any secret trust for the grantor, if actually intended to deprive existing creditors of satisfaction of their debts, would be void against such creditors, yet would not be void against subsequent ones:—there is no doubt, upon the American authorities, that a conveyance for valuable consideration made with an actually fraudulent intention to one taking part in such fraudulent design, would be void against the creditors intended to be defrauded; *Lowry* v. *Pinson*, 2 Bailey, 324, 328; *Thomas & Ashby*, v. *Jeter & Abney*, 1 Hill's So. Car. 380; *Union Bank* v. *Toomer*, 2 Hill's Chancery, 27, 31; *Edgell* v. *Lowell et al.*, 4 Vermont, 405, 412; *Fuller, Jr.* v. *Sears et al.*, 5 Id. 527, 530; *Beals* v. *Guernsey*, 8 Johnson, 446, 452; *Wickham* v. *Miller*, 12 Id. 320, 323; *Streeper* v. *Eckart*, 2 Wharton, 302, 308; *Dean* v. *Connelly*, 6 Barr, 239, 250; *Ashmead* v. *Ilean & Moulfair*, 1 Harris, 584, 588; *The Farmers' Bank et al.* v. *Douglass et al.*, 11 Smedes & Marshall, 472, 545; *Ward, &c.* v. *Trotter, &c.*, 3 Monroe, 1, 3; *Trotter* v. *Watson*, 6 Humphreys, 509, 512; (see this subject discussed in *Brown* v. *Foree, &c.*, 7 B. Monroe, 357; *Brown* v. *Smith*, Id. 361; *Kendall* v. *Hughes*, Id. 368;) but see *Wood* v. *Dixie*, 7 Queen's Bench, 893: it is doubtful, however, whether it could be considered void against any creditors, but those whose injury was specially contemplated. An intent actually to defraud creditors is to be legally inferred from the grantor's being insolvent at the time, or greatly embarrassed, or so largely indebted that his conveyance necessarily has the effect to hinder and defraud creditors, and a voluntary conveyance made under such circumstances, may be set aside by a subsequent creditor; *Gilmore* v. *The N. A. Land Co.*, 1 Peters's C. C. 460, 464; *Ridgeway* v. *Underwood*, 4 Washington, 129, 137; *Reade* v. *Livingston*, 3 Johnson's Chancery, 481, 497, 501; *Thomson* v. *Dougherty*, 12 Sergeant & Rawle, 448, 458; *Howe* v. *Ward*, 4 Greenleaf, 195, 208; *Iley* v. *Niswanger*, 1 M'Cord's Chancery, 518; *Henderson* v. *Dodd*, 1 Bailey's Equity, 138, 140; *Taylor* v. *Ex'or of Heriot*, 4 Desaussure, 227, 232; *Smith* v. *Greer et al.*, 3 Humphreys, 118, 121; *Morgan* v. *McLelland*, 3 Devereux, 82; *Doyle, &c.*, v. *Sleeper, &c.*, 1 Dana, 531, 433; and see *Green* v. *Tanner and others*, 8 Metcalf, 411, 419; indebtedness raises a presumption of fraud, which becomes conclusive by insolvency; *Hutchison et al.* v. *Kelly*, 1 Robinson's Virginia, 125; *Bank of Alexandria* v. *Patton, &c.*, Id. 500, 527. But the presumption of fraud as to subsequent creditors arising from indebtedness, is repelled by the fact of those debts being secured by mortgage, or by a provision in the settlement; *Reade* v. *Livingston*; *Ridgeway* v. *Underwood*; or by proof of an understanding and agreement, not in the deed, that the trustee was to pay such debts by the sale of so much property; *Hester et als.* v. *Wilkinson et als.*, 6 Humphreys, 215, 219: it is rebutted also, and if it were the only circumstance of presumptive fraud in the case, would probably be entirely repelled by the subsequent voluntary payment of those debts by the grantor; because that shows that the grantor was not insolvent, and that he intended no fraud against existing creditors; *Bank of Alexandria* v. *Patton, &c.*, 1 Robinson's Virginia, 500, 536; *Hudnal* v. *Wilder*, 4 M'Cord, 295, 304; *Izard* v. *Izard*, 1 Bailey's Equity, 228, 237; but if those earlier debts are paid off by contracting new ones, or remain until, in the insolvency of the debtor, they are paid off on account of their priority, it is obvious

that such a discharge of subsisting debts does not repel the presumption of fraud so as to render the conveyance valid against subsequent creditors; *Madden* v. *Day*, 1 Bailey, 337, 341; *M'Elwee* v. *Sutton*, 2 Id. 128, 130. In equity, if a conveyance is set aside by the prior creditors, as being voluntary, and fraudulent as against them, the whole settled estate becomes assets, and the subsequent creditors are entitled to come in upon the proceeds; *Reade* v. *Livingston*, 499; *Kipp* v. *Hanna*, 2 Bland, 26, 35; *Iley* v. *Niswanger*, 1 M'Cord's Chancery, 518, 522; *Ingram* v. *Phillips*, 5 Strobhart, 200; *Thompson* v. *Dougherty*, 12 Sergeant & Rawle, 448, 455, 456.

Where a parol gift of land by a father to his son, was made while the father was unembarrassed, and a conveyance executed after he had become involved in debt, and under circumstances to show an intention of saving the property from liability to creditors, it was decided that the transfer was invalid against creditors; but that the son had a lien on the land for the value of improvements which he had made upon it; *Rucker, &c.* v. *Abell et al.* 8 B. Monroe, 566.

The statute, 13 Elizabeth, c. 5, protects creditors and *others;* and a liberal construction in allowing to persons who are or might be injured by a fraudulent conveyance the character of creditors under this statute, has always prevailed. As to rights from contract, any one liable upon a contract, express or implied, though only contingently, is a debtor from the time that the liability is entered into; accordingly, a surety is a creditor of the co-obligor, or co-suretics, from the time that the obligation is entered into; *Howe* v. *Ward*, 4 Greenleaf, 195, 202; *Sargent* v. *Salmond*, 27 Maine, 539, 542; and those interested in an official bond, are creditors of the surety from the time that the bond is executed by him; *Hutchison et al.* v. *Kelly*, 1 Robinson's Virginia, 125, 136; *Carlisle* v. *Rich*, 8 New Hampshire, 44; the guarantee of an assigned judgment is a creditor of the guarantor from the time that the guaranty is given; *Jackson* v. *Seward*, 5 Cowen, 67; *acc.* Spencer, *contra* Stebbins, in S. C. 8 Id. 407, 429, 437, and *acc.* Tracy, S. C. 18 Wendell, 375, 405; see also *McLaughlin* v. *Bank of Potomac et al.* 7 Howard, 220, 229; a plaintiff in an action for breach of promise to marry, and a defendant who, after judgment against him, obtains a reversal of it, and a judgment in his favour, are creditors from the commencement of the suit, at least; *Lowry* v. *Pinson*, 2 Bailey, 324, 328; *Parsons* v. *McKnight*, 8 New Hampshire, 35; and a debt existing before the time of the conveyance, and renewed afterwards with the same endorser, will be considered, especially by courts of equity, as the same continuing debt; *M'Laughlin* v. *Bank of Potomac et al.* 7 Howard, 220, 228. Where the claim is founded on tort, for example in an action of slander, the plaintiff from the time that the action is begun, is so far a creditor as to be able to avoid conveyances made with an actual intent to defraud him; *Jackson* v. *Myers*, 18 Johnson, 425; *Lillard* v. *McGee*, 4 Bibb, 165; see *Fox* v. *Hills*, 1 Connecticut, 295; *Langford* v. *Fly*, 7 Humphreys, 585, and *Clapp* v. *Leatherbee*, 18 Pickering, 131: but in *Meserve* v. *Dyer*, 4 Greenleaf, 52, it was considered that a plaintiff in trespass, *vi et armis*, was to be considered as a creditor only from the time of the judgment; see *McErwin* v. *Benning*, 1 Hawks, 474. A creditor who blends prior and subsequent debts in one judgment, can come in only as a subsequent creditor, at least at law; *Usher* v. *Hazeltine*, 5 Greenleaf, 471. An assignee by act of law, for the use of creditors, such as an assignee in bankruptcy, is vested with the rights of creditors, for the purpose of vacating fraudulent assignments; *Edwards, &c.* v. *Coleman*, 2 Bibb, 204; and the assignee, under an insolvent law, possesses the same rights; *Doe* d. *Grimsby* v. *Ball*, 11 Meeson &

Welsby, 531; *Englebert* v. *Blanjot*, 2 Wharton, 240: but the assignee, under a voluntary assigument for the benefit of creditors, has in this respect no other rights thau the grantor had, and is not entitled to set aside a previous fraudulent conveyance; *Brownell* v. *Curtis*, 10 Paige, 212, 218; *Storm* v. *Davenport*, 1 Sandford, 135, 138; *Vandyke* v. *Christ*, 7 Watts & Sergeant, 373, overruling contrary *dicta* in *Englebert* v. *Blanjot*, and in *Irwin* v. *Keen*, 3 Wharton, 347. In *Bayard* v. *Hoffman*, 4 Johnson's Chancery, 450, the assignees were also creditors, and their bill might have been regarded as a creditor's bill; though in *Storm* v. *Davenport*, 1 Sandford, 135, 138, that case is said to be overruled.

Whether an administrator may set aside a fraudulent conveyance of his intestate when the property is wanted for the payment of debts, has been much disputed. The general principle is clear that a fraudulent conveyance is good between the parties and their representatives; and the fraudulent donee may recover the property from the executor or administrator; *Hawes* v. *Leader*, Cro. Jac. 270; S. C. Yelv. 196; 1 Brownl. 111; *Starke's Ex'rs* v. *Littlepage*, 4 Randolph, 368; *Drinkwater* v. *Drinkwater*, 4 Massachusetts, 354, 360; *Killinger* v. *Reidenhauer*, adm'r of Smith, 6 Sergeant & Rawle, 531; even if the latter be a creditor; *Dorsey* v. *Smithson*, 6 Harris & Johnson, 61. The creditors, also, have their remedies independently of the administrator; for a fraudulent donee taking or keeping possession of the goods is, at common law, liable to creditors as executor *de son tort; Bailey* v. *Miller*, 5 Iredell's Law, 444; *Sturdivant* v. *Davis*, 3 Id. 365, 369; *Howland, Ward & Spring* v. *Dews*, Charlton, 383; *Hopkins* v. *Towns*, &c., 4 B. Monroe, 124; *Commonwealth* v. *Richardson et al.* 8 Id. 81, 93; *dicta* in *Brownell* v. *Curtis*, 10 Paige, 212, 218; *Dorsey* v. *Smithson*, 6 Harris & Johnson, 61; *Osborne* v. *Moss*, 7 Johnson, 161, &c.: and the creditors are entitled to go into equity against the property in the hands of the fraudulent grantee; and in such a proceeding, the administrator ought to be made a party, that the property when recovered may be received by him, and go in a course of administration; *Brockman* v. *Bowman*, 1 Hill's Chancery, 338; *Peaslee* v. *Barney*, Chipman, 331, 335; see also *Simpson* v. *Simpson et als.* 7 Humphreys, 275, 277; and this is probably so whether the bill be in form a creditor's bill, or the bill of an individual creditor; *Thompson* v. *Brown*, 4 Johnson's Chancery, 620, 638; *Hammond* v. *Hammond*, 2 Bland, 307, 324; but where the conveyance is of real estate, see *U. S. Bank* v. *Burke*, 4 Blackford, 141; *Jones* v. *Jones*, 1 Bland, 443: a third remedy the creditors are declared in *Drinkwater* v. *Drinkwater*, to possess in the right to sell the property on a judgment against the administrator; but this is denied in *Anderson* v. *Belcher*, 1 Hill's So. Car. 246, and in *Ralls* v. *Graham*, &c., 4 Monroe, 120, 123; and cannot be true unless such property is considered as assets, because, while a judgmeut against an intestate in his lifetime, ascertains or creates a debt against his person and all his property, a judgment against an administrator ascertains the debt only as against the assets for which he is responsible; *Brodie* v. *Bickley*, 2 Rawle, 431. But with regard to the rights and duties of the administrator, when the property is wanted for the payment of debts, the decisions conflict. The better opinion is, that at law, such property is not *assets* from the testator's death, for the profits of which in his hands from that time the administrator is responsible; *Backhouse's administrator* v. *Jett's administrator, et al.*, 1 Brockenbrough, 501, 507; or which he can recover as administrator from the fraudulent grantee; Orlabar and Harwar, Comb. 348; *Osborne* v. *Moss*, 7 Johnson, 161; *Dorsey* v. *Smithson*, 6 Harris & Johnson, 61; *Peaslee* v. *Barney*, Chipman, 331; *Adm'r of Martin* v. *Mar-*

tin, 1 Vermont, 91; *Commonwealth* v. *Richardson, et al.*, 8 B. Monroe, 81, 93; *Benjamin* v. *Le Baron's administrator*, 15 Ohio, 517, 526; *Sharp* v. *Caldwell & Hunter*, 7 Humphreys, 415, 416; *Coltraine* v. *Causey*, 3 Iredell's Equity, 246; (*Shields, adm'r, &c.*, v. *Anderson, adm'r, &c.*, 3 Leigh, 729, and dictum in *Babcock* v. *Booth*, 2 Hill's N. Y., 182, 184, apparently *contra;* but the latter explained and controlled by *Dennison* v. *Ely*, 1 Barbour's S. Ct., 612, 624;) or is bound to take possession of or retain; *Greenlee* v. *Hays*, administrator, Overton's Tennessee, 300, 304: if, however, the administrator be the fraudulent grantee, or be otherwise in possession of the property, it is liable to the creditors as assets from the time that they claim to treat it so, as it would be were he charged as executor *de son tort; Shears* v. *Rogers*, 3 B. & Ad. 362; *Greenlee* v. *Hays*, administrator; *Stephens' administrator* v. *Barnett, administrator*, 7 Dana, 257, 262; *Smith* v. *Pollard, &c.*, 4 B. Monroe, 66; *Backhouse's administrator* v. *Jett's administrator, et al.*, p. 508: in like manner, lands fraudulently conveyed to a stranger are not assets by descent, for which the heir can be made responsible, or which he is entitled to recover; *Ralls* v. *Graham, &c.*, 4 Monroe, 120; *Harrison, &c.*, v. *Campbell, &c.*, 6 Dana, 263; yet if the heir or devisee be the fraudulent grantee, then to the extent to which he has possession of the lands, he may be charged as holding them not in his own right, but as heir or devisee having assets; *Warren* v. *Hall*, 6 Dana, 450; *Lynch* v. *Sanders*, 9 Id. 59. On the other hand, it is settled in Connecticut, that property fraudulently conveyed is assets, which the administrator is bound to inventory, if he knows of it, and is entitled to recover; *Minor* v. *Mead*, 3 Connecticut, 289, 294; *Booth* v. *Patrick*, 8 Id. 106; *Andness* v. *Doolittle*, 11 Id. 283. In equity, however, when the estate is insolvent, an administrator or executor becomes a trustee for creditors; *Thomson* v. *Palmer*, 2 Richardson's Equity, 32; *Neale* v. *Hagthrop*, 3 Bland, 551, 565; *Gibbens* v. *Peeler*, 8 Pickering, 254, 257; *Holland* v. *Cruft*, 20 Id. 321, 328; and as such may perhaps set aside a fraudulent conveyance; but even that is doubtful; see *Lassiter* v. *Cole*, 8 Humphreys, 621. In Pennsylvania, under the mixed jurisdiction of their courts, it is settled that the administrator of an insolvent estate may set aside a fraudulent conveyance, as he is in such a case a trustee for creditors; *Buehler* v. *Gloninger*, 2 Watts, 226; *Stewart* v. *Kearney*, 6 Id. 453; *Welsh* v. *Bekey*, 1 Pennsylvania, 57, 61; *Englebert* v. *Blanjot*, 2 Wharton, 240, 243, 245. In *Drinkwater* v. *Drinkwater, adm.*, 4 Massachusetts, 354, 357, it is said by Parsons, C. J., that where the estate is not insolvent, the administrator having obtained license from the proper court, may sell land fraudulently conveyed, and out of the proceeds satisfy the creditors. In New York, by the Revised Statutes, the administrator may recover from the grantee, as a trustee for creditors; *Babcock* v. *Booth*, 2 Hill, 182, 185; *Brownell* v. *Curtis*, 10 Paige, 212, 218; *M'Knight* v. *Morgan*, 2 Barbour, 171.

A voluntary or a fraudulent conveyance is perfectly good between the parties and their representatives, and against all persons except creditors; *Reichart* v. *Castator*, 5 Binney, 109; *Sherk* v. *Endress*, 3 Watts & Sergeant, 255; *Eyrick & Deppen* v. *Hetrick*, 1 Harris 488, 491; *Jackson* v. *Garnsey*, 16 Johnson, 189; *Worth* v. *Northam*, 4 Iredell's Law, 102; *Dyer* v. *Homer*, 22 Pickering, 253; *Gillespie* v. *Gillespie's Heirs*, 2 Bibb, 89, 91; *Dale* v. *Harrison*, 4 Id. 65; *Findley* v. *Cooley*, 1 Blackford, 263; *Randall* v. *Phillips et al.*, 3 Mason, 378, 388; *Byrd* v. *Curlin*, 1 Humphreys, 466; *Burgett* v. *Burgett*, 1 Ohio, 469; *Dearman* v. *Radcliffe*, 5 Alabama, 192; *M'Guire, Adm'r* v. *Miller*, 15 Id. 394, 397; the estate becomes subject at once to the grantee's debts; *Den* v. *Monjoy*, 2

Halstead, 173; and a voluntary reconveyance by the fraudulent grantee to the original grantor, will be fraudulent against the former's creditors; *Chapin* v. *Pease*, 10 Connecticut, 69. Equity will sustain an executed conveyance of this kind, and will remedy the infringement of executed rights; *Rochelle* v. *Harrison*, 8 Porter, 352; but in regard to executory rights growing out of a conveyance to defraud creditors, it is a settled rule in equity to leave the parties to their remedies at law, and not to interfere in favour of either; equity will therefore not compel a reconveyance or enforce a secret trust in favour of the grantor or his heirs; *Stewart* v. *Iglehart*, 7 Gill and Johnson, 132, 136; *James* v. *Bird's administrator*, 8 Leigh, 510; *Owen* v. *Sharp et ux.*, 12 Id. 427; *Grider* v. *Graham*, 4 Bibb, 70; *Black & Manning* v. *Oliver*, 1 Judges' Alabama, 449; *Jackson* v. *Dutton*, 3 Harrington, 98; Contra, *Smith* v. ——, 2 Haywood, 229; nor enforce execution of a contract in favour of the grantee when the parties are *in pari delicto*; *Mason & Wife* v. *Baker et al.*, 1 Marshall, 208, 210; *Norris* v. *Norris's adm'r.*, 9 Dana, 317; and the remark in *Sherk* v. *Endress*, 3 Watts & Sergeant, 255, that a contract infected with actual fraud against a third person is enforceable in equity between those who intended to perpetrate the act, is, if it refer to executory contracts, scarcely correct. This distinction between executory and executed agreements, has by some courts been extended to suits at law upon bonds or notes given for the consideration of fraudulent conveyances, which have been held not to be enforceable between the parties; *Smith et al.* v. *Hubbs*, 1 Fairfield, 71; *Nellis* v. *Clark*, 20 Wendell, 24; S. C. 4 Hill, 424; *Walker* v. *M'Conico*, 10 Yerger, 228; and see *Davis* v. *Holding*, 1 Meeson & Welsby, 159, 166; but is rejected in *Sherk* v. *Endress*, 3 Watts & Sergeant, 255, where bonds for such consideration are decided to be enforceable. A fraudulent conveyance is void only against judgment creditors; *Hastings* v. *Belknap*, 1 Denio 191, 198: and against them when they choose so to treat it, the conveyance is wholly *void* and nullity, the title being considered as remaining in the grantor, subject to execution from his creditors; *M'Kee* v. *Gilchrist*, 3 Watts, 230; *Englebert* v. *Blanjot*, Wharton, 240, 245; *Jones* v. *Crawford*, 1 M'Mullan, 373; *Owen* v. *Dixon*, 17 Connecticut, 493, 498; *Banks* v. *Thomas*, Meigs, 28, 33. But though the conveyance is wholly defeated by the levy of a creditor's execution, and is considered as no conveyance as against it, yet it is defeated only from the time of the judgment and execution, and the conveyance is not rendered void *ab initio*; *Jones* v. *Bryant*, 13 New Hampshire, 53.

The statute 13 Eliz. c. 4, in express terms, embraces conveyances of real and personal estate and the creation of some rights which may charge such estates. Gifts of money were held by Marshall, C. J., in *Hopkirk* v. *Randolph et al.*, 2 Brockenbrough, 133, 153, to be within it; and see *In the Matter of Grant*, 2 Story, 313; but this was doubted or denied in *Doyle, &c.*, v. *Sleeper, &c.*, 1 Dana, 531, 536, 557; and see *Ewing* v. *Cantrell*, Meigs, 364, 375. That choses in action, and other property that could not have been reached at law by the creditors, may, when fraudulently conveyed, be reached in equity, see *Bayard* v. *Hoffman*, 4 Johnson's Chancery, 450; *Hadden* v. *Spader*, 20 Johnson, 554; *Weed* v. *Pierce*, 9 Cowen, 722; *Storm* v. *Waddell*, 2 Sandford, 495, 511; *Proseus* v. *McIntyre*, 5 Barbour's S. C. 425, 433; *Tappan* v. *Evans*, 11 New Hampshire, 312, 326; *Sargent* v. *Salmond*, 27 Maine, 539, 543. Bonds given by sons to a sister upon a conveyance of land by the father were regarded as gifts by the father to his daughter, and the husband of the daughter was held liable for what was received upon them, in *Hopkirk* v. *Randolph et al.*, 2 Broc-

kenbrough, 133, 150. The statute applies only to conveyances or gifts; purchases with the debtor's money in the name of third persons, are not within it; *Crozier, &c.* v. *Young*, 3 Monroe, 157; *Gowing* v. *Rich*, 1 Iredell's Law, 553, 559; but though not strictly within it, they are dealt with in courts of equity, where only they can be reached, upon principles essentially the same as those embodied in the construction of the statute; *Taylor* v. *Ex'or of Heriot*, 4 Desaussure, 227, 234; *Doyle, &c.* v. *Sleeper, &c.*, 1 Dana, 531; *Whittlesey* v. *M'Mahon*, 1 Connecticut, 138, 141; *Botsford* v. *Beers*, 11 Id. 370, 374: a purchase in the name of a stranger creates a resulting trust in the person who furnishes the money, but in the name of wife or child is presumed to be an advancement; but this presumption against a resulting trust in the case of a wife or child, is rebutted by showing indebtedness or other circumstances of fraud; *Doyle, &c.*, v. *Sleeper, &c.*; *Baker* v. *Dobyns, &c.*, 4 Dana, 220, 225; *Guthrie* v. *Gardner*, 19 Wendell, 414. In Pennsylvania, where equitable estates may be taken in execution, a purchase in the name of another, may be levied on and sold under a judgment against the fraudulent cestui que trust; *Kimmel* v. *M'Right*, 2 Barr, 38.

The construction of the statute 27 Elizabeth, c. 4, in favour of *purchasers*, has been more liberal than that of 13 Elizabeth, c. 5, in favour of creditors: the former class, not having trusted to the personal responsibility of the grantor, but having advanced money upon a conveyance of specific property and upon the faith of acquiring an immediate title to it, are regarded as having a higher equity than general creditors: per Gould, J., in *Salmon* v. *Bennett*. This is carried so far in England, that a voluntary conveyance is in law fraudulent and void against a subsequent purchaser for valuable consideration even with notice; *Evelyn* v. *Templar*, 2 Eden's Brown, 148, 149, *note; Doe dem. Otley* v. *Manning and another*, 9 East, 59; *Doe* v. *Martyr*, 1 New, 332; notice, said Lord Ellenborough, C. J., cannot vary the question, for it is only notice of a conveyance which was void against a subsequent purchaser for a valuable consideration; *Doe* v. *James*, 16 East, 212, 213; it is notice, said Sir William Grant, not of a title, but of a nullity and a fraud; *Buckle* v. *Mitchell*, 18 Vesey, 111; a voluntary grantee upon however fair and meritorious a ground is considered as having no equity whatever against a subsequent purchaser for valuable consideration with full notice, who will receive the aid of a court of chancery to enforce specific execution of a contract of purchase; *Pulvertoft* v. *Pulvertoft*, 18 Vesey, 84; *Buckle* v. *Mitchell*, Id. 100; *Metcatfe* v. *Pulvertoft*, 1 Vesey & Beames, 180; though that court will not interfere to aid the grantor to set aside his voluntary conveyance for the purpose of selling the land; *Smith* v. *Garland*, 2 Merivale, 123. The ground upon which these decisions have gone, said Marshall, C. J., in *Cathcart et al.* v. *Robinson*, 5 Peters, 265, 279, is that the subsequent sale is considered as proving conclusively that the voluntary deed was executed with a fraudulent intent to deceive subsequent purchasers: but undoubtedly, the effect of them is, as stated by Mansfield, C. J., in *Hill* v. *The Bishop of Exeter*, 2 Taunton, 69, 83, that if a man after marriage make a most prudent settlement on his wife and children, such as every wise man may approve, yet if he is dishonest enough to sell it for money afterwards, he *may*. The law in America does not go so far: a conveyance actually fraudulent is void against a subsequent purchaser for valuable consideration even *with* notice; *Ricker* v. *Ham et al.*, 14 Massachusetts, 137; *Clapp* v. *Leatherbee*, 18 Pickering, 131; *Clapp* v. *Tirrell*, 20 Id. 247; *Lewis* v. *Love's Heirs*, 2 B. Monroe, 345, 347; *Mason & Wife* v. *Baker et al.*, 1 Marshall, 208, 210; *Waller* v. *Cralle*, 8 B. Monroe, 11, 12; *Elliott* v. *Horn*,

10 Alabama, 348, 352; *Verplank* v. *Sterry*, 12 Johnson, 536, 557; *Hudnal* v. *Wilder*, 4 M'Cord, 295, 308; and a voluntary conveyance is presumptively fraudulent against a subsequent bonâ fide purchaser *without* notice; that is, a subsequent sale to a bonâ fide purchaser without notice, is evidence that a prior voluntary conveyance was fraudulent; *Cathcart et al.* v. *Robinson*, 5 Peters, 265, 281; *Hudnal* v. *Wilder*, 4 M'Cord, 295, 305; *Caston* v. *Cunningham*, 3 Strobhart, 59, 63; *Bank of Alexandria* v. *Patton &c.*, 1 Robinson's Virginia, 500, 544; but a voluntary conveyance (at least according to the decisions in some of the states), is not void against a subsequent purchaser *with* notice; *Lancaster* v. *Dolan*, 1 Rawle, 231; *Foster* v. *Walton*, 5 Watts, 378; *Dougherty* v. *Jack*, Id. 456; *Speise* v. *M'Coy*, 6 Watts & Sergeant, 485, 487; *Hudnal* v. *Wilder*, 4 M'Cord, 295, 310; *Moultrie* v. *Jennings*, 2 M'Mullan, 508; *Howard* v. *Williams*, 1 Bailey, 375, 580; *Bank of Alexandria* v. *Patton, &c.*, 1 Robinson's Virginia, 500, 540; *Corprew* v. *Arthur, et als.*, 15 Alabama, 525, 530; *The Farmer's Bank et al.* v. *Douglass et al.* 11 Smedes & Marshall, 472, 548; and see *Cathcart et al.* v. *Robinson*, 5 Peters, 265, 280, which seems to control *Ridgeway* v. *Underwood*, 4 Washington, 129, 136. In others, however, the general rule is stated, that a voluntary conveyance, as against a subsequent *bonâ fide* purchaser for valuable consideration with or without notice, is fraudulent; *Cains* v. *Jones*, 5 Yerger, 250; *Marshall* v. *Booker*, 1 Id. 13, 15; *Mason and Wife* v. *Baker et al.*, 1 Marshall, 208, 210; *Doyle, &c.*, v. *Sleeper, &c.*, 1 Dana, 531, 554; or at least *primâ facie* fraudulent; *Lewis* v. *Love's Heirs*, 2 B. Monroe, 345, 347. In North Carolina, a voluntary conveyance was, prior to the statute of 1840, c. 28, void against a subsequent purchaser *with* notice; *Freeman* v. *Eatman*, 3 Iredell's Equity, 81. But by that statute no purchasers are protected but those who buy without notice and for full value; *Hiatt* v. *Wade*. 8 Iredell, 340. In New York, in *Sterry* v. *Arden*, 1 Johnson's Chancery, 261, it was held by Kent, C., upon the authorities, that a voluntary settlement is void against a subsequent purchaser for valuable consideration, with notice; the decision in the case was confirmed in the Court of Errors on another ground, but Spencer, J., held there, that a fair voluntary deed is not void in law against a subsequent purchaser with notice; *Sterry* v. *Arden*, 12 Johnson, 536, 555; and to the same effect in *Sanger* v. *Eastwood*, 19 Wendell, 514.

A *mortgagee* is a *purchaser* within the statute 27 Eliz. c. 5; *Lancaster* v. *Dolan*, 1 Rawle, 231, 244; *Presbyterian Corporation* v. *Wallace and others*, 3 Id. 130; *Lewis* v. *Love's Heirs*, 2 B. Monroe, 345, 347; *Ledyard* v. *Butler*, 9 Paige, 132, 137; *Clapp* v. *Leatherbee*, 18 Pickering, 131, 138. One who purchases from the grantor's executor or administrator, is a purchaser to avoid a previous conveyance actually fraudulent; *Clapp* v. *Leatherbee*, 18 Pickering, 131, 138. One who buys at a judicial sale by a creditor, is not a purchaser under the statute (though the contrary is suggested in *Wadsworth* v. *Havens*, 3 Wendell, 411; and see *Lessee of Heister* v. *Fortner*, 2 Binney, 40, 46); but has all the rights which the creditor had for avoiding a fraudulent conveyance; *Jackson* v. *Ham*, 15 Johnson, 261; *Jones* v. *Crawford*, 1 M'Mullan, 373; *Ridgeway* v. *Underwood*, 4 Washington, 129, 137; see *Reed's Appeal*, 1 Harris, 476. An assignee in trust for creditors is not a *bonâ fide* purchaser for a valuable consideration without notice, under this statute, however he may fall within that description under other statutes for other purposes, and has no other rights than the assignor had; *Seaving* v. *Brinkerhoff*, 5 Johnson's Chancery, 329, 331; *Twelves* v. *Williams*, 3 Wharton, 485; *Knowles* v. *Lord*, 4 Id. 500; *Luckenbach* v. *Brickenstein*, 5 Watts & Ser-

geant, 145, 149; *In re Dohner's Assignees*, 1 Barr, 101, 104; *Pierce* v. *M'Keehan*, 3 Id. 136, 140; *Holland* v. *Cruft*, 20 Pickering, 321, 338; *Willis et al* v. *Henderson*, 4 Scammon, 14, 19; *Frow & Ferguson* v. *Downman*, 11 Alabama, 881, 885; *Walker et al.* v. *Miller et al.*, Id. 1068, 1084. Whether one who receives a conveyance of property in payment of an antecedent debt is a purchaser entitled to protection under the statute is not quite clear: in New York and Massachusetts, it is said that one who purchases in consideration of indebtedness is not entitled to protection, unless he has incurred some new responsibility on the credit of the property, or has given up some security or parted with some right or advantage on the faith of receiving a perfect title; *Root* v. *French*, 13 Wendell, 570; *Dickerson* v. *Tillinghast*, 4 Paige, 215, 221; *Padgett* v. *Lawrence*, 10 Id. 171, 180; *Clark* v. *Flint*, 22 Pickering, 231, 243; *Morse* v. *Godfrey et al.*, 3 Story, 365, 390: —these decisions do not distinguish very clearly between a conveyance as collateral security, and a conveyance in satisfaction and discharge of a debt: but there is nothing in them conflicting with the distinction established in some analogous cases, that the discharge of a debt or of any security or right respecting it, is a valuable consideration, but that the adding of security to a debt is voluntary: see the cases on promissory notes, in the note to *Swift* v. *Tyson*.

In terms, the statute 27 Elizabeth, c. 4, applies only to land, and in England and in many of the states, the construction goes no further; *Jones* v. *Croucher and others*, 1 Simons & Stuart, 315; *Bohn* v. *Headley*, 7 Harris & Johnson, 257, 271; *Sewall* v. *Glidden*, 1 Judges' Alabama, 53, 61; but in *Hudnal* v. *Wilder*, 4 M'Cord, 295, it was held, that upon common law principles, a fraudulent conveyance of chattels might be avoided by a subsequent bonâ fide purchaser for valuable consideration without notice.

While it is agreed that a conveyance actually fraudulent is void against subsequent purchasers, it is held in *Foster* v. *Walton*, 5 Watts, 378; *Douglas* v. *Dunlap and others*, 10 Ohio, 162; *Sanger* v. *Eastwood*, 19 Wendell, 514; and in *Bank of Alexandria* v. *Patton, &c.*, 1 Robinson's Virginia, 500, 539, that the fraud must be intended specifically against purchasers, and that they cannot avoid a conveyance intended to defraud creditors only; but the contrary is held in *Ricker* v. *Ham et al.*, 14 Massachusetts, 137; *Clapp* v. *Leatherbee*, 18 Pickering, 131, 138; and *Wadsworth* v. *Havens*, 3 Wendell, 411; and in *Hudnal* v. *Wilder*, 4 M'Cord, 295, 303, it was thought to be clear, in respect to such fraud as consists in retaining possession of chattels sold, that a voluntary deed which is seen to be intended to secure property from the reach of creditors, may be considered as fraudulent against a subsequent purchaser; for the fact that a fraud was originally intended, taken in connexion with the subsequent sale, would very well authorize the inference that no change of property was intended to take place, and that the right still continued in the grantors. But probably this apparent conflict of opinions is to be reconciled upon the distinction, noted above, as taken in *Clark* v. *French*, 23 Maine, 221. There can be no reasonable doubt that a conveyance which is fraudulent against creditors upon the ground of its being fictitious, or without consideration, and otherwise presumably for the benefit of the grantor, is fraudulent against subsequent purchasers; but an absolute conveyance on full consideration, which is fraudulent against creditors only, because actually intended to hinder and delay them, would not be void against purchasers.

In examining what conveyances are on valuable consideration, under the statutes, 13 & 27 Elizabeth, it must be observed that in respect to the consideration of conveyances, there is an important difference between law and

equity: at law, a security or conveyance is wholly good or wholly bad; *Holland* v. *Craft*, 20 Pickering, 321, 338; but in equity when a security or conveyance is set aside as constructively fraudulent, it is upheld, in favour of one not guilty of any actual fraud, to the extent of the actual consideration, and is vacated only as to the excess: *M'Meekin* v. *Edmonds and wife and others*, 1 Hill's Chancery, 288, 294; *Anderson et al.* v. *Fuller et al.*, 1 M'Mullen's Equity, 27, 33. Accordingly, if there be any substantial and not merely a nominal consideration, the whole conveyance is valid at law, without regard to the adequacy of the consideration, unless the inadequacy be so gross as to raise a presumption of actual fraud; *Magniac & Co.* v. *Thompson*, Baldwin, 344, 361; or the conveyance, as to the excess, be construed to be conclusively fraudulent in law; *Saunders* v. *Ferrell*, 1 Iredell's Law, 97, 102; but in equity, when the property is of greater value than the consideration, the conveyance may be impeached as being voluntary to a partial extent, and, if not actually fraudulent, will be sustained to the extent of the consideration, and vacated as to the residue, or the grantee decreed to be as to such residue a trustee for creditors; *Wright & Cook* v. *Stanard*, 2 Brockenbrough, 312, 314; *Hopkirk* v. *Randolph et al.*, Id. 133, 150; *Boyd* v. *Dunlap*, 1 Johnson's Chancery, 478; *Wickes* v. *Clarke*, 8 Paige, 161, 172; but if actually fraudulent, it is in equity set aside entirely; *Sands & others* v. *Codwise & others*, 4 Johnson, 536, 598; *Harris et al.* v. *Sumner*, 2 Pickering, 129, 137. At law, a conveyance is voluntary where nothing valuable, or only a nominal value, is received. The ordinary consideration of one dollar, or five shillings, or ten dollars, is merely nominal, and though it is sufficient to pass the title under the statute of uses, a deed upon such a consideration, is deemed voluntary; *Ward, &c.* v. *Trotter, &c.*, 3 Monroe, 1, 3; *M'Kinley, &c.* v. *Combs, &c.*, 1 Id. 105, 106; *Cains* v. *Jones*, 5 Yerger, 250, 256. But if anything of substantial, legal value passes or is secured, the conveyance is not voluntary; and, without extrinsic evidence of fraud, cannot be avoided at law, unless the disproportion of value is so gross as to prove a fraudulent intent: a bond for purchase-money, or the payment of an annuity, or the reservation of a rent, or onerous covenants on the part of the grantee, constitute a valuable consideration, and prevent the conveyance from being voluntary and fraudulent in law; Opinions of Spencer and Allen, Senators, in *Seward* v. *Jackson*, 8 Cowen, 407, reversing S. C., 5 Id. 67; *Jackson* v. *Peek*, 4 Wendell, 301, 304; *Gunn* v. *Butler*, 18 Pickering, 248; *Thomas* v. *Smith*, 3 Wharton, 401, 406; *Smith* v. *Smith*, 11 New Hampshire, 460, 465; (but see *Johnson's Heirs* v. *Harvey*, 2 Pennsylvania, 82, 92.) A mortgage, to secure the debt of another, is not voluntary; *Marden* v. *Babcock and another*, 2 Metcalf, 99, 104: a conveyance by a father to his sons, in consideration of their paying his debts, was held not to be voluntary, but to be valid, in *Patteson* v. *Stewart*, 6 Watts & Sergeant, 72, where it appeared that the sons were performing their engagement, but was pronounced voluntary and fraudulent, in *Waller* v. *Mills*, 3 Devereux, 515, where the son was insolvent: see *Neale* v. *Hagthorp*, 3 Bland, 551, 582. Payments under a voluntary obligation are not regarded as voluntary; *Hopkirk* v. *Randolph et al.*, 2 Brockenbrough, 133, 151, 155. Marriage is a valuable consideration, as effective as money; *Magniac & Co.* v. *Thompson*, Baldwin, 344, 358; indeed, it is, in contemplation of the law, a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution; S. C. 7 Peters, 349, 393; *Bradish* v. *Gibbs*, 3 Johnson's Chancery, 523, 550; *De Barante* v. *Gott*, 6 Barbour's S. Ct. 493, 497: an antenuptial settlement, therefore, in consideration of marriage,

is valid against creditors, though the grantor be in debt; *Tunno* v. *Trezevant*, 2 Desaussure, 264; *Gasset and others* v. *Grout and trustee*, 4 Metcalf, 486; *Betts* v. *Union Bank of Maryland*, 1 Harris & Gill, 175, 203; and even if the settlement be fraudulent on the part of the grantor, yet if there be no fraud upon the other side, the settlement is valid; *Magniac and others* v. *Thompson*, 7 Peters, 349, 393; *Andrews & Bros.* v. *Jones et al.*, 10 Alabama, 401, 421; but it seems that the *reasonableness* of the settlement, as to amount, is open to examination, upon a question of fraudulent intent in all the parties; and accordingly in *Davidson & Simpson* v. *Graves*, Riley's Chancery, 219, 236, 238, it was decided, after careful inquiry, that the settlement of the *whole* of one's fortune, in consideration of marriage, was so unreasonable as to be *conclusive* of fraud, the fortune in that case being very large, and the settlor much indebted. In like manner, a post-nuptial settlement in pursuance of a valid agreement entered into before marriage, is on a valuable consideration; *Reade* v. *Livingston*, 3 Johnson's Chancery, 481, 488; *Andrews & Bros.* v. *Jones et al.*, 10 Alabama, 401, 421; *Lockwood* v. *Nelson*, 16 Id. 295: and is good in equity to the extent of the previous agreement; *Saunders* v. *Ferrill*, 1 Iredell's Law, 97, 102: but under the Statute of Frauds, the previous agreement must be in writing; *Reade* v. *Livingston*, 488; *Davidson & Simpson* v. *Graves*, 231; *Caines & Wife* v. *Marley*, 2 Yerger, 582, 588; *Wood* v. *Savage*, 2 Douglass, 316, 322; *Smith* v. *Greer et al.*, 3 Humphreys, 118, 121; see *Andrews & Bros.* v. *Jones et al.*, 10 Alabama, 401, 421; where this statute is not in force, however, as in Pennsylvania, the agreement need not be in writing; *Blanchard's Lessee* v. *Ingersoll*, 4 Dallas, 305, *note;* and the ante-nuptial agreement must be satisfactorily proved by independent evidence, and the recital of it in the deed of settlement is not sufficient evidence against creditors; *Reade* v. *Livingston*, 491; *Simpson & Davidson* v. *Graves*, 242; *Jones* v. *Henry, &c.*, 3 Littell, 428, 434; *Saunders* v. *Ferrill*, 1 Iredell's Law, 97, 103; *Rogers* v. *Hall*, 4 Watts, 359, 362: See *Boyle and others* v. *Abercrombie*, 5 Rawle, 144, 149. Valuable considerations, sufficient to sustain a settlement against creditors, may intervene also, after marriage. A wife's release of dower in her husband's lands, or renunciation of her inheritance in her own, or a cession by her of any other rights of property, is a sufficient consideration for a reasonable settlement upon her by the husband out of his own property; *Prescott* v. *Hubbell*, Riley's Chancery, 136; *The Banks* v. *Brown & others*, Id. 131, 135; *Duffy* v. *The Insurance Company*, 8 Watts & Sergeant, 413, 434; *Hood et al.* v. *Sorrell et al.*, 11 Alabama, 387, 399; *Barnett* v. *Goings*, 8 Blackford, 285; *Powell* v. *Powell*, 9 Humphreys, 477: and, if the property settled is more valuable than the property ceded, the conveyance, unless actually fraudulent, will be good for the whole at law, but in equity, not beyond the extent of the property ceded; *Wright & Cook* v. *Stanard*, 2 Brockenbrough, 312, 314; yet a court of equity, when satisfied of the fairness of the transaction, "does not weigh these comparative values in golden scales," and inclines to sustain the settlement in whole; *Taylor* v. *Ex'or of Heriot*, 4 Desaussure, 227, 231; *The Banks* v. *Brown, &c.*, Riley's Chancery, 131, 138; *Duffy* v. *The Insurance Company*, 8 Watts & Sergeant, 413, 435; *Hood et al.* v. *Sorrell et al.*, 11 Alabama, 387, 400: a parol executory promise, however, by the wife, to release her dower, which is not capable of being enforced, is not a consideration to sustain a settlement of personalty, though, after the rights of creditors have attached, she performs the promise; *Harrison, &c.* v. *Carroll, &c.*, 11 Leigh, 476: as to the necessary connexion in general,

between the cession and the settlement, see *The Banks* v. *Brown, &c.*, 135, and remarks of the Vice Chancellor in *Wickes* v. *Clarke*, 8 Paige, 161. Where the wife's patrimonial personal estate remains separate and distinguished in the hands of her guardian or of the executor of her father's will, not reduced into possession by the husband, an assignment of it by the husband or the husband and wife for the benefit of the wife and children, is good against creditors; *Gassett and others* v. *Grout & Trustee*, 4 Metcalf, 486; *McCauley, &c.* v. *Rodes, Macklin, &c.*, 7 B. Monroe, 462; *Bradford* v. *Goldsborough*, 15 Alabama, 312; and if the husband, by virtue of a marriage settlement, good as between the husband and wife, but not valid as against creditors for want of registry, gets into his possession, for her benefit, her funds, not passing to him by operation of the marital right, under a promise to settle it to her separate use, and does so before the liens of creditors attach, the arrangement will be upheld; *Embry & Young* v. *Robinson & Wife*, 7 Humphreys, 444, 446: and a reasonable settlement out of the husband's estate, in consideration of receiving the wife's choses in action, such as a legacy or a distributive share, is valid against creditors: and even an executory agreement upon such consideration, though not performed till insolvency, might, independent of a bankrupt law or other law forbidding preferences of particular creditors at such a time, be carried into effect; *Rundle* v. *Murgatroyd's assignees*, 4 Dallas, 304; but if the husband receives the wife's inheritance without any agreement for a separate trust, and mixes the avails with his general funds, and subsequently, upon becoming insolvent, settles the amount of it upon his children, the settlement cannot be sustained; *Whittlesey* v. *McMahon*, 10 Connecticut, 138. A voluntary settlement of personalty upon the wife to the extent of the provision which chancery would decree as the wife's equity, out of the wife's choses in action, will be sustained in chancery to the extent of that consideration; *Wickes* v. *Clarke*, 8 Paige, 161. Independently of any of these valuable considerations, a settlement after marriage on a wife or children, though meritorious, is voluntary, and its validity will depend upon the principles above stated in relation to such conveyances: the rule *generally* established in this country may be taken to be, that a voluntary post-nuptial settlement on a wife and children, will be good if the husband be not in debt at the time, or the settlement be not disproportionate to his means, taking into view his debts and situation; in short, if it be *bonâ fide*, reasonable, and clear of any intent, actual or constructive, to defraud creditors; *Picquet* v. *Swan et al.*, 4 Mason, 444, 451; *Gassett and others* v. *Grout and Trustee*, 4 Metcalf, 486, 488: see *Anonymous*, Wallace, Jr., 107; *Haskell* v. *Bakewell*, 10 B. Monroe, 206, 209.

A gift or conveyance, originally voluntary, may become supported by a valuable consideration, by matter *ex post facto*, as, if it be an inducement to a marriage subsequently contracted; and it appears that if one marry a voluntary donee with knowledge of a voluntary gift or grant previously made, though it were made without any view to a marriage, the original donee or grantee becomes a purchaser, and the conveyance cannot be disturbed; *Sterry* v. *Arden*, 1 Johnson's Chancery, 261, 271; S. C. on error, 12 Johnson, 536; *Weed* v. *Jackson*, 8 Wendell, 10, 33; *Huston's Adm'r* v. *Cantril et al.*, 11 Leigh, 137; *Bentley et als.* v. *Harris's Adm'r*, 2 Grattan, 357; *Halcombe* v. *Ray*, 1 Iredell's Law, 340, 344; see the remarks in *Hopkirk* v. *Randolph et al.*, 2 Brockenbrough, 133, 147, 148; and see the judgment in *Willis* v. *Cole et als.*, 6 Grattan, 645.

Under both statutes, *bonâ fide* purchasers for a valuable consideration without notice, whether purchasing from the fraudulent grantor or grantee,

are protected. In *Preston* v. *Crowfut*, 1 Connecticut, 527 *note*, and by Chancellor Kent in *Roberts* v. *Anderson*, 3 Johnson's Chancery, 372, and by the court in *Hoke* v. *Henderson*, 3 Devereux, 12, 16, it was supposed that there is a distinction between the statutes 13 Elizabeth, c. 5, and 27 Elizabeth, c. 4; and that a conveyance by the fraudulent *grantee* to a *bonâ fide* purchaser, is not good against the creditors of the grantor, the former statute being for the protection of creditors, as the other is for that of purchasers, and it being expressly declared by the former that, as against creditors, the conveyance is utterly void: but the decision of the chancellor in *Roberts* v. *Anderson* was reversed in the Court of Errors, S. C., 18 Johnson, 515; and the distinction, though it may still exist in Connecticut where the statute is peculiar, and possibly in North Carolina, is exploded in New York and everywhere else; *Ledyard* v. *Butler*, 9 Paige, 132, 136; *Bean* v. *Smith*, 2 Mason, 252; *Wood* v. *Mann et al.*, 1 Sumner, 507, 509; *Somes* v. *Brewer*, 2 Pickering, 184, 198; *Rowley* v. *Bigelow*, 12 Id. 307, 312; *Oriental Bank* v. *Haskins*, 3 Metcalf, 332, 339; *Green* v. *Tanner and others*, 8 Id. 411, 421; *Hood* v. *Fahnestock*, 8 Watts, 489, 492; *Mateer* v. *Hissim*, 3 Pennsylvania, 160, 164; *Neal* v. *Williams*, 18 Maine, 391; *Gordon* v. *Haywood*, 2 New Hampshire, 402; *Myers et al.*, v. *Sanders' Heirs*, 7 Dana, 506, 511; *Wineland* v. *Coonce*, 5 Missouri, 296, 300; *note* to *Hopkirk* v. *Randolph et al.*, 2 Brockenbrough, 152, 153; *Reed* v. *Smith*, 14 Alabama, 380, 386. If a grantor make two voluntary conveyances, and the second grantee convey for valuable consideration, his grantee will be a purchaser for valuable consideration to avoid the former conveyance; *Lessee of Moffett* v. *Whittaker*, Longfield and Townsend (Irish Exchequer), 141. Indeed, it is a universal principle, of equity and of common law, applicable alike to lands and chattels, that where a sale is fraudulent, legally or actually, against third persons only, a *bonâ fide* purchaser without notice is protected and has a valid title; *Thompson* v. *Lee*, 3 Watts & Sergeant, 479; *George* v. *Kimball*, 24 Pickering, 234, 239; *Neal* v. *Williams*, 18 Maine, 391; *Truluck and others* v. *Peeples and others*, 3 Kelly, 446. But one who purchases *with* notice, though for a valuable consideration, is not protected; *Shaw and Another* v. *Levy*, 17 Sergeant & Rawle, 99, 102; but where a conveyance, fraudulent upon its face as against creditors, is part of the chain of the purchaser's title, the purchaser must further have notice, actual or constructive, of the fact that there are creditors to be defrauded; *Johnston's Heirs* v. *Harvey*, 2 Pennsylvania, 82, 92. A purchaser with notice from one who purchased without notice may avail himself of his vendor's want of notice; *Hagthorp et ux. et al.* v. *Hook's Adm'rs*, 1 Gill & Johnson, 273, 301. The burden of proving a valuable consideration is upon the purchaser, when proof of that fact becomes necessary to his protection against either creditors or subsequent purchasers, or when he seeks to avoid a previous voluntary conveyance; and the acknowledgment of consideration in the deed, is said in *Clapp* v. *Tirrell*, 20 Pickering, 247, to be admissible *prima facie* evidence, though of the lowest kind; but, in truth, as, in such cases, the persons to be affected by the evidence, claim by a paramount right, it is no evidence at all, not even *prima facie; Rogers* v. *Hall*, 4 Watts, 359, 362; *Kimball* v. *Fenner*, 12 New Hamp., 248, 251; *Falkner* v. *Leith and Jones*, 15 Alabama, 9, 14.

Equity has concurrent jurisdiction with law, in regard to frauds under these statutes; and the construction of the statutes is the same in both courts; *Hopkirk* v. *Randolph et al.*, 2 Brockenbrough, 133, 139. There are two cases in which a creditor may go into equity to obtain satisfaction out of property fraudulently settled or conveyed; one, where the transaction has assumed such a form, or the property

is of such a nature, that it was never subject to an execution at law, and in this case the remedy is only in chancery; *Botsford* v. *Beers*, 11 Connecticut, 370; *Weed* v. *Pierce*, 9 Cowen, 722; the other, where property legally liable to execution has been fraudulently conveyed or encumbered, for though the property might be sold on an execution at law against the debtor, yet equity will not require the creditor to sell a doubtful or obstructed title at law, but will set aside the conveyance; *Lillard* v. *M' Gee*, 4 Bibb, 165; *Dodge* v. *Griswold*, 8 New Hampshire, 425; *Trippe & Slade & others* v. *Lowe's Adm'r & others*, 2 Kelly, 304; *Thurmond & others* v. *Reese*, 3 Id. 449; *Dargan* v. *Waring et al.*, 11 Alabama, 989, 993; *Buck* v. *Sherman*, 2 Douglass, 177, 180. Where a demand is purely legal, the creditor cannot go into equity to obtain relief or satisfaction until his debt has been ascertained in a court of law: *Wiggins* v. *Armstrong*, 2 Johnson's Chancery, 144; *Greenwood* v. *Brodhead*, 8 Barbour's S. Ct., 593; *Hafner* v. *Irwin*, 4 Iredell's Law, 529; *Donaldson* v. *The Bank of Cape Fear*, 1 Devereux's Equity, 103, 107; *M'Kinley, &c.* v. *Combs, &c.* 1 Monroe, 105, 106; *Allen & Ward* v. *Camp & Gray*, Id. 231, 232; *Woods* v. *M' Gavock*, 10 Yerger, 133, 137; *Chester et al.* v. *Greer et al.*, 5 Humphreys, 26, 35; *Williams et al.* v. *Tipton et al.*, Id. 66: but if the demand be cognizable in equity in the first instance, as where the claim is purely equitable, or from the death, or death and insolvency of the debtor, has become subject to chancery jurisdiction, the debt may be proved and the property reached under the same proceeding; *Halbert, &c.* v. *Grant*, 4 Monroe, 580, 583; *Thompson*, v. *Brown*, 4 Johnson's Chancery, 620, 631; *O'Brien* v. *Coulter*, 2 Blackford, 421, 423; and the remark in *Russel* v. *Clark's Ex'rs*, 7 Cranch, 89, that the fund's being equitable gives original jurisdiction to equity is to be understood of the case where the only fund existing is equitable, as in case of death and insolvency. But with regard to the extent to which a legal creditor must proceed at law, before he can claim the aid of a court of chancery, there is a difference, depending on the nature of the property which he seeks to charge; where lands or chattels of which the legal title was in the debtor, have been fraudulently conveyed, it is enough to have a judgment in the former case, and to issue an execution to the sheriff in the latter, because the application to chancery is to remove an obstruction which prevents a legal lien from operating upon the property, but where it is desired to reach equitable assets it is necessary to have the execution levied and returned unsatisfied, or something equivalent to that, because chancery does not let a creditor in upon that fund until the legal assets appear to be exhausted; *Beck* v. *Burdett*, 1 Paige, 305, 308; *M'Elwain* v. *Willis*, 9 Wendell, 548; *Mer. & Mech. Bank* v. *Griffith*, 10 Paige, 519; *Storm* v. *Waddell*, 2 Sandford, 495, 510; *Brown et al.* v. *Long et al.*, 1 Iredell's Equity, 190; *M'Nairy* v. *Eastland*, 10 Yerger, 310, 319; *Screven* v. *Bostick*, 2 M'Cord's Chancery, 410, 416; *Perry* v. *Nixon*, 1 Hill's Chancery, 335; *Roper* v. *M' Cook and Robertson's Adm'r*, 7 Alabama, 319, 324; *Stone et al.* v. *Manning*, 2 Scammon, 531, 534; *Manchester et al.* v. *McKee, Ex'r*, 4 Gilman, 511, 515; *Miller et al.* v. *Davidson*, 3 Id. 518, 522; *Reese & Heylin* v. *Bradford et al.*, 13 Alabama, 838, 845; *Daryan* v. *Waring et al.*, 11 Alabama, 989, 994; *Webster* v. *Clark*, 25 Maine, 313, 315; *Same* v. *Withey*, Id. 326, 329; *Tappan* v. *Evans*, 11 New Hampshire, 312, 327; but where legal assets have been fraudulently conveyed, a creditor is entitled to set the conveyance aside in equity without showing that there is no other property retained by the debtor from which satisfaction might be had; *Botsford* v. *Beers*, 11 Connecticut, 370, 375; *Thurmond and*

others v. *Reese*, 3 Kelly, 449; *Stephens* v. *Beal*, Id. 319; perhaps if the conveyance were merely voluntary and without fraud, it might be otherwise, as was held in *Eigleberger and others* v. *Kibler*, 1 Hill's Chancery, 113, though probably the only exception would be where the consideration is a meritorious one, as a settlement on a wife or child. A creditor may file a bill in his own name and for his sole benefit, or with others for their common benefit, or in behalf of himself and all others who may be entitled and may choose to come in; if he proceeds on his own account alone, and no lien has been gained, or can be acquired, at law, he acquires a specific lien by filing the bill, and is entitled to priority over other creditors; *Edmeston* v. *Lyde*, 1 Paige, 637; *Corning* v. *White* 2 Id. 567; *Farnham* v. *Campbell*, 10 Id. 598, 601; *Weed* v. *Pierce*, 9 Cowen, 722, 728; *U. S. Bank* v. *Burke*, 4 Blackford, 141, 145; *Miers & Coulson* v. *The Zanesville and Maysville Turnpike Co.*, 13 Ohio, 197; but no specific lien is acquired upon equitable assets, but from the filing of the bill; *Blake* v. *Bigelow and others*, 5 Georgia, 437, 439. Several judgment creditors may unite in one bill against their common debtor and his grantees to avoid fraudulent transfers, though they take by separate conveyances, and no joint fraud is charged; *Donelson's Adm'rs* v. *Posey et al.*, 13 Alabama, 752, 762.

In equity, a voluntary donee without frand, is not responsible for the property, or the value of it, if he has sold or restored it, or it has accidentally been destroyed before the filing of the bill, because the right of the creditor is not to have an account taken of the property, and for its use, but only to proceed against the property in the hands of the donee; *Swift & Nichols* v. *Holdridge and others*, 10 Ohio, 230; *Simpson* v. *Simpson et als.*, 7 Humphreys, 275, 277; *Tubb* v. *Williams et al.*, Id. 367, 371; nor for profits or losses upon it prior to such time; *Backhouse's administrator* v. *Jett's administrator et al.*, 1 Brockenbrough, 501, 510, 515; but only as it was at the filing of the bill and profits from that time; or, where the debtor has taken the benefit of the insolvent laws or become bankrupt, from the time of the application or bankruptcy; *Kipp* v. *Hanna*, 2 Bland, 26, 36; *Sands and others* v. *Codwise and others*, 4 Johnson, 536, 600; because the conveyance was perfectly good and the property belonged entirely to the grantee, until the rights of creditors attached upon it; *Fripp* v. *Talbird*, 1 Hill's Chancery, 142, 143: But where there has been actual fraud, any one holding *malâ fide* is accountable for rents and profits from the time that he came into possession; *Strike* v. *M'Donald & Son*, 2 Harris & Gill, 193, 220, 224. As to the personal liability of the fraudulent grantee of a chattel who has sold it or does not produce it, see *Halbert, &c.* v. *Grant*, 4 Monroe, 580, 588, 591.

Of voluntary assignments to trustees for the benefit of creditors.

THOMAS AGAINST JENKS.

PARRY AGAINST THE SAME.

In the Supreme Court of Pennsylvania.

PHILADELPHIA, APRIL 16, 1835.

[REPORTED, 5 RAWLE, 221–227.]

A voluntary assignment by an insolvent, in trust for his creditors, which contains no provisions tending fraudulently to hinder and delay them, is valid: but the reservation of any benefit or advantage to the debtor renders the assignment fraudulent and void.

An assignment by partners of the partnership effects, and not of their separate property also, if it contain a condition that the creditors shall release their claims against the assignors, individually, and as co-partners, is fraudulent and void.

THIS was an appeal by Joseph S. Sloan, assignee of Jenks and Company, from the decision of the Court of Common Pleas of Bucks County, awarding to the plaintiffs the money in the hands of the sheriff, made under executions against Jenks and Company.

By indenture, dated the seventh day of February, A.D. 1833, William P. Jenks and William Maris, trading as William P. Jenks & Co., made an assignment to Sloan, of all the machinery, stock, goods, chattels, debts, moneys, effects, messuages, lands and tenements, book-debts, accounts, claims, and all other things whatsoever of the said William P. Jenks & Co., as well real as personal, in trust to pay creditors in the manner therein set forth.

The assignment contained the following proviso: provided always, nevertheless, that no creditor shall be entitled to any benefit under the assignment, who shall not, on or before the sixth day of March next, at 12 o'clock at noon on that day, in due form of law execute a full and sufficient release of and from their respective claims to the said William P. Jenks and William Maris, *individually and as co-partners.* Fourthly, to restore and repay to the said William P. Jenks and William Maris, the residue of the estate and effects, or the proceeds thereof, remaining in the hands of the said Joseph S. Sloan, after payment and discharge

and indemnity of the aforesaid claims in the manner and order aforesaid.

Releases were accordingly signed by a number of the creditors on the fifth day of March, 1833.

On the 8th of April, 1833, Thomas and Parry issued writs of fi. fa.

On the eleventh day of April, 1833, the sheriff levied under the plaintiffs' executions on the property, the right to the proceeds of which was the subject of the present controversy.

Sloan issued a foreign attachment against William P. Jenks & Co., and directed the sheriff to attach the machinery included in the assignment.

Sharswood (*J. R. Ingersoll* was with him) for the appellant.

The first question is, whether an assignment of partnership property for the benefit of partnership creditors, and stipulating for a general release, is *per se* fraudulent? It is to be taken for granted, that this transaction was fair in fact, as nothing appears to the contrary. The right of a debtor in failing circumstances to prefer one creditor to another cannot now be doubted. Hendricks v. Robinson, 2 Johns. Ch. Rep. 283. Wilt v. Franklin, 1 Binney, 510. Nor can it be doubted that he may make a special assignment of part of his property for the benefit of particular creditors; nor is the mode of designation material. The case of Lewkner v. Freeman, Finch, 105, was a special assignment to pay scheduled debts and such other debts as the debtor within a certain time should appoint. The stipulation for a release has been recognised as valid in general assignments. Lippincott v. Barker, 2 Binn. 174. Pierpont v. Graham, 4 Wash. C. C. Rep. 232. It is worthy of remark that in Pierpont v. Graham, the assignment was as in our case, an assignment of partnership property only, and stipulated for a general release. Sheepshanks v. Cohen (14 Serg. & Rawle, 35), appears also to have been an assignment of that character. But Judge STORY has expressly decided this point in our favour in Halsey v. Whitney and al. 4 Mason, 218, and in a very lucid and able opinion examined and sifted most of the cases. The only thing to the contrary that can be found in any of the books is a mere *obiter dictum*, and a very loose one, of Chancellor KENT in Seaving v. Brinckerhoff, 5 Johns. Ch. Rep. 329, which turned upon an entirely different point, and where, though he viewed such a stipulation as unreasonable and strong evidence of fraud in fact, he does not say it is fraud *per se*.

Here was no resulting trust. The separate property continued open to the execution of the dissenting creditors. It did not pass by the assignment. All the cases on this subject are where the creditor is

obliged to break down the assignment in order to get at the reserved fund. M'Alister v. Marshall, 6 Binn. 338. It results from the right of the debtor to prefer that he may offer terms, and provided he does not withdraw any part of his property from the process of his creditors for his own benefit, the transaction is unimpeachable.

The second question is, whether the executions in these cases were not laid too late? It appears that they were levied subsequent to the signature of the release by a large number of creditors. By so doing they had in effect accepted the fund assigned in full satisfaction of their respective debts, and in equity it had become theirs. Brown v. Mintum et al. 2 Gallison, 557, was an assignment of particular property for the benefit of certain creditors enumerated in a schedule; and it was held that they acquired by their assent not only an equitable but a legal right to the fund. That such an assignment as this is capable of confirmation is shown by many cases. Austin v. Bell, 20 Johns. 442. Murray v. Riggs, 15 Johns. 571. Hatch v. Smith, 5 Mass. 42. Bradway's estate, Ashmead, 212. Marbury v. Brooks, 7 Wheat. 556. Brooks v. Marbury, 11 Wheat. 78. In Adlum v. Yard, 1 Rawle, 163, there was no stipulation for a release, and it was decided by this court, that if a creditor take a dividend under a fraudulent assignment, he cannot afterwards question its validity. A release under the hand and seal of the creditor is certainly a more solemn and direct confirmation than the mere receipt of a dividend. "It has been conceded," says TILGHMAN, C. J., in Lippincott v. Barber, 2 Binn. 181, "that if any of the creditors had given a release before the execution was levied, such creditor would have been entitled to a preference." Indeed that case when examined will be found to be a case in point; for the court there carefully avoid deciding the question whether the assignment was valid; but defeated the execution of the dissenting creditor on the ground that it was not laid until after the assignment had been accepted by certain of the creditors. So it has been held in the Supreme Court of the United States, that in a fraudulent assignment, the assignee is entitled to retain for his own bonâ fide debt, for his equity is equal to the other creditors, and he has the possession. Beach v. Viles, 2 Peters's S. C. Rep. 675.

Ross, contra.

The assignment is void.—

1. Because it contains a resulting trust to the debtor. The court intimated that this point had been decided in favour of the resulting trust.

2. The time fixed for a release was unreasonably short, only thirty days. Pierpont v. Graham, 4 Wash. C. C. R. 237.

3. Because the assignment is only of partnership property and yet stipulates for a release of their separate estates. An assignment stipulating for an exemption of part of the property is void as tending to delay, hinder and defraud creditors. The assignors here had individual property. All the debtor's property must pass in order shown to render the transactions valid. The courts have of late a disposition rather to restrict and extend these voluntary assignments.

Mr. *Ross* then went into an examination of the cases, citing M'Alister v. Marshall, 6 Binn. 338. Passmore v. Eldridge, 12 Serg. & Rawle, 198. Sheepshanks v. Cohen, 14 Serg. & Rawle, 35. Wilson v. Knepley, 10 Serg. & Rawle, 439. Johnson v. Harvey, 9 Serg. & Rawle, 123. 2 Penn. Rep. 92. Adlum v. Yard, 1 Rawle, 153. McClury v. Lecky, 3 Penn. R. 83. Leaving v. Brinckerhoff, 5 Johns. C. R. 329. Austin v. Bell, 20 Johns. 450.

4. The possession of the property must pass to the assignee. Hower v. Geesaman, 17 Serg. & Rawle, 251. Shaw v. Levy, 17 Serg. & Rawle, 101. The attachment was conclusive evidence that the possession did not pass. There is no evidence that the assignee complied with the requisites of the act of 1832, as to schedule, bond, &c. Though the omission to comply with these requisites does not vitiate the assignment, it is evidence that the assignee never assented.

Randall, on the same side, was relieved by the Court.

The opinion of the court was delivered by

GIBSON, C. J.—It is difficult, at a glance, to reconcile the mind to the decisions in support of these conditional assignments in any case; or comprehend how a conveyance which puts the debtor's property beyond his creditor's reach, except on terms prescribed by himself, can be anything else than an act to "delay, hinder and defraud" within the purview of the 13 Elizabeth. On the other hand, where the object is in truth distribution and not hindrance, the supervening delay being but incidental to the process, it is not easy to point out a defect in the argument on which they have been sustained. The basis of it is the admitted right which every debtor in failing circumstances has, to prefer one creditor to another: for as an assignment on valuable consideration and for a lawful purpose as payment of debts is, necessarily passes the property out of the debtor, the consequence indicated as apparently objectionable, is unavoidable though there be even an express reservation of a trust for the debtor in the unconsumed surplus, which is no more

than the law would imply without it, such surplus being liable in his hands as if it had never passed from him. The difficulty is to understand how he may lawfully manage his right to give a preference in such a way as to secure an advantage to himself in the release of his person and future earnings. And the solution of it is found in the arbitrary control over the order of payment allowed him by the common law, and not restrained by the 13 Elizabeth; which, suffering him to postpone any creditor to the rest, makes participation of the fund before those he may choose to prefer are served, not so much matter of right as of favour. To let a creditor in among the first, therefore, though on condition that he release the unpaid residue of his debt, may be to do him a favour instead of a wrong, which may consequently be extended to him on terms, or not at all. Having an unquestionable power of preference of which he is the absolute master, it follows that he may set his price on it, provided it be not a reservation of part of the effects for himself, or anything that would carry his power beyond mere preference. Such is the unavoidable, if not the just, effect of suffering a debtor to distribute the wreck of his fortune among his creditors according to his pleasure; and it is the repugnance of the mind to inequality of satisfaction which has induced legislators to extirpate the root of it in bankruptcy and insolvency, by substituting for it a process of distribution paramount to the will of the debtor. To expunge the principle of preference from a bankrupt law made by the debtor for himself, so long as he is permitted to legislate for himself, would require the force of a statute: and I am unable to say that the decisions which sustained these assignments originally, though coupled with a stipulation for prospective exemption, were unfounded in the principles of the common law: certainly it is now too late to question their authority. The legality of such a stipulation seems not to have been contested in Burd v. Smith, 4 Dallas, 76. Indeed the reasons of the judges are so indistinctly set forth in that case, and the discrepance of their views is so remarkable, as to render it of little value as a precedent for anything. From Lippincott v. Barker, 2 Binney, 174, in which the point was expressly ruled, to the present time, the occurrence in practice of a countless number of such assignments—many of them recognised by judicial decision—and the immense amount of property held by the title, would make it dangerous even to pause as to the validity of it.

But the principle of preference on terms of compromise, is not to be indulged so far as to legalize the reservation of a portion of the effects for the debtor. In M'Allister v. Marshall, 6 Binney, 338, it was held that an assignment of *all* the effects upon a stipulation to reconvey *a part* for the benefit of the debtor's family, is void for the part to be reconveyed. It was not necessary to pronounce it void for the whole as

no more than the part re-conveyed was in contest; but nothing is clearer than that a contract fraudulent in part by the provisions of a statute, whatever be the abstract effect of fraud in other cases, is void in the whole. The principle has since been applied in Hyslop v. Clark, 14 Johns. 465, to the very case of an assignment in trust for payment of debts. Under the 13 Elizabeth, then, what is the difference between a conveyance of the whole on terms of returning a part, and a conveyance of a part in the first instance? Certainly but a difference of form, and not a difference in principle or effect. In either form the transaction would give the debtor the same advantage at the expense of the creditors. A debtor, for example, who has enough to pay seventy-five per cent. all round, assigns two-thirds of his effects, or to the value of fifty per cent. of his debts, in trust to pay those who shall release by a day certain; and retains to the value of twenty-five per cent. With the alternative of choosing between these two funds put before him, what would a creditor probably do? If two-thirds in value, and no more, should happen to prefer the trust fund, they would get seventy-five per cent.; their just proportion of the whole effects; while the others would get as much from the portion in the hands of the debtor; and in that conjuncture, any particular choice would be indifferent to him. But if less than two-thirds should accept the terms proffered in the assignment, they would get more than their just proportion, and those who rejected them would get less. If, however, all should accept, then all would get at the least fifty per cent., while if all should reject, they would get but half as much. The probability therefore is that a great majority—perhaps all—would elect the trust fund; and that would leave a surplus to the debtor. Now it must be obvious that an exercise of the right of preference, which might produce that result, cannot be a legitimate one. The creditors are entitled to the benefit of the whole estate, of which they are not to be deprived by an arrangement which would impose on them the necessity of resorting to a part of it in exclusion of the rest. The very imposition of a choice which might prove unfortunate, would be an exposure of them to a peril which they are not bound to encounter. An assignment, therefore, that would present but a part of the effects to the creditors and refuse the rest, is necessarily fraudulent, inasmuch as it might be a means to extort an unfair advantage. But why, it may be demanded, shall not the debtor be suffered to stipulate for a part of the property as well as for the exemption of his person and future acquirements? The answer is that the statute, by which alone any stipulated exemption is prohibited, looks but to property which may be the subject of present assignment. It protects the creditor's recourse to the property conveyed by avoiding all conveyances that would "delay, hinder, and defraud" him of it, without, however, protecting his recourse

to anything else, because the assignment cannot operate on anything else.

Now an assignment of partnership effects is a partial one wherever the debtor has separate property. The terms of the present, embrace "all manner of machinery, stock, goods, chattels, debts, accounts, claims, and all other things whatsoever of the said *William P. Jenks and company*, as well real as personal, and of what nature, kind, or quality soever," which evidently has respect but to the joint effects. And this assignment of the partnership effects is on condition that the creditor execute by a day certain, "a full and sufficient release of and from his claim, to the said *William P. Jenks and William Maris, individually*, and as copartners." Such a release would unquestionably exonerate their separate estates; and the validity of the assignment therefore depends on a single question of fact. It amply appears in the proofs reported by the Commissioner, that both partners had separate property—the one to the value of several hundred dollars, and the other to the value of several thousand. The assignment was therefore fraudulent and void; and the proceeds of the property were properly awarded to the execution creditors.

Decree in each case affirmed.

GROVER *v.* WAKEMAN.

In further illustration of the principles applicable to voluntary assignments for the benefit of creditors, the following extract is given from the opinion delivered by Mr. Justice Sutherland in the case of Grover v. Wakeman, in the Court of Errors of New York, in 1833, 11 Wendell, p. 200 to 203. The views expressed by Mr. Sutherland, in these remarks, have been extensively adopted.

There being, then, such a conflict among the authorities, and so much doubt on which side the preponderance lies, it seems to be not only proper but necessary to consider the question with reference to the general principles involved in it. Every conveyance of property to trustees is, to a certain extent, a hindering and delaying of creditors. It interrupts and presents obstacles to their legal remedies; and every such assignment is absolutely void, if it does not appoint and declare the uses for which the property is to be held and to which it is to be applied. A provision that the uses shall be subsequently declared by the assignor

will not do; they must accompany the instrument and appear on its face, in order to rebut the conclusive presumption of a fraudulent intent, which would otherwise arise. But where the assignor parts with all control over the property, and devotes it absolutely to the benefit of his creditors, without any reservation or stipulations for his own advantage, the honesty of his intention is so apparent, and the advantage to the creditors so direct and decisive, that they cannot be said to be obstructed or delayed in their remedies. But where, instead of directly distributing his property among his creditors as far as it will go, he places it beyond their reach by an assignment, not merely for the purpose of saving it from one particular creditor, to be given to another, or to be equally divided among all, but for the purpose of enabling him to extort from some or all of them, an absolute discharge of their debts as the condition of receiving a partial payment, he perverts the power to a purpose which it was never intended to cover, and which the principle on which the right to give preference is founded, will not justify. Why should a debtor be permitted in this way to operate upon the fears of his creditors and coerce them into his own terms? It has sometimes been said, in answer to this view of the case, that there is nothing immoral or unjust in a debtor in embarrassed circumstances and who is unable to pay all his debts, making the best arrangement in his power with his creditors, and giving the largest dividend or the whole, to those who will settle with him on the best terms; and if he can do this while he retains his property in his own hands, there is no reason, it is said, why he should not be permitted to do it under cover of an assignment. Parties not under legal disabilities, may make such contracts as they please; and if they are supported by a consideration, and there is no fraud in the case, they will not be disturbed. If a debtor, therefore, with his property in his own hands and open to the legal pursuit of his creditors, can satisfy them that it is for their interest or the interest of any of them to accept 2*s*. 6*d*. in the pound, and give him an absolute discharge, there is no legal objection to it; they treat upon equal terms; the ordinary legal remedies of the creditor are not obstructed. But the case is materially changed when the debtor first places his property beyond the reach of his creditors, and then proposes to them terms of accommodation. He obstructs their legal remedies, hinders and delays them in the prosecution of their suits, by putting his property into the hands of trustees, with the view of getting an absolute discharge from his debts, and exempting his future acquisitions from all liability. It has been decided in this court, that the reservation of the least pecuniary provision for the assignor or his family, renders an assignment of this description fraudulent and void. How much more valuable is a discharge from his debts or a portion of them to an insolvent debtor, than a temporary pe-

cuniary pittance. Judge Van Ness, in Hyslop v. Clarke, states what I consider to be the sound principle upon this subject. He says an insolvent debtor has no right to place his property in such a situation as to prevent his creditors from taking it, under the process of a court of law, and to drive them into a court of equity, where they must encounter expenses and delay, unless it be under very special circumstances, *and for the purpose of honestly giving a preference to some of his creditors, or to cause a just distribution of his estate to be made among them all.* Judge Spencer, in Austin v. Bell, and Chancellor Kent, in Seaving v. Brinckerhoff, obviously concurred in the soundness of that position. Judge Story expressed his approbation of it in Halsey v. Whitney. The Supreme Court of Errors in Connecticut adopted it in Ingraham *v.* Wheeler, and it was most happily and impressively amplified and illustrated by the learned Judge of the United States District Court for the State of Maine, in the case to which I have referred.

It is time that some plain, simple, but comprehensive principle should be adopted and settled upon this subject. In the absence of a bankrupt law, the right of giving preferences must probably be sustained. Let the embarrassed debtor therefore assign his property for the benefit of whom he pleases; but let the assignment be absolute and unconditional; let it contain no reservations or conditions for the benefit of the assignor; let it not extort from the fears and apprehensions of the creditors, or any of them, an absolute discharge of their debts as the consideration for a partial dividend; let it not convert the debtor into a dispenser of alms to his own creditor; and above all, let it not put up his favour and bounty at *auction* under the cover of a trust to be bestowed upon the highest bidder. After the maturest reflection upon this subject, I have come to the conclusion that the interests, both of debtor and creditor, as well as the general purposes of justice, would be promoted, if the question is still an open one, by confining these assignments to the simple and direct appropriation of the property of the debtor to the payment of his debts. The remnants of many of these insolvent estates are now wasted in litigation growing out of the complex or suspicious character of the provisions of these assignments. One device after another to cover up the property for the benefit of the assignor, or to secure to him, either directly or indirectly, some unconscientious advantage, has from time to time been brought before our courts and received condemnation. But new shifts and devices are still resorted to, and will continue to be so, until some principle is adopted upon the subject, so plain and simple that honest debtors cannot mistake it, and fraudulent ones will be deterred from its violation by the certainty of detection and defeat. The principle to which I have adverted, it appears to me, if adopted, will, to a very considerable extent, accomplish that object.

In the absence of any statutory prohibition, and of a bankrupt law, a debtor may, at any time before liens have attached upon his property, make a general or partial assignment to a trustee for the benefit of his creditors, with preferenees, which assignment will be valid as against the process of creditors, from the time of the exeeution of the deed; *Brashear* v. *West and others*, 7 Peters, 609, 614; *Lippincott* v. *Barker*, 2 Binney, 174, 186; *Wilkes & Fontaine* v. *Ferris*, 5 Johnson, 335; *De Forest* v. *Bacon*, 2 Connecticut, 633, 637; *M'Cullough et al.* v. *Sommerville*, 8 Leigh, 416, 426; *Niolon* v. *Douglass and others*, 2 Hill's Chancery, 443, 446; *Smith, Wright & Co.* v. *C. C. Campbell & Co.*, Riee 353, 366; *Moore* v. *Collins*, 3 Devereux, 126, 134; *Pearson & Anderson, &c.* v. *Rockhill & Co.*, 4 B. Monroe, 296, 297; *Hindman* v. *Dill & Co.*, 11 Alabama, 689; *Hall et al.* v. *Denison & Tr.*, 17 Vermont, 311, 317; *Cross* v. *Bryant et al.*, 2 Seammon, 37, 43. And a bank, or other corporation, in a state of insolvency, possesses the same rights that an individual possesses, to make an assignment with preferenees; *Catlin* v. *Eagle Bank*, 6 Conuecticut, 233, 242; *Savings Bank* v. *Bates*, 8 Id. 506, 512; *The State of Maryland* v. *The Bank of Maryland*, 6 Gill & Johnson, 206, 219; *Bank U. S. et al.* v. *Huth*, 4 B. Monroe, 423, 429; *Arthur* v. *The Commercial and Railroad Bank of Vicksburg*, 9 Smedes & Marshall, 396, 429; *Dana* v. *The Bank of the United States*, 5 Watts & Sergeant, 224, 243; *De Ruyter* v. *St. Peter's Church*, 3 Comstock, 238, 242; 3 Barbour's Chancery, 119; *Hopkins et als.*, v. *The Gallatin Turnpike Co.*, 4 Humphreys, 403, 410; *Conway et al., Ex parte*, 4 Pike, 305, 353; *Tower* v. *Bank of River Raisin*, 2 Douglass, 530, 553; and see opinions of Mr. Kent, Id. app. xii., and in 6 Humphreys, 532: but though settled by a conclusive weight of authority, the soundness of the principle, in regard to preferences, as applied to corporations, is doubted upon weighty reasons, in *Robins et al.* v. *Embry, et al.*, 1 Smedes & Marshall's Chaneery, 208, 259, 265: and a general assignment by a bank, though admitted to be valid, was deeided in *The State* v. *The Real Estate Bank*, 5 Pike, 596, 607, to be a good cause of forfeiture of its charter.

An assignment *bonâ fide*, for the security of a future or contingent liability, as that of a surety or endorser, is also within the proteetion of the law; *Stevens et al.* v. *Bell*, 6 Massachusetts, 339; *Halsey et al.* v. *Whitney et al.*, 4 Mason, 207, 231; *Canal Bank* v. *Cox, & tr.*, 6 Greenleaf, 395, 399; *Hendricks* v. *Robinson*, 2 Johnson's Chaneery, 284, 306, 308; *Miller* v. *Howry*, 3 Penrose & Watts, 374, 381; *Vernon, &c.* v. *Morton & Smith, &c.*, 8 Dana, 247, 253, 266; *Duvall & others*, v. *Raisin & others*, 7 Missouri, 449, 450; *M'Whorter* v. *Wright, Nichols & Co.*, 5 Georgia, 555; see *Allen et al.* v. *Montgomery R. R. Co., et al.*, 11 Alabama, 438, 452: but as to indemnifying speeial bail, see *Whallon* v. *Scott*, 10 Watts, 237, 244.

Where a eonveyanee is made direetly to ereditors in consideration of indebtedness, their assent (actual, or to be presumed), to the conveyance is neeessary (see *Tompkins* v. *Wheeler*, 16 Peters, 106, 119); but where the eonveyance is to a trustee for their benefit, their assent, where there is nothing fraudulent in the deed, is not neeessary; *Nicoll* v. *Mumford*, 4 Johnson's Chaneery, 523, 529; *Cunningham* v. *Freeborn*, 11 Wendell, 241, 249; *Halsey et al.* v. *Whitney et al.*, 4 Mason, 207, 214; *Houston* v. *Nowland*, 7 Gill and Johnson 480, 492; *Bank U. S. et al.* v. *Huth*, 4 B. Monroe, 423, 437; *Smith* v. *Leavitts*, 10 Alabama, 93, 104; *Kinnard* v. *Thompson*, 12 Id. 487, 491; *The Governor, use, &c.* v. *Campbell et als.*, 17 Id. 566, 569: see *Klapp's Assignees* v. *Shirk*, 1 Harris, 589, 592. The cases in Massachusetts, which required the assent of a creditor to render an assignment valid

as against him (*Russell* v. *Woodward*, 10 Pickering, 408), were grounded upon the difficulty formerly felt respecting the power of the courts in that state, to compel the trustee to execute the trust; *Stevens et al.* v. *Bell*, 6 Massachusetts, 339, 342; *Widgery et al.* v. *Haskell*, 5 Id. 144, 154; but since the act of 1836, c. 238, which gives the creditors a remedy against the trustee, the assent of creditors is no longer necessary in Masaachusetts; *Shattuck* v. *Freeman*, 1 Metcalf, 10.

By an acceptance of an assignment for the benefit of creditors, the assignee becomes a trustee for the creditors, and chancery will compel the execution of the trust for their benefit; *Moses* v. *Murgatroyd*, 1 Johnson's Chancery, 119, 129; *Shepherd* v. *M'Evers*, 4 Id. 136; *Nicoll* v. *Mumford*, Id. 523, 529; *Ward et al.* v. *Lewis et al.*, 4 Pickering, 518, 523; *New England Bank* v. *Lewis et al.*, 8 Id. 113, 118; *Pingree* v. *Comstock*, 18 Id. 46, 50; *Weir & another* v. *Tannehille & others*, 2 Yerger, 57; *Robertson et als.* v. *Sublett et al.*, 6 Humphreys, 313; *Pearson & Anderson, &c.* v. *Rockhill et al.*, 4 B. Monroe, 296, 303; see *Hulse, Montellius & Fuller* v. *S. Wright*, Wright, 61, 64. When a creditor goes into equity to seek the benefit of an assignment, he must either make the other creditors parties, or must file the bill in behalf of others who may choose to come in, as well as of himself; but when he desires to set aside an assignment, he files a bill in his own name against the assignor and assignee alone without making the other creditors parties; *Wakeman* v. *Grover*, 4 Paige, 24, 33; *Russell* v. *Lasher*, 4 Barbour's Supreme Court, 233, 237.

When the trustee is not present, his assent may be presumed, for the purpose of giving operation to the deed; and the deed of assignment will take effect, as a transfer of the property, as against creditors, from the time of the first delivery by the grantor, subject to be defeated by the dissent or refusal of the trustee; *Skipworth ex'or* v. *Cunningham, &c.*, 8 Leigh, 272, 281; *Wilt* v. *Franklin*, 1 Binney, 502, 518; *M'Kinney* v. *Rhoads*, 5 Watts, 343; *Read* v. *Robinson*, 6 Watts & Sergeant, 329; see *Moore* v. *Collins*, 3 Devereux, 126, 133, and *Ward et al.* v. *Lewis et al.*, 4 Pickering, 518, 519, 520, and *Merrills* v. *Swift*, 18 Connecticut, 257, 262. In like manner, a letter assigning personal property to an absent creditor for the indemnity of himself, or of himself and others, and sent by mail, takes effect from its date; *Dargan* v. *Richardson*, 1 Cheves Law, 197; *Shubar & Bunting* v. *Winding*, Id. 218. But where a deed was put into the hands of the trustee, and he hesitated and delayed to accept it, but subsequently, and after an execution had been levied, claimed the property under it, it was held that the deed did not operate against the execution, for there was a clear non-acceptance in fact during the period of delay; *Crosby* v. *Hillyer*, 24 Wendell, 280.

An assignment in trust for creditors, which by its provisions tends to hinder or delay creditors, is fraudulent and void in law; see *Sheldon* v. *Dodge*, 4 Denio, 218, 225; *Bodley et al.* v. *Goodrich* 7 Howard, 277; *Hart & McFarland et al.*, 1 Harris 185, and this may occur in various ways. Postponing to an unreasonable time, the period of sale and payment will avoid the assignment, and the reasonableness of the delay depends on the character of the property and the circumstances of the case; *Hafner* v. *Irwin*, 1 Iredell's Law, 490, 496; *Hardy* v. *Skinner*, 9 Id. 191; *Rundlett* v. *Dole & Trustee*, 10 New Hampshire, 458, 465; *Grover* v. *Wakeman*, 11 Wendell, 187, 207; *Bennett et als.* v. *Union Bank et als.*, 5 Humphreys, 612, 616; *Robins et al.* v. *Embry et al.*, 1 Smedes & Marshall's Chancery, 208, 271; *The Farmers' Bank et al.* v. *Douglass et al.*, 11 Smedes & Marshall, 472, 539; *Arthur* v. *C. & R. Bank of Vicksburg*, 9 Id. 396, 433; see

Browning & Hart, 6 Barbour's S. Ct. 91, 93; an interval of three years before any payment is made, is unreasonably long; *Adlum* v. *Yard*, 1 Rawle, 163, 171; *Mitchell* v. *Beal*, 8 Yerger, 134, 141; three months, in the case of a growing crop or fattening stock, is not unreasonable; *Christopher* v. *Covington & Smith*, 2 B. Monroe, 357, 358, 368; a year's suspension of proceedings, where the expressed object of the conveyance was to prevent a sacrifice of the property, was decided to be fraudulent in *Ward, &c.* v. *Trotter, &c.*, 3 Monroe, 1: but in Pennsylvania, upon an analogy to the statutory period allowed to trustees for the settlement of the trust estate, a year is declared to be the proper limit, beyond which a postponement of the trustee's accountability will be fraudulent; *Sheerer* v. *Lautzerheizer*, 6 Watts, 543, 549; *Dana* v. *The Bank of the United States*, 5 Watts & Sergeant, 224, 251. See *Hindman* v. *Dill & Co.*, 11 Alabama, 689; *Lockhart* v. *Wyatt*, 10 Id. 231; *Hodge* v. *Wyatt & Houston*, Id. 271; *Abercrombie* v. *Bradford*, 16 Alabama, 560. The reserving of a power of revocation, (*Riggs* v. *Murray*, 2 Johnson's Chancery, 565, 576, not overruled in S. C. on error, 15 Johnson, 571, and approved in *Grover* v. *Wakeman*, 11 Wendell, 187, 196,) and the introduction of such limitations and contingencies as give the debtor a control of the property, and enable him to defeat the conveyance, (*Whallon* v. *Scott*, 10 Watts, 237, 244,) also render the assignment fraudulent. Preferring a fictitious debt would have the same effect; *Webb* v. *Daggett*, 2 Barbour, 10. See, also, *Planck* v. *Schermerhorn*, 3 Barbour's Chancery, 644.

It has been held also, that the selection of an assignee, who from desperate bodily illuess, or mental infirmity, or distance from the place, is incapable of performing the duties of a trustee, evinces such a disposition to keep the property within the control and disposition of the assignor, or at least to render it unprofitable to the creditors, as will make the assignment fraudulent and void; *Cram* v. *Mitchell*, 1 Sandford, 251; *Currie* v. *Hart*, 2 Id. 353, 356: and the selection of an insolvent person, or one not of sufficient character and pecuniary ability to afford assurance that the trust will be properly administered, is *primâ facie* evidence of fraud; *Reed* v. *Emery*, 8 Paige, 417; *Connah* v. *Sedgwick*, 1 Barbour, 211, 214.

It is a general principle also, that stipulations tending to coerce the creditors unreasonably, to the prejudice of their just claims and the advantage of the assignor, render the assignment fraudulent. A power given to the assignee to compound with the creditors, (*Wakeman* v. *Grover*, 4 Paige, 24, 41, S. C. on error, 11 Wendell, 187, 203; *Hudson et al.* v. *Maze*, 3 Scammon, 579, 583,) or to either the assignor or assignee, subsequently to declare or alter preferences, renders the deed fraudulent; *Barnum* v. *Hempstead*, 7 Paige, 569, 572; *Boardman* v. *Halliday*, 10 Id. 224, 228; *Strong* v. *Skinner*, 4 Barbour's Supreme Court, 547, 569; *Averill* v. *Loucks*, 6 Id. 471, 476; *Sheldon* v. *Dodge*, 4 Denio, 218, 222; *Gazzam* v. *Poyntz*, 4 Alabama, 374, 380; *Mitchell* v. *Stiles*, 1 Harris, 306.

But the circumstance which most usually renders these assignments fraudulent, is the reservation of a use or benefit to the grantor. It is a settled principle, that a reservation to the grantor or his family, or any one not a creditor, of any trust, profit or benefit out of the property conveyed, or of a credit on account of any part of it, is a fraud in law, and voids the whole assignment; *Mackie & Cairns*, 5 Cowen, 549; *Jackson* v. *Parker*, 9 Id. 73, 86; *Mead* v. *Phillips and others*, 1 Sandford, 83, 86; *Goodrich* v. *Downs*, 6 Hill's N. Y., 438, 440; *Kissam* v. *Edmundson et al.*, 1 Iredell's Equity, 180; *Anderson et al.* v. *Fuller et al.*, 1 McMullan's Equity, 27; *M'Allister* v. *Marshall*, 6 Binney, 338, 344; *Shaffer* v. *Watkins*, 7 Watts & Ser-

geant, 219, 227; *Faunce* v. *Lesley*, 6 Barr, 121, 123; *Peacock* v. *Tompkins*, Meigs, 317, 328; *Austin* v. *Johnson*, 7 Humphreys, 191, 192; *Leadman* v. *Harris*, 3 Devereux, 144; *Byrd* v. *Bradley*, 2 B. Monroe, 239. Accordingly, a stipulation for a maintenance for the grantor or his family, or that the grantor shall be employed as agent or manager at a fixed salary, (*Johnson's heirs* v. *Harvy*, 2 Penrose & Watts, 82, 92; *M'Clurg* v. *Lecky*, 3 Id. 83, 91,) or a reservation of a specific sum of money, or of so much a year to the grantor, (*Harris et al.* v. *Sumner*, 2 Pickering, 129; *Richards* v. *Hazzard*, 1 Stewart & Porter, 139, 156; *Mackie & Cairns*, 5 Cowen, 549, considered in *Butler* v. *Van Wyck*, 1 Hill's N. Y., 463, and *Goodrich* v. *Downs*, 6 Id. 440, as overruling contrary opinions in *Riggs* v. *Murray*, 2 Johnson's Chancery, 565, and S. C. on error, 15 Johnson, 571, and of course those in *Austin* v. *Bell*, 20 Id. 442, 447, grounded upon it,) avoids the deed. But the courts have hesitated in applying this as an inflexible rule in all cases, without regard to amount or circumstances: it was held in *Canal Bank* v. *Cox & Tr.*, 6 Greenleaf, 395, 399, that a reservation by the grantor of "means of paying his small debts under fifty dollars, and ordinary family expenses," and in *Skipwith's Ex'or* v. *Cunningham, &c.*, 8 Leigh, 272, 273, 292, of three hundred and fifty dollars "to his individual use and disposition, for the purpose of paying some small claims due from him, of high honorary obligation, which are not now liquidated or specifically ascertained," and in *Kevans et als.* v. *Branch*, 1 Grattan, 275, a reservation of six months' possession, did not, under the circumstances, of themselves, avoid the deed. It seems also that there is no objection to the trustees, of their own accord, employing the debtor as agent or manager at a reasonable salary; *Shattuck* v. *Freeman*, 1 Metcalf, 10, 14; *Vernon, &c.* v. *Morton & Smith, &c.*, 8 Dana, 247, 252; *Pearson & Anderson, &c.* v. *Rockhill & Co.*, 4 B. Monroe, 296, 301; nor to a clause in the deed giving them that power if they think fit; *Planters and Merchants Bank of Mobile* v. *Clarke*, 7 Alabama, 765, 770; see remarks in *Fitler* v. *Maitland*, 5 Watts & Sergeant, 307, 310.

The reservation to the grantor, of the surplus after payment of all the creditors, is not fraudulent; for it is no more than the law would imply; *Hall et al.* v. *Denison et tr.*, 17 Vermont, 311, 318. An express reservation of the surplus upon an assignment of all or nearly all the debtor's property, to or for a part of his creditors, was decided in *Suydam & Jackson* v. *Martin, &c.*, Wright, 698; *Goodrich* v. *Downs*, 6 Hill's N. Y., 438; *Strong* v. *Skinner*, 4 Barbour's Supreme Court, 547, 559; *Cole* v. *Jessup*, 2 Id. 307; and *Griffin* v. *Barney*, 2 Comstock, 365, 371; to be fraudulent, whether in fact there was any surplus or not; see *Doremus* v. *Lewis*, 8 Barbour's S. Ct. 124; and in *Dana, Adm'r* v. *Lull*, 17 Vermont, 390, it was decided, that an assignment of all the debtor's property for the benefit of a portion of his creditors, without a provision that the surplus shall be distributed among the creditors, is fraudulent, by reason of the resulting trust of the surplus, and this, even if it turns out that there is no surplus. But in *Rahn* v. *M'Elrath*, 6 Watts, 151, 155, an express reservation of the surplus was held not to be fraudulent, on the ground that the delay of other creditors would be no longer than might be necessary to turn the property into money, unless where the amount of property assigned was so excessive as to create a presumption of fraud in fact: a *secret* reservation, however, of the surplus upon a conveyance absolute upon its face, is admitted to be a fraud; *M'Culloch* v. *Hutchinson*, 7 Watts, 434; *Smith* v. *Lowell*, 6 New Hampshire, 67; *Smith* v. *Smith*, 11 Id. 460, 465. In the recent case of *Hindman* v. *Dill & Co.*, 11 Alabama,

689, a reservation to the grantor in the deed of assignment, of the surplus after payment of the debt for which the assignment was made, was decided not to be fraudulent. It was declared to be not the reservation of a benefit under the assignment, but rather a declaration in terms, of what would be the legal effect of the deed, without such a clause: and the decision in *Goodrich* v. *Downs* was thought to be controlled by the particular statute of that state, which declares a deed void if it reserves a trust for the *use* of the person making it. A similar decision was made in *Austin* v. *Johnson*, 7 Humphreys, 191, where a variety of articles of unascertained value were conveyed to a trustee for the security of one creditor, and at the conclusion of the deed it was stipulated, that after paying the debt specified, any balance that might remain should be paid to the vendor or his order. This, it was contended, rendered the assignment void. "If the property conveyed were obviously of greater amount than was necessary to secure the debt provided for, this objection might have much weight," said the court; "but it does not so appear, and the stipulation only amounts to what the vendor would have been entitled to without it, viz., to receive any small balance that might be left after paying the debt. Why should he not be permitted to do this? no other creditor could get it without his judgment and by bill or garnishment. And if the design in conveying the property were not actually fraudulent, we are not warranted in presuming, that any balance left, would not be fairly appropriated by the vendor."

Whether a condition of release will avoid an assignment, as falling within the notion of a reserved benefit, has been disputed. An assignment to a trustee of *part* of the debtor's property, upon condition of a full release, is certainly fraudulent; *Seaving* v. *Brinkerhoff*, 5 Johnson's Chancery, 329, 332; *Skipwith's Ex'or* v. *Cunningham, &c.*, 8 Leigh, 272, 291; (except perhaps in Massachusetts; *Nostrand* v. *Atwood*, 19 Pickering, 281, 285, 286;) and an assignment by partners which does not include the individual property of both, as well as the joint property, and is upon a condition of release from all liabilities, individual and joint, is fraudulent, as was held in the principal case, *Thomas* v. *Jenks;* and this even where it does not appear that the partner whose separate property is not transferred, in fact possessed any; *Hennessy* v. *The Western Bank*, 6 Watts & Sergeant, 301, 311; *In re Wilson*, 4 Barr, 431, 448: the *dicta* in *Fassit* v. *Phillips*, 4 Wharton, 399, 409, were in an interlocutory proceeding, and are extra-judicial. But in *Canal Bonk* v. *Cox and Tr.*, 6 Greenleaf, 395, 402, it was held that a stipulation for the release of the grantor's sureties and endorsers, as well as of himself, was not fraudulent. An assignment of part of the debtor's property to such creditors as should release, the surplus to be divided among the creditors generally, where the existence of a residue was concealed by the debtor, was considered to be fraudulent in fact, in *Le Prince* v. *Guillemot*, 1 Richardson's Equity, 187, 201, 218, 219; and in *Jacot* v. *Corbet et al.*, 1 Cheves's Chancery, 71, 74, a reservation to the grantor of the surplus after paying to releasing creditors forty per cent., if the estate would yield as much, was decided to be fraudulent.

In New York, it is conclusively settled, not only that a stipulation for a release as a condition of receiving a benefit under the deed, the surplus returning to the debtor in exclusion of non-releasing creditors, is fraudulent; *Hyslop* v. *Clarke*, 14 Johnson, 458; *Austin* v. *Bell*, 20 Id. 442, 448; but that such a stipulation as a condition of preferenee, though the only penalty be the postponement of non-releasing creditors to others, avoids the deed; *Wakeman* v. *Grover*, 4 Paige, 24; S. C. on error, 11 Wendell, 187, 202, 225; and the principle established by

that case, and repeated in *Goodrich* v. *Downs*, 6 Hill's N. Y. 438, is, that though preferences are allowed, the appropriation of the property to the use of the creditors must be absolute and unconditional, and that the creation of a trust that is to operate by way of coercing the creditors into a relinquishment of part of their demands, is fraudulent and void, though no portion of the property be reserved to the debtor's own use: and this general principle is approved and sanctioned in *Hafner* v. *Irwin*, 1 Iredell's Law, 490, and *Robins et al.* v. *Embry et al.*, 1 Smedes & Marshall's Chancery, 208, 265; and see *Whallon* v. *Scott*, 10 Watts, 237, 244; see also *Hastings* v. *Belknap*, 1 Denio, 197. The law of Ohio goes as far as that of New York: a condition of release avoids the assignment; *Atkinson & Rollins* v. *Jordan Ellis & Co. and others*, 5 Ohio, 293; *Woolsey* v. *Urner*, Wright, 606; even if the surplus is not reserved to the debtor but is to be distributed to creditors; *Barret & Nicholson* v. *Reids et al.*, Wright, 701: and the decisions in Missouri appear to go to the same extent; *Brown* v. *Knox, Boggs & Knox*, 6 Missouri, 302; *Drake* v. *Rogers & Shrewsbury*, Id. 317, 319. In Connecticut and Illinois, the requirement of a release, as a condition of participation in the fund, the surplus resulting to the assignor, is fraudulent and avoids the deed; *Ingraham* v. *Wheeler*, 6 Connecticut, 277, 283; *Howell et al.* v. *Edgar et al.*, 3 Scammon, 417; *Ramsdell et al.* v. *Sigerson et al.*, 2 Gilman, 78, 83; *Swearinger* v. *Slicer*, 5 Missouri, 241; and the same principle has been adopted in the District of Maine; *The Watchman*, Ware, 232, 242, 244: these cases leaving undecided the question whether a release being made a condition of preference merely, is fraudulent. In the State of Maine, before the statute of April 1, 1836, conditions of release were valid; *Todd* v. *Buckman*, 2 Fairfield, 41; but since that statute, as also in New Hampshire since the act of July 5, 1834, both of which provide for equality of distribution among all the creditors, conditions of release or discharge, are fraudulent; *Pearson* v. *Crosby*, 23 Maine, 261; *Hurd* v. *Silsby and Trustees*, 10 New Hampshire, 108. In Pennsylvania, Virginia, and South Carolina, assignments for the benefit of such as shall release, are valid, being now too long established to be overthrown; *Lippincott* v. *Barker*, 2 Binney, 174; *Livingston* v. *Bell*, 3 Watts, 198, 201; *Bayne* v. *Wylie*, 10 Id. 309, 312; *Mechanics' Bank* v. *Gorman*, 8 Watts & Sergeant, 304, 308; *Pearpoint & Lord* v. *Graham*, 4 Washington, 232, 236; *Skipwith's Ex'or* v. *Cunningham, &c.*, 8 Leigh, 272, 290; *Kevan et als.* v. *Branch*, 1 Grattan, 275; *Niolon* v. *Douglas and others*, 2 Hill's Chancery, 443, 452; *Le Prince* v. *Guillemot*, 1 Richardson's Equity, 187, 218; and on the authority of the Pennsylvania decisions, Marshall, C. J., with some doubt and regret, sustained such an assignment in a Pennsylvania case; *Brashear* v. *West and others*, 7 Peters, 609, 615: in South Carolina, however, it has been held that an *express* reservation of the surplus to the grantor, would be fraudulent; *Niolon* v. *Douglas and others*, 2 Hill's Chancery, 443, 453; *Jacot* v. *Corbett et al.*, 1 Cheves's Chancery, 71, 78; and though this distinction is denied in Pennsylvania; *Dana* v. *The Bank of the United States*, 5 Watts & Sergeant, 224, 250; yet perhaps it is well taken, upon the ground that in the face of such an express provision, Chancery probably could not exercise its jurisdiction to let the creditor come in upon the surplus in the hands of the trustee, without overturning the deed. See *Doremus* v. *Lewis*, 8 Barbour's S. Ct. 124. In Massachusetts, such conditions seem to be sustained; *Borden et al.* v. *Sumner*, 4 Pickering, 265; *Andrews* v. *Ludlow & Trs.*, 5 Id. 28, 33; *Nostrand* v. *Atwood*, 19 Id. 281; and partly upon the supposed opinions of the profession in that region, a condition of release was upheld

in *Halsey et al.* v. *Whitney et al.*, 4 Mason, 207, 227, 230. In Alabama, a condition of release was decided to be valid in an early case (two judges dissenting); *Robinson* v. *Rapelye & Smith*, 2 Stewart, 86, 100; and that decision has reluctantly been adhered to, on the ground of mere authority, the principle being strongly condemned, in *Ashurst* v. *Martin*, 9 Porter, 567, 573; see also *Smith* v. *Leavitts*, 10 Alabama, 93, 105: and the later cases in that State have approved and adopted the general principle of *Grover* v. *Wakeman*, that an assignment for the benefit of creditors must be absolute and unconditional, without reserved benefit or attempted coercion: *Gazzam* v. *Poyntz*, 4 Alabama, 374, 382; *Wiswall* v. *Ticknor & Day*, 6. Id. 179, 184. And it has since been decided that a condition of release with an express reservation of the residue to the grantor, in case of non-release, makes the assignment fraudulent and void; *Grimshaw & Brown* v. *Walker*, 12 Id. 101. See *Brown, trustee* v. *Lyon & O'Neal*, 17 Id. 659, 663; *West, Oliver & Co.* v. *Snodgrass*, 17 Alabama, 549. See the subject of the validity of assignments, with a stipulation for a release, discussed at length in *M'Call et al.* v. *Hinkley & Woodward*, 4 Gill. 129.

If the time allowed for a release is unreasonably short, it will render the conveyance fraudulent, even where a provision of release is not deemed unlawful; *Fox* v. *Adams et al.*, 5 Greenleaf, 245, 253; *Ashurst* v. *Martin*, 9 Porter, 567, 574.

When a condition of release is sustained, equity will decree the surplus to those creditors who have not acceded to the deed; *Brashear* v. *West and others*, 7 Peters, 609, 615; *Vaughan and others* v. *Evans and others*, 1 Hill's Chancery, 414, 422; *Vernon, &c.* v. *Morton & Smith, &c.*, 8 Dana, 247, 254; *Skipwith's Ex'or* v. *Cunningham, &c.*, 8 Leigh, 272, 295.

An assignment which is fraudulent in any of its provisions is void *in toto*, as against those entitled to take advantage of the fraud; *Mackie & Cairns*, 5 Cowen, 549, 580; *Goodrich* v. *Downs*, 6 Hill's N. Y. 438, 440; *Fiedler* v. *Day*, 2 Sandford's S. Ct. 594, 597; *Harris et al.* v. *Sumner*, 2 Pickering, 129, 137; *M'Clurg* v. *Lecky*, 3 Penrose & Watts, 83, 94; *Irwin* v. *Keen*, 3 Wharton, 347, 355; *Halsey et al.* v. *Whitney et al.*, 4 Mason, 207, 230; *Ticknor & Day* v. *Wiswall*, 9 Alabama, 305, 311; *Kissam* v. *Edmundson et al.*, 1 Iredell's Equity, 180, 184; *Hafner* v. *Irwin*, 1 Iredell's Law, 490, 498; this appears to depend upon the principle, that if a contract be fraudulent and void in part it is void altogether, because contracts are entire: but the same deed may contain several distinct contracts of conveyance, and then the circumstance that one contract is fraudulent, will not render void another contract, which is legally distinct from it; *Skipwith's Ex'or* v. *Cunningham, &c.*, 8 Leigh, 272, 293; *Anderson et al.* v. *Hooks et al.*, 9 Alabama, 705, 712.

A creditor who has confirmed a fraudulent deed, by receiving a benefit under it, or has become a party to it, is estopped from afterwards impeaching it; *Adlum* v. *Yard*, 1 Rawle, 163, 171; *Burrows & Jennings* v. *Alter & others*, 7 Missouri, 424; and an insolvent's assignee who has affirmed a fraudulent sale of the insolvent by suing for the price and attaching the buyer's property, cannot afterwards set aside the sale and maintain trover for the property; *Butler* v. *Hildreth*, 5 Metcalf, 49.

When an assignment is set aside for fraud, the assignee is not answerable for payments made under it to bona fide creditors before the filing of the bill; *Wakeman* v. *Grover*, 4 Paige, 24, 42; *Ames* v. *Blunt*, 5 Id. 13, 22; *Stewart* v. *M'Minn*, 5 Watts & Sergeant, 100, 103; *Hutchins* v. *Sprague et al.*, 4 New Hampshire, 469, 477; *Crowninshield* v. *Kittridge*, 7 Metcalf, 520, 523; or money retained under it

by him as a bona fide creditor; *Peacock* v. *Tompkins*, Meigs, 317, 329.

In several of the states, for example, New Jersey, (Act of 23 Feb. 1820, Rev. Laws, 674, 1 Elmer, 16,) Maine, (Act of Ap. 1, 1836, 3 Laws of Maine, 550, ch. 761,) New Hampshire, (Act of July 5, 1834,) and Connecticut (Act of 1828, c. 3, p. 182), preference in general assignments for creditors by insolvent persons are prohibited; *Varnum* v. *Camp*, 1 Green, 326; *Pike* v. *Bacon*, 21 Maine, 280; and these statutes have generally been held to extend only to general assignments; *Bates* v. *Coe*, 10 Connecticut, 281, 293; *Mer. Man. Co.* v. *Smith*, 8 New Hampshire, 347; *Beard* v. *Kimball and Trustees*, 11 Id. 471; *Barker* v. *Hall and Trustee*, 13 Id. 298, 350. See also the statute of Massachusetts, of 1836, c. 238, and *Henshaw* v. *Sumner*, 23 Pickering, 446, 452. In Ohio, by the acts of 1835, and 1838, fraudulent assignments, and assignments in contemplation of insolvency, to a trustee for creditors with preferences, enure to the equal benefit of all the creditors; and this, though limited to assignments to a trustee, and not extending to conveyances directly to creditors, applies where the fraud is only in the assignor; *Hulls* v. *Jeffrey et al.*, 8 Ohio, 390; *Harshman, Rench and others* v. *Lowe and others*, 9 Id. 92; *Wilcox and Welch* v. *Kellogg and others*, 11 Id. 394; *Mitchell* v. *Gazzam and others*, 12 Id. 315. In Pennsylvania, by an act of 17th April, 1843, assignments by insolvent debtors to trustees, to prefer one or more creditors, except for payment of wages of labour to the extent of fifty dollars, were directed to be construed as enuring to the benefit of all the creditors in proportion to their respective demands. Under this act, upon an assignment in trust for such creditors as shall release, non-releasing creditors are excluded; *Lea's Appeal*, 9 Barr, 504. In Georgia, assignments for the benefit of some creditors to the exclusion of others, by persons unable to pay their debts, are by statute made fraudulent and void against creditors: Act of 1818; *Ezekiel* v. *Dixon*, 3 Kelly, 146; yet absolute and bona fide sales of property to a creditor in satisfaction of his claim, are valid; *M' Whorter* v. *Wright, Nichols & Co.*, 5 Georgia, 555, 561.

In those states in which the principle of preferences has not been proscribed by statute, it is now viewed with strong disfavour, and the determination is universal to support it no further than a respect for adjudged cases requires; see *Boardman* v. *Halliday*, 10 Paige, 224, 229, and *Cram* v. *Mitchell*, 1 Sandford, 251, 253; *Webb* v. *Daggett*, 2 Barbour, 10. The view now generally adopted appears to be this: that since the claims of creditors may be meritorious in unequal degrees, and since particular creditors have it in their power to obtain a priority by legal proceedings, the preference of creditors is an allowed object or *result* of a debtor's assignment, but that it is not permitted to be used as a *means* of accomplishing ends which are not the legitimate objects of a debtor's efforts.

Of the legal definition of Slander.

BROOKER AGAINST COFFIN.

In the Supreme Court of New York.

NEW YORK, NOVEMBER, 1809.

[REPORTED, 5 JOHNSON, 188–192.]

To say of a person, "she is a common prostitute, and I will prove it;" *or that* "she was hired to swear a child on me: she had a child before this, when she went to Canada; she would come damn'd nigh going to the state prison," *is not actionable, without alleging special damages.*

The rule seems to be, that where the charge, if true, will subject the party charged to an indictment for a crime, involving moral turpitude, or subject him to an infamous punishment, then the words are in themselves actionable.

THIS was an action for *slander.* The declaration contained two counts. The first charged, that on the 1st of January, 1808, at Schagticoke, in the county of Rensselaer, &c., for that whereas the plaintiff, being a person of good name, &c., the defendant falsely and maliciously did speak and utter of and concerning the plaintiff, the following false, scandalous, and defamatory words: "*She* (meaning the plaintiff) *is a common prostitute, and I can prove it.*" The second count charged, that the defendant afterwards, to wit, on the day and year aforesaid, at the place aforesaid, in a certain other discourse, &c., did falsely and maliciously speak and utter the following false, scandalous, and defamatory words, to wit: *She* (meaning the plaintiff) *was hired to swear the child on me;*" (meaning that the plaintiff was hired falsely and maliciously to swear a certain child on the defendant). "*She* (meaning the plaintiff) *has had a child before this,*" (meaning before this child or the child which the said defendant had before said the said Nancy had been hired to swear on him,) "*when she went to Canada;*" (meaning a certain time when the plaintiff had been at *Canada.*) "*She* (meaning the plaintiff) *would come damn'd nigh going to the state prison,*" (meaning that the said plaintiff was guilty of such

enormous and wicked crimes, as would, if punished according to the laws and statutes, in such cases made and provided, condemn her to infamous punishment in the state prison.) Whereas, in truth, &c.

There was a general demurrer to the first count, and a special demurrer to the second count, and joinder.

Wendell, in support of the demurrer. In England, there are various statutes for the punishment of disorderly persons. (4 Com. Just. B. 76. 83.) But the decisions in support of the action have been where the party shows a special damage, as for calling a woman a whore, whereby she lost her marriage. (1 Com. Div. 262. Action for Defamation (D. 30).) Notwithstanding the statutes against disorderly persons, it has never been held that those words were actionable, without alleging a special damage. It is true, that by the act for apprehending and punishing disordely persons (11 sess. c. 31), a common prostitute is declared to be a disorderly person, and therefore liable to punishment: but, by the same act, vagrants, beggars, jugglers, pretenders to physiognomy, palmistry, or such crafty sciences, fortune-tellers, discoverers of lost goods, persons running away from their wives and children, vagabonds and wanderers, and all idle persons not having visible means of livelihood, are also declared to be disorderly persons, and are equally liable to be apprehended and punished under the act. If, then, to call a woman a common prostitute is actionable, without alleging special damage, on the ground of a liability to punishment under this act, then to call a person a juggler, fortune-teller, or physiognomist, would also be actionable, which will hardly be pretended.

The words, "that the plaintiff was *hired to swear a child*," are not actionable; (1 Com. 270. (F. 12.) (D. 6),) and they are not helped out by the *innuendo*. The words are ambiguous, and it is not said whose child was referred to, so that the defendant could not come prepared to prove the truth of the words. The words, that "she would come damn'd nigh going to the state prison," are too vague and general to be the ground of an action. (2 Johns. Rep. 12.)

Again, in the second count, the plaintiff does not aver that she was of good fame, &c., and free from the crime charged against her. (1 Com. Dig. 276. (G. 1).)

Sedgwick, contra. 1. The numerous cases to be found in the books relative to the action of slander, and as to what words are actionable, and what are not, are so contradictory and absurd, as to afford no satisfactory rule on the subject. (1 Com. Dig. Action on the case for Defamation (D. 3.) (D. 9.) (F. 20.) 3 Black. Com. 124. 4 Bac. Abr. 487.) Resort must, therefore, be had to the principle on which the

action of slander is founded. Where the words spoken impute to a person an act of moral turpitude or crime which may subject him to punishment, they are actionable. Here the words, besides imputing great moral turpitude, and tending to render the person odious in the opinion of mankind, may, if true, also subject the party to an infamous and disgraceful punishment. *Common* prostitutes, by the act which has been cited, are declared disorderly persons, and may be sent to bridewell or house of correction, and may be kept to hard labour for 60 days, or even for six months; and, moreover, may be whipped, at the discretion of the general sessions of the peace. (11 sess. c. 31, s. 1, 2, 3.) The first set of words charged in the declaration are, according to the general principle I have stated on this subject, actionable.

2. As to the second set of words, I admit, that the sense of them cannot be enlarged by the *innuendo*. The true rule is, that the words are to be taken in the sense in which they are understood by the generality of mankind. This rule is well laid down and illustrated by Lord Ellenborough, in the case of Woolnoth v. Meadows. (5 East, 463. Cowp. 275. 278. 2 Ld. Raym. 959. 1 Vent. 117.) If the words, then, fairly import the charge of a crime, and would be so understood by mankind, the injury is inflicted on the character of the plaintiff, as completely and deeply, as if the crime had been imputed in the most direct and positive terms; and the plaintiff is entitled to a remedy. Can there be any doubt, in the mind of any man, that the defendant meant to say that the plaintiff had been guilty of perjury?

Wendell, in reply, observed that if to say of a person what, if true, might subject him to an indictment, would render the words actionable, without alleging special damage, then to say of a person that he had committed an *assault* and *battery* on another, would be actionable.

SPENCER, J., delivered the opinion of the court. The first count is for these words, "She is a common prostitute, and I can prove it;" and the question arises, whether speaking these words gives an action, without alleging special damages. By the statute (1 R. L. 124), common prostitutes are adjuged disorderly persons, and are liable to commitment, by any justice of the peace, upon conviction, to the bridewell or house of correction, to be kept at hard labour for a period not exceeding 60 days, or until the next general sessions of the peace. It has been supposed that, therefore, to charge a woman with being a common prostitute, was charging her with such an offence as would give an action for the slander. The same statute which authorizes the infliction of imprisonment on common prostitutes, as disorderly persons, inflicts the same punishment for a great variety of acts, the commission of which renders

persons liable to be considered disorderly; and to sustain this action would be going the whole length of saying, that every one charged with any of the acts prohibited by that statute, would be entitled to maintain an action for defamation. Among others, to charge a person with pretending to have skill in physiognomy, palmistry, or pretending to tell fortunes, would, if this action is sustained, be actionable. Upon the fullest consideration, we are inclined to adopt this as the safest rule, and one which, as we think, is warranted by the cases: In case the charge, if true, will subject the party charged to an indictment for a crime involving turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable; and Baron Comyns considers the test to be, whether the crime is indictable or not. (1 Com. tit. Action on the case for Defamation, F. 20.) There is not, perhaps, so much uncertainty in the law upon any subject, as when words shall be in themselves actionable. From the contradiction of cases, and the uncertainty prevailing on this head, the court think they may, without overleaping the bounds of their duty, lay down a rule which will conduce to certainty, and they, therefore, adopt the rule I have mentioned as the criterion. In our opinion, therefore, the first count in the declaration is defective.

The second count is for saying of the plaintiff, "She was hired to swear the child on me; she has had a child before this, when she went to Canada; she would come d—d near going to the state prison." These words are laid as spoken at one time; if, then, any of them are actionable, it is sufficient. The *innuendoes* enlarge their meaning, and are not justified. One of them avers, that the defendant meant that the plaintiff was hired, falsely and maliciously, to swear the child on the defendant; and another *innuendo*, in explaining the words, "She would come damn'd near going to state prison," alleges, that the defendant meant that the plaintiff was guilty of such enormous crimes as would, if punished according to the laws, &c., condemn her to infamous punishment in the state prison. Now I do not perceive, that the charge at all warrants the inference that the plaintiff had been guilty of perjury; and the cases of Hopkins v. Bradle, (1 Caines, 347,) Stafford v. Green, (1 Johns. Rep. 505,) and Ward v. Clark (2 Johns. Rep. 11), are authorities against sustaining this count.

The defendant must, therefore, have judgment.

BURTCH AGAINST NICKERSON.

In the Supreme Court of New York.

ALBANY, OCTOBER, 1819.

[REPORTED, 17 JOHNSON, 217–221.]

To say of a blacksmith, *in relation to his business and trade,* "He keeps false books, and I can prove it," *is actionable: and where the declaration stated that the plaintiff, at the time of publishing the slanderous words, was, and long before had been, a blacksmith, and carried on the business and trade of a blacksmith honestly, and found and provided all such iron as was necessary, and required of him in his business; and made correct charges, and had always kept honest, true, and faithful accounts with all persons relating to his trade, &c. Yet the defendant, in order to injure the plaintiff in his business, and to cause to be believed, &c., in a certain discourse of and concerning the plaintiff in his said business, spoke and published the following words, &c., it was held sufficient, without a more special averment, that there was a discourse of and concerning the plaintiff's* trade, *and that the words were spoken of his* trade.

IN ERROR, to the Court of Common Pleas, of Putnam County. Nickerson brought an action of *slander* against Burtch in the court below. The declaration stated, that, at the time of publishing the slanderous words, the plaintiff was, and long before had been, a blacksmith, and carried on the business and trade of a blacksmith, honestly, and found and provided all such iron as was necessary, and required of him in the business aforesaid, and made correct charges, *and has always kept honest and faithful accounts with all persons relating to his trade;* and until the speaking the words charged, was never suspected of keeping false books and accounts with persons who employed him; yet the defendant, in order to injure the plaintiff in his business, and to cause it to be believed that he kept false books of accounts, in a certain discourse which he had with divers good citizens, of and concerning the plaintiff *in his said business*, spoke and published the words following: "*He keeps false accounts, and I can prove it.*"

The plaintiff further alleged damages, in the loss of customers, who were named in the declaration; and on the trial he proved, by Edward Mooney, the words substantially as laid, and that, in consequence of

publishing the same by the defendant, the witness did not employ the plaintiff as a blacksmith, which he otherwise would have done; that the defendant was speaking of the plaintiff as a blacksmith, when he made the charge of keeping false books. Other witnesses were examined on the part of the plaintiff, but their testimony did not appear to support the declaration.

The counsel for the defendant insisted, that the words were not, *of themselves, actionable*, unless they were spoken of the plaintiff's trade; and further, that they were not actionable in any sense, and more especially if they had reference to any item in the accounts of the parties; and that the plaintiff was not entitled to recover, unless he had *proved special damages*, and requested the court so to charge the jury.

The court charged the jury, "*That it made no difference whether words were spoken of a blacksmith, or merchant, as to their being actionable*," but *did not charge on any other point.* The jury found a verdict for the plaintiff, on which judgment was rendered. A bill of exceptions was taken to the opinion of the court; and on the return to the writ of error, the cause was submitted to the court without argument.

WOODWORTH, J., delivered the opinion of the court. The defendant in error contends, that the plaintiff in error is confined to the single point contained in the bill of exceptions. This, I apprehend, is incorrect; for when the record is made up, a special assignment of errors to the bill of exceptions is not required, but a general assignment is sufficient. (13 Johns. Rep. 475, Shepherd v. Merrit.) Consequently, the plaintiff in error may claim to have the judgment reversed, for matter apparent *on the record or bill of exceptions.*

Before I consider whether the exceptions are well taken, it is proper to state, that no question can now arise on those points on which the court below omitted to charge the jury. (T. Raym. 404. 2 Term Rep. 145. Show. 120, 122.) A bill of exceptions may be taken *on some point of law, either in admitting or denying evidence, or a challenge, or some matter of law arising upon a fact not denied, in which either party is overruled by the court.* (Graham v. Camman, 2 Caines's Rep. 168.) But the refusal of the court to express any opinion on any particular point is not a case within the reach of a bill of exceptions. Our inquiry then is, in the first place, whether the declaration contains a good cause of action, independent of the special damages alleged; and if so, whether the charge of the court below, on the point adjudged, was correct.

The general rule is well settled, that slanderous words are not actionable, unless "*the charge, if true, will subject the party charged to an*

indictment for a crime, involving moral turpitude, or subject him to an infamous punishment." (Brooker v. Coffin, 5 Johns. Rep. 188.) The exceptions to the general rule are words spoken of a person in his office, profession, or trade, or which impute to him an infectious disease. (Feise v. Linder, 3 Bos. & Pull. 374, note (*a*). Comyn's Dig. Title Action on the case for defamation (D.), 10 D. 29.) If the present action can be supported, it must be because it comes within one of the exceptions to the general rule.

If the words are not actionable, but in regard of the plaintiff's trade or profession, it is not sufficient to allege the speaking *of him*, without a *colloquium of his trade, &c.* (1 Com. Dig. 277 (G. 3). 1 Lev. 250.) Yet, if the speaking be alleged to be *of the plaintiff and his art*, it is sufficient without *an express colloquium of his trade.* (Comyn's Dig. 277.)

In the present case, the plaintiff charges, that he was, at the time of speaking the words, and long before had been, a blacksmith, *carrying on the trade of a blacksmith, and found and provided all such iron as was necessary, and required of him in the said business, and that he always kept honest and true accounts with all persons relating to the trade*, and that the defendant, in a discourse concerning *the plaintiff, in his said business*, published the words charged in the declaration. Here, then, it appears, that a colloquium is substantially stated; and although the plaintiff might have averred expressly, that there was a discourse concerning the trade, and, then, that the defendant published the words of the plaintiff in relation to such trade, I do not perceive any material departure from that form of declaring; for in speaking, "*of the plaintiff in his trade*," it follows, of necessity, that the trade or business must have been, in part, the subject of discourse; but admitting that here is not strictly a colloquium concerning the trade, still the declaration is good, and is supported by the authorities cited from Comyns and Levinz, which declare, that if it be alleged that the words are spoken *of the plaintiff and his art*, it is sufficient.

In 8 Went. 232, the averment is, that the words were "spoken *concerning A. B. as such trader, and of, and concerning, the state of his circumstances*," but no colloquium is laid.

The next question is, whether words calculated to injure and impair public confidence in the integrity of a mechanic, in relation to his trade, are actionable. That they are so, when spoken of a merchant, cannot be doubted. (Backus v. Richardson, in Error, 5 Johns. Rep. 471.) It is well settled, in England, that words, not in themselves actionable, become so, when spoken of a person in his trade or profession; and the rule equally applies, whether the plaintiff is a merchant, or is carrying on the business of a mechanic. The plaintiff in error contends that no

action can be sustained in this case, because the words, if true, do not impute criminality, for which the plaintiff is punishable; but it has already been shown, that cases of this description are exceptions to the general rule, and are governed by different considerations. Whether the law is wisely settled, that a charge imputing the want of moral honesty is actionable, when applied to an individual in relation to his trade, and is not so, when there is no such reference, would be a useless inquiry.

The defendant must, then, be considered as liable, if a book of accounts appertains to the business of a blacksmith. The fact is averred in the declaration, and as to the necessity of such books, there can be no doubt, if credit is ever given for the work, labour, and services.

In 5 Com. Dig. 260, 261, it is laid down, that to say of a weaver, "*he pawneth the goods of his customers, and is not to be trusted, is actionable.*"

To say of a malster, "*he is a cheating knave, and keeps a false book;*" (1 Vent. 117;) "*he keeps false books, deal not with him;*" (Palm. 65;) and, generally, words which charge deceit or dishonesty, in the trade, are held to be actionable.

In 1 Lev. 115 (Terry v. Hooper, before cited), the court say "*an action lies for speaking scandalous words of a lime-burner, or of any man of any trade or profession, be it ever so base, if they were spoken with reference to his profession.*"

My opinion is, that the charge is well alleged in the declaration, that the keeping of a book of accounts is incident to the business of a blacksmith, and necessary in this country, where credit is generally given, as well by the mechanic as by the merchant and professional man; that the words, as applied, are actionable, and entitled the plaintiff to recover damages, without proving special damages. The charge of the court below, is, in substance, that the words in this case were actionable equally as if spoken of a merchant. In my view, this was correct, and consequently the judgment ought to be affirmed; and that is the opinion of the court.(*a*)

Judgment affirmed.

Prior to the case of *Onslow* v. *Horne*, 3 Wilson, 177, the notion of actionable slander was very unsettled, and the decisions were conflicting: but the definitions marked out by Chief Justice De Grey in that case, have given reasonable certainty and distinctness to the subject. The rule now generally established, both in England and in this country, is, that words spoken,

(*a*) Vide Loomis v. Swick, 3 Wendell's Rep. 205. Sewall v. Catlin, ibid. 291. Mott v. Comstock, 7 Cowen, 654. Ostram v. Calkins, 5 Wendell's Rep. 263. Tobias v. Harland, 4 Wendell's Rep. 537.

in order to be actionable, must (1.) import a charge of some punishable crime, or (2.) impute some offensive disease which would tend to deprive the person of society, or (3.) must tend to injure the party in his trade, occupation, or (4.) must have produced some special damage. See *Chaddock* v. *Briggs*, 13 Massachusetts, 248, 252; *Bloss* v. *Tobey*, 2 Pickering, 320, 328.

(1.) *The imputation of an indictable or punishable crime.*

It is universally agreed, that words, imputing an offence against morality, are not actionable, unless the offence is indictable or punishable at the time the words are uttered; *Harvey* v. *Boies*, 1 Penrose & Watts, 12; *Weierbach* v. *Trone*, 2 Watts & Sergeant, 408, 409; *Williams* v. *Karnes*, 4 Humphreys, 9; yet it is not every indictable offence, or penal act, the imputation of which is slanderous. Some other element of disgrace must be superadded; but in attempting to fix this additional quality, courts and text-writers are somewhat at variance with one another, fluctuating to some extent between the criterion suggested by Lord Holt in *Turner* v. *Ogden*, 2 Salkeld, 696; S. C. 6 Modern, 104, or one of the criteria mentioned in that case, which requires that some infamy should be connected with the punishment, and that adopted by Chief Justice De Grey, in *Onslow* v. *Horne*, 3 Wilson, 177, which requires that a moral infamy should be attached to the offence, and also that the offence should be punishable by law.

The case of *Turner* v. *Ogden*, as reported in Salkeld, 696, is as follows: "*Thou art one of those that stole my Lord Shaftesbury's deer;* held not actionable; for though imprisonment be the punishment in those cases, yet *per Holt*, C. J., it is not a scandalous punishment. A man may be fined and imprisoned in trespass; for there must not only be imprisonment, but an infamous punishment." In the case of *Onslow* v. *Horne*, De Grey, C. J., said that the first rule to determine whether words spoken were actionable, was, "That the words must contain an express imputation of some crime liable to punishment, some capital offence, or other infamous crime or misdemeanour; and the charge upon the person spoken of, must be precise. In the case of *Turner* v. *Ogden*, 2 Salk. 696, the words are, '*Thou art one of those that stole my Lord Shaftesbury's deer,*' held not actionable; for though imprisonment be the punishment in those cases, yet *per Holt*, Chief Justice, it is not a scandalous punishment; a man may be fined and imprisoned in trespass, for (says he,) there must not only be imprisonment, but an infamous punishment. I think *Holt* there carries it too far as to precision; for it is laid down in *Finch's Law*, 185, if a man maliciously raise any false slander, to the endangering one in law, as to say, '*He hath reported that money is fallen; for he shall be punished for such report.*' Here is the case of a crime and the punishment not infamous; and yet Finch seems to say that an action lies for these words." It would seem, however, from the report of the case of *Ogden* v. *Turner*, in 6 Modern, 104, that the remarks ascribed by Salkeld to Holt, if uttered by him, do not express accurately the rule laid down by the Court on that occasion. The rule stated in 6 Modern, as given by the Court, is this: "Words which of themselves are actionable, without regard to the person or foreign help, must either endanger the party's life, or subject him to infamous punishment; and it is not enough that the party may be fined and imprisoned, for if one be found guilty of any common trespass he shall be fined and imprisoned, yet none will say, that to say one has committed a trespass will bear an action; *or, at least, the thing charged upon him must in itself be scandalous.*" This last addition perhaps brings the rule substantially into accordance with the rule in *Onslow* v. *Horne*, and *Brooker* v. *Coffin*.

In Lord Holt's criterion, as given by Salkeld, the words, scandalous or

infamous punishment, are obviously to be understood according to their known and definite meaning in law, as indicating mutilation, whipping, branding, the pillory, hard labour in the house of correction, the stocks, &c., and as distinguished from mere imprisonment; see per Dayton, J., *M'Cuen* v. *Ludlum*, 2 Harrison, 13, 18; and Holt's rule, in this sense, seems to be adopted in North Carolina, but in no other courts of this country. In that state, the test of a crime involving moral turpitude is objected to, as raising discussions in morals which the law cannot settle, and therefore the criterion adopted is, an indictable crime subjecting one to an infamous punishment: and, thereupon, it has been decided that a charge of harbouring a runaway slave, though indictable and punishable by fine and imprisonment, is not actionable, because the punishment is not infamous; *Skinner* v. *White*, 1 Devereux & Battle, 471: see also *Brady* v. *Wilson*, 4 Hawks, 93; *Shipp* v. *M'Craw*, 3 Murphey, 463; *Wall* v. *Hoskins*, 5 Iredell's Law, 177. In some other states, Holt's rule has been professed to be followed, but in application it has been broken down, so far as to make infamous, synonymous with corporal punishment, and to refer to imprisonment in contradistinction to a mere fine. Thus, in Kentucky, in *Elliott* v. *Ailsberry*, 2 Bibb, 473, and *M'Gee* v. *Wilson*, Littell's Select Cases, 187, 188, where Holt's definition is approved, it is declared that "words to be actionable, must charge an offence subject to corporeal or other infamous punishment;" and, therefore, charges of sabbath-breaking, profane swearing, and drunkenness, which involve only a pecuniary penalty, are not actionable. In a late case in Kentucky, however, it was supposed that the imputation of a misdemeanour punishable with imprisonment or other corporal penalty, would not be slanderous, unless it were of "some heinous offence, involving moral turpitude;" *Mills & Wife* v. *Wimp*, 10 B. Monroe, 417. In Tennessee, the rule is stated in similar language to that used in the earlier Kentucky cases; *Williams* v. *Karnes*, 4 Humphreys, 9. And this is in effect the rule laid down by Mr. Starkie in his treatise on Slander (p. 43), that words, to be actionable in themselves, must impute some "crime or misdemeanor for which corporal punishment may be inflicted in a temporal court:" and this is expressly adopted in *Billings* v. *Wing*, 7 Vermont, 439, where it is decided that a charge of assault and battery is not actionable as slander, *because* by the law of the state, only a fine, and not imprisonment, or imprisonment only as a means of compelling payment of the fine, is the punishment. But though this decision was undoubtedly correct, the weight of authority in this country is altogether against the accuracy of this definition as a principle, and in favour of that laid down by De Grey in *Onslow* v. *Horne*, which is expressly approved of by Lawrence, J., in *Holt* v. *Scholefield*, 6 Term, 691, 694, and by Tilghman, C. J. in *Shaffer* v. *Kintzer*, 1 Binney, 537, 542, and *Andres & Wife* v. *Koppenheafer*, 3 Sergeant & Rawle, 255; and is adopted and repeated in *Bloom & Wife* v. *Bloom*, 5 Id. 391, 392, and in *Chipman* v. *Cook*, 2 Tyler, 456, 464. Mr. Starkie's rule is erroneous in two respects: it is not always necessary that the offence should be punishable by a corporal infliction, and that circumstance will not always be sufficient to render the imputation of an offence slanderous.

The case of *Brooker* v. *Coffin*, appears to have reached the true principle applicable to this subject, and thereby to reconcile the conflicting definitions in the earlier English cases. According to the criterion there established, the circumstance of an offence being penal, and of infamy attaching either to the offence

or to the punishment, will render an imputation of that offence slanderous.

The offence must be punishable, either through process of indictment, or by summary proceeding; and in addition to that, there must be something infamous, either in the offence, or in the punishment of it. The rule, as laid down by Spencer, J., it will be observed, is in the following language: "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be actionable in themselves."

That branch of the rule which relates to the infamy of the punishment, is but little applicable in this day and country: but it is, no doubt, valid and operative as a principle of law. The court seem to have proceeded upon it, in the case of *Miles* v. *Oldfield*, 4 Yeates, 423, which decided, that to call one a "vagrant" was slanderous, under an Act of Assembly, which provided that persons legally convicted of vagrancy, before any justice of the peace, should be sent to the workhouse, or common gaol of the county, to be kept there at hard labour, for any time not exceeding one month. "To charge a person with an offence, which subjects him to punishment of this kind," said Tilghman, C. J., "is, in the opinion of the court, actionable."

The criterion, involved in the other part of the rule, which is the only part of much practical application at present, viz., that the imputed offence should be indictable, or otherwise punishable, and should involve moral turpitude, has ever since been adhered to in New York; and is expressly approved of, and applied, in *Widrig* v. *Oyer*, 13 Johnson, 124; in *Martin* v. *Stillwell*, Id. 275; *Case* v. *Buckley*, 15 Wendell, 327; *Bissell* v. *Cornell*, 24 Id. 354; and *Young* v. *Miller*, 3 Hill's N. Y. 21, in which last the rule is examined, and it is declared to be unnecessary that legal infamy should attach to the offence, provided it be indictable either at common law or by statute, and be infamous or disgraceful in a general or moral sense; and this is confirmed in *Crawford* v. *Wilson*, 4 Barbour, S. Ct. 505, 511; see also *Van Ness* v. *Hamilton*, 19 Johnson, 349, 367. The rule in *Brooker* v. *Coffin*, is approved in Alabama, and the test of being indictable, and of involving moral turpitude, has there been applied to sustain an action for slander where the offence was indictable only by statute, and was punishable by fine, and not by infamous punishment, but was morally base and wicked; *Coburn* v. *Howard*, Minor, 93; *Perdue* v. *Burnett*, Id. 138; and is again approved in *Hillhouse* v. *Peck*, 2 Stewart & Porter, 395; *Johnston* v. *Morrow*, 9 Porter, 525. The same case and rule have been approved and adopted in New Jersey, Delaware, Michigan, Georgia and Pennsylvania; *M'Cuen* v. *Ludlum*, 2 Harrison, 13; *Kinney* v. *Hosea*, 3 Harrington, 77; *Taylor* v. *Kneeland*, 1 Douglass, 68, 72; *Giddens* v. *Mirk*, 4 Georgia, 364, 368; *Andress & wife* v. *Koppenheafer*, 3 Sergeant & Rawle, 255, 257; see also *Shaffer* v. *Kintzer*, 1 Binney, 537; *M'Clurg* v. *Ross*, 5 Id. 218, and in Pennsylvania it has been decided that the imputation of an offence —removing land-marks — which was punishable by pecuniary penalty only, but was of an infamous character, was actionable; *Todd* v. *Rough*, 10 Sergeant & Rawle, 18, 22. In South Carolina, also, although the test of infamous punishment was mentioned in *Howard* v. *Stephenson*, 2 Mill's Const. R. 408; the definition in *Brooker* v. *Coffin* is adopted in *Gage* v. *Shelton*, 3 Richardson, 243. The same test seems to prevail in Massachusetts; in *Miller* v. *Parish*, 8 Pickering, 384, the court said "whenever an offence is charged, which, if proved, may subject the party to a punishment, though not ignominious, but which [i. e. the offence, as it

seems] brings disgrace upon the party falsely accused, such an accusation is actionable:" and in *Dunnell* v. *Fiske*, 11 Metcalf, 551, it is said, that words to be actionable in themselves must charge "some crime or offence punishable by law." In Indiana, they do not seem to have decided between Mr. Starkie's rule and that in *Brooker* v. *Coffin*. In some cases they have gone upon both; *Wilcox* v. *Edwards*, 5 Blackford, 183; in others, the latter criterion seems to be adopted; *Hays* v. *Allen*, 3 Id. 408. In New Hampshire, the imputation of "a crime punishable by law;" *Tenney* v. *Clement*, 10 New Hampshire, 52, 57; and in Maryland of "a crime which subjects the plaintiff to punishment;" *Shealy* v. *Biggs*, 2 Harris & Johnson, 363, is stated to be the test. In the later English cases, similar language is used; "the words, to be actionable, must impute a criminal offence," says Alderson, B., in *Heming* v. *Power*, 10 Meeson & Welsby, 564, 570, "that is, the words, if true, must be such that the plaintiff would be guilty of a criminal offence:" and in *Edsall* v. *Russell*, 5 Scott's New, 801; S. C. 2 Dowling's N. S., 641, it is said to be "well known that words are not actionable unless they impute some crime or indictable offence." These definitions are quite the same as that of De Grey in *Onslow* v. *Horne*; and understanding the word *crime*, as denoting something inherently immoral, which is no doubt the sense in which it is intended, they agree with *Brooker* v. *Coffin*.

To illustrate the general principle stated and adopted in *Brooker* v. *Coffin*, it may be expedient to refer to some cases, which will show that the imputation of an indictable or punishable offence is not actionable unless the offence involve moral turpitude; that the imputation of an offence of moral turpitude is not actionable unless the offence be indictable; and that the imputation of any offence of moral turpitude which is indictable by statute, though only a misdemeanour, is actionable.

It is agreed that a charge of assault and battery, or forcible entry and detainer, is not actionable, though indictable and punishable by fine and imprisonment, because there is no moral turpitude in such acts; *dicta* per Tilghman, C. J., and Gibson and Duncan, Js., in *Andres & wife* v. *Koppenheafer*, 3 Serg. & Rawle, 255, 256, 258, 261; and per Hornblower, C. J., and Dayton, J., in *McCuen* v. *Ludlum*, 2 Harrison, 13, 17. It has been held, also, that a charge of "breaking open and reading a letter" sent by mail is not actionable, though the offence is indictable; because it is not inherently a crime, nor infamous, and the law rendering it indictable, is intended rather to protect the post-office department than to punish a crime; *Hillhouse* v. *Peck*, 2 Stewart and Porter, 395. A charge of drunkenness, or profane swearing, is not actionable, it is said, because punishable only by fine; but the true reason appears to be because they are not acts of moral turpitude; *Warren & wife* v. *Norman & wife*, Walker, 387; *Elliott* v. *Ailsberry*, 2 Bibb, 473. On the other hand, an imputation of breach of trust is not slanderous, because the offence, though morally base and disgraceful, is not indictable; *M'Clurg* v. *Ross*, 5 Binney, 218; *Shecut* v. *M'Dowel*, 1 Const. Rep. 1st ser. 35: and to charge a man with being a "swindler" or "cheat," or to use words which import a cheat in a private transaction, and not in a course of public dealing, is not actionable, because the thing is not an offence known to the law, and is not indictable; *Savile* v. *Jardine*, 2 H. Blackstone, 531; *Stevenson* v. *Hayden*, 2 Massachusetts, 406; *Winter* v. *Sumvalt*, 3 Harris & Johnson, 38; *Chase* v. *Whitlock*, 3 Hill's N. Y. 139; *Weierbach* v. *Trone*, 2 Watts & Sergeant, 408; and in Alabama, a charge of marking another person's hogs was held not to be actionable, because though civilly punishable, it was not

indictable; *Johnston* v. *Morrow*, 9 Porter, 525. Upon the same distinction, in New York, where the crime against nature is indictable by statute, it has been decided that such a charge is slanderous and actionable; *Goodrich* v. *Woolcott*, 3 Cowen, 231, 239 (S. C. on error, 5 Id. 714); but in Alabama, it has been decided not to be slanderous, because though of the highest moral turpitude, it is not indictable by common law, nor is made so by the laws of that state; *Coburn* v. *Harwood*, Minor, 93.

And the rule seems to be general, that any act, though not felonious, yet if indictable by common law or by statute, and inferring moral or social degredation, is actionable. Accordingly, a charge of keeping a bawdy-house is actionable, because the offence is a common nuisance, and the person guilty of it is indictable, and it obviously involves moral turpitude; *Martin* v. *Stillwell*, 13 Johnson, 275; *Brayne* v. *Cooper*, 5 Meeson & Welsby, 249; a charge of soliciting a person to commit murder, which is a high misdemeanour; *Demarest* v. *Haring*, 6 Cowen, 76, 87; a charge of making a libel; *Andres & wife* v. *Koppenheafer*, 3 Sergeant & Rawle, 255; (but see the remarks on this case in *Proper* v. *Luce*, 3 Penrose & Watts, 65, 66;) a charge of embracery, which is indictable both by statute and common law; *Gibbs* v. *Dewey*, 5 Cowen, 503; a charge of removing landmarks, in New York and Pennsylvania, being, by statutes, punishable, in the former state by fine and imprisonment, and in the latter by fine alone, but clearly involving the *crimen falsi*; *Young* v. *Miller*, 3 Hill's N. Y. 21; *Todd* v. *Rough*, 10 Sergeant & Rawle, 18, 23; and in Alabama, a charge of altering the marks on hogs, being by statute indictable and punishable, though by fine only; *Perdue* v. *Burnett*, Minor, 138; in Indiana, a charge of malicious trespass, being by statute indictable and punishable, by fine and imprisonment, and being an offence infamous in its character; *Wilcox* v. *Edwards*, 5 Blackford, 183; and in South Carolina, a charge of killing the defendant's horse in the night-time, being indictable by statute; *Gage* v. *Skelton*, 3 Richardson, 242; have all been decided to be slanderous. In New York, where a statute made it a misdemeanour, punishable by imprisonment in the county jail, to make wilfully a false declaration of a right to vote at a district meeting, upon being challenged, it has been decided that words charging a person with having wilfully made such false declaration, are "actionable in themselves; as they impute a misdemeanour involving moral turpitude, for which the person against whom the charge is made can be proceeded against by indictment;" *Crawford* v. *Wilson*, 4 Barbour's Supreme Court, 505, 510. See other similar instances in *Widrig* v. *Oyer*, 13 Johnson, 124; *Bissell* v. *Cornell*, 24 Wendell, 354.

In England, it is well settled that, unless special damage is shown, to charge a woman with fornication or adultery, or incontinence in any shape, is not actionable at common law, the offences not being punishable in the temporal courts, but cognizable in the ecclesiastical courts only; *Byron* v. *Elmes*, Sal. 693; *Graves* v. *Blanehet*, Id. 696; except in London, and some particular places, where, by custom, the offence is summarily punishable, and where the imputation is therefore actionable; *Brandt & wife* v. *Roberts & wife*, 4 Burrows, 2418: and this is the law of several states in this country, where those offences have not been made indictable by statute; *Buys & wife* v. *Gillespie*, 2 Johnson, 115; *Stanfield* v. *Boyer*, 6 Harris & Johnson, 248; *Woodbury* v. *Thompson*, 3 New Hampshire, 194; and was the law of others, before statutes were passed to make such charges actionable; *Boyd & wife* v. *Brent*, 3 Brevard, 241; *Robert W. & wife* v. *E. S.*, 2 Nott & M'Cord, 204; *Berry* v. *Carter et ux.*, 4 Stewart & Porter, 387; *Elliott* v. *Ailsbury & wife*, 2 Bibb, 473; but

in those states in which fornication and adultery have been made indictable by statute, such charges are held to be actionable, as, in Pennsylvania, Massachusetts, Connecticut, and Georgia; *Walton* v. *Singleton*, 7 Sergeant & Watts, 449; *Harker* v. *Orr*, 10 Watts, 245, 248; *Beirer* v. *Bushfield*, 1 Id. 23; *Miller* v. *Parish*, 8 Pickering, 384; *Frisbie* v. *Fowles*, 2 Connecticut, 707; *Pledge & wife* v. *Hathcock*, 1 Kelly, 550; and in New Jersey, where fornication and bastardy constitute a punishable offence, an imputation thereof is actionable, though an imputation of fornication alone is not; *Smith* v. *Minor*, Cox, 16: and in several states, statutes have been passed making the charge of fornication or adultery, slanderous and actionable; for example, in North Carolina; St. of 1808; see *M'Brayer* v. *Hill*, 4 Iredell's Law, 136; *Watts* v. *Greenlee*, 2 Devereux, 115; Kentucky; St. of 1811, sec. 9; see *Morris* v. *Barkley*, 1 Littell, 64; *Phillips* v. *Wiley*, 2 Id. 153; Indiana; Ind. Terr. Statutes, 1813, p. 110; *acc.* Ind. St. 1823, p. 296, and Ind. R. S. 1838, p. 452; see *Akom* v. *Hooker*, 7 Blackford, 58; *Worth* v. *Butler*, Id. 251; *Shields* v. *Cunningham*, 1 Id. 86; *Wilcox* v. *Webb*, Id. 258; South Carolina; St. of 1824, p. 28; see *Freeman* v. *Price*, 2 Bailey, 115; Illinois; R. S. 522; see *Regnier* v. *Cabot*, 2 Gilman, 34; *Patterson et al.* v. *Edwards et al.*, Id. 720; Alabama; St. of Feb. 2d, 1839; see *Williams & wife* v. *Bryant & wife*, 4 Alabama, 44. In Ohio, by an innovation on the common law, it is held that to charge want of chastity on a female is actionable, on account of the probable injury to her social position and prospects; *Goodenow* v. *Tappan*, 1 Ohio, 60; *Sexton* v. *Todd*, Wright, 317; *Wilson* v. *Runyan*, Id. 651; and this has since been pushed to a very irrational extent; for, in the late case of *Malone* v. *Stewart & wife*, 15 Ohio, 319, the court said, "We hold it a sound principle of law (!) that words spoken of a female, which have a tendency to wound her feelings, bring her into contempt, and prevent her from occupying such position in society as is her right as a woman, are actionable in themselves;" and the defendant in that case having called the woman an hermaphrodite, instead of the judgment "Risu solventur tabellæ, tu missus abibis," being entered, the words were decided to be actionable! See *Wetherhead* v. *Armitage*, 2 Levinz, 233.

The imputation of any felony is actionable: and we may consider separately the most prominent instances that have occurred.

1. *A felonious killing.*—A general charge of having killed another, without explanation or limitation, is actionable; *Johnson* v. *Robertson & wife*, 4 Porter, 486, 489; because "every homicide is judicially, as well as to the common apprehension of mankind, deemed felonious unless the circumstances of justification or excuse appear;" per Minor, J., in *Taylor* v. *Casey*, Minor, 258, 261: accordingly, the following expressions have been held actionable; "You have killed my brother;" *Johnson* v. *Robertson*; "You killed a negro;" *Hays & wife* v. *Hays*, 1 Humphreys, 402; "You are a gang of murderers—you killed T., and you know it;" *Chandler* v. *Holloway*, 4 Porter, 18; "He killed my child—it was the saline injection that did it," innuendo of felonious killing; *Edsall* v. *Russell*, 5 Scott's New, 801; S. C. 2 Dowling's N. S. 641; "I think the present business ought to have the most rigid inquiry, for he murdered his first wife, that is he administered improperly medicines taken for a certain complaint, which was the cause of her death;" *Ford* v. *Primrose*, 5 Dowling & Ryland, 287. The imputation of an intent to kill, as by saying, "She put poison in a barrel of drinking water to poison me," is also slanderous; *Mills & wife* v. *Wimp*, 10 B. Monroe, 417.

2. *Arson.*—At common law, it is actionable to charge a man with any burning of a house which amounts to arson, but not where the burning is

not arson: to say, therefore, "G. burnt the camp-ground," referring to certain houses owned by a corporation, is actionable; *Giddens* v. *Merk*, 4 Georgia, 364, 374; but to say, "the plaintiff burnt his (the defendant's) house," where the conversation showed that he alluded to an out-house not parcel of a dwelling-house, is not actionable; *Brady* v. *Wilson*, 4 Hawks, 93. In Kentucky and Maryland, however, where statutes have made the wilful burning of any house arson, it is actionable to charge a man with burning a school-house or barn; *Wallace* v. *Young*, 5 Monroe, 155; *Jones* v. *Hungerford*, 4 Gill & Johnson, 402; *House* v. *House*, 5 Harris & Johnson, 124; and in Alabama, to charge one with burning a cotton-house or gin-house (a house to store cotton in), a statute making the offence arson, is actionable; *Waters* v. *Jones*, 3 Porter, 442. To charge a man with burning his own house, is not actionable, because the act is not unlawful unless the house were contiguous to others, or the burning were with intent to defraud the insurance officers, which should be averred; *Sweetapple* v. *Jesse*, 5 Barnewall and Adolphus, 27; but a charge of burning one's own house, where a statute made that arson in the third degree, has been decided to be actionable; *Case* v. *Buckley*, 15 Wendell, 327. In *Bloss* v. *Tobey*, 2 Pickering, 320, the words "he burnt his store; he would not have got his goods insured if he had not meant to burn it," were held not to be actionable, because burning one's own property, unaccompanied by injury to others or a design to injure, is not actionable; such a charge was therefore said not to be actionable, unless there be in the declaration an averment that goods belonging to another were in the store, or goods belonging to the plaintiff in the store were insured: but the words used in this case do seem sufficiently to impute an intention to cheat the insurers by the burning of the store.

3. *Felonious stealing or larceny.*— There are several kinds of taking which are unlawful, but it is only a felonious taking, the charge of which is actionable; the cases therefore go upon a distinction between larceny on the one hand, and a mere trespass, or a mere breach of trust, on the other. A charge of stealing matters which are of such a nature that there may be a felonious stealing of them, is actionable; therefore to say "he stole my sugar and coffee;" *Gill* v. *Bright*, 6 Monroe, 130; or "you did steal my brother's cotton;" *Stokes* v. *Stuckey*, 1 M'Cord, 562; or "there is the man that stole my horse, and fetched him home yesterday morning;" *Bonner* v. *Boyd*, 3 Harris & Johnson, 278; or a charge of stealing a key, for that, though in the lock of the door of a house, is the subject of larceny; *Haskins* v. *Torrence*, 5 Blackford, 417; or for an employer to say of an overseer that he stole his wheat and corn, for that may be a ground of felony; *Wheatley* v. *Wallis*, 3 Harris & Johnson, 1; have been held actionable. Taking clothes, animo furandi, from the dead body of a man drowned in the wreck of a vessel and driven on shore, is a felony, and the imputation of it is a slander; *Wonson* v. *Sayward*, 13 Pickering, 402. And a charge of *taking* things accompanied with circumstances showing that the taking was secret and blameable, has been held to amount to an imputation of felony; *Bournman* v. *Boyer*, 3 Binney, 515; *M'Kennon* v. *Grew*, 2 Watts, 352; *Jones* v. *M'Dowell*, 4 Bibb, 188. And, in a general way, to call a man a "thief," without more, is actionable, because *ex vi termini*, it imports a felony; *Fisher* v. *Rotereau & wife*, 2 M'Cord, 190; *Dudley* v. *Robinson*, 2 Iredell's Law, 141; *Penfold* v. *Westcote*, 2 New, 335; see also *Slowman* v. *Dutton*, 10 Bingham, 402; and so is a charge of "pilfering;" *Becket* v. *Sterrett*, 4 Blackford, 499, 500; and of being a "thieving person;" *Ally* v. *Neely*, 5 Id. 200. But

if one be charged with stealing, under such circumstances as show that a felony was not capable of being committed, or at least was not committed, but that the act was either a trespass or a breach of trust, the charge will not be actionable. A charge of stealing something which is part of the freehold; for example, a charge of stealing, understood to relate to standing timber; *Dexter* v. *Taber*, 12 Johnson, 239; as to say "he stole my bee-tree;" *Idol* v. *Jones*, 2 Devereux, 162; *Cock* v. *Weatherby*, 5 Smedes & Marshall, 333; or, a charge of stealing earth, as, to say, "he stole my marl;" *Ogden* v. *Riley*, 2 Green, 186; is not actionable: nor is a charge of stealing a dog, that not being a felony; *Findlay* v. *Bear*, 8 Sergeant & Rawle, 571; or a charge, "you have stolen a file of bills out of my desk," that not being larceny; *Blanchard* v. *Fisk*, 2 New Hampshire, 398. In like manner, the following expressions, "those two rascals killed my hogs and converted them to their own use," *innuendo* of felonious stealing; *Sturgenegger* v. *Taylor*, 2 Brevard, 480; and "H.'s boys did frequently come to our house and hire our negroes and take the dogs and go down into the river bottom and kill cattle no more theirs than mine;" *Porter et ux.* v. *Hughey*, 2 Bibb, 232; have been held not actionable, as merely imputing a trespass: see, however, *Yearly* v. *Ashley*, 4 Harris & Johnson, 314. And the case is similar, if the imputation amount merely to a breach of trust; as, to charge one with stealing woolfilling sent to his own house to be woven, which would not be a felony; *Hacon & wife* v. *Smith*, 4 B. Monroe, 385; or, to say, "J. M. was an United Irishman, and got the money of the United Irishmen into his hands and ran away with it, and is now a rich man at P.;" *M'Clurg* v. *Ross*, 5 Binney, 218; see also, *Thompson* v. *Bernard*, 1 Campbell, 48; or to charge one with embezzling goods, because that implies the wrongful appropriation and use of what came rightfully to possession; *Caldwell* v. *Abbey*, Hardin, 529; *Taylor* v. *Kneeland*, 1 Douglass's Michigan, 68; these are not actionable in themselves, because they import a breach of trust. To charge a churchwarden with stealing the bell-ropes of the church of which he was warden, is not actionable, because in law the possession is in him; but a charge of stealing bell-ropes generally, is; *Jackson* v. *Adams*, 2 Bingham's N. C. 402. See, also, *Hall* v. *Hawkins*, 5 Humphreys, 357, 360. To say that a "library has been plundered by C.," is not in itself actionable, because though denoting a wrongful acquisition, it does not sufficiently charge a felony; *Carter* v. *Andrews*, 16 Pickering, 1, 9: and the same may be said of an expression like this: "D. must settle for some of my logs he has made away with;" *Brown* v. *Brown*, 14 Maine, 317. With regard to charges of *robbery*, see *Rowcliffe* v. *Edmonds & wife*, 7 Meeson & Welsby, 12; *Slowman* v. *Dutton*, 10 Bingham, 402; *Tomlinson* v. *Brittlebank*, 4 Barnewall & Adolphus, 630; *Russell* v. *Wilson*, 7 B. Monroe, 261. A charge against a postmaster of taking money out of a letter, put into the post-office by the defendant, and appropriating it to his own use, and of keeping and embezzling letters, is actionable, because the offence is indictable by statute and imports moral turpitude; *Hays* v. *Allen*, 3 Blackford, 408; and for the same reason, a charge of robbing the United States mail, is actionable; *Jones* v. *Chapman*, 5 Id. 88.

4. *Forgery.*—A general charge of forgery, or a distinct imputation of that which is forgery at common law, or by statute, is actionable; see *Jones* v. *Herne*, 2 Wilson, 87; *Nichols* v. *Hays*, 13 Connecticut, 156, 162; *Arnold* v. *Cost*, 3 Gill & Johnson, 220; *Atkinson* v. *Reding*, 5 Blackford, 39; *Andrews* v. *Woodmansee*, 15 Wendell, 232; but a charge of

forging that of which the forgery is not indictable, as of a letter, is not actionable; *Jackson* v. *Weisiger*, 2 B. Monroe, 214; in *Alexander* v. *Alexander*, 9 Wendell, 141, however, it was held that a charge of forgery, understood to relate, not to felonious forgery, but to the forgery of a name to a petition to the legislature, of such character as would make a misdemeanour, was actionable.

5. *Counterfeiting* is a species of *crimen falsi*, and involves moral turpitude, and is indictable, and therefore a charge of it, is actionable. To say "you are a counterfeiter," without more, is actionable; *Thirman* v. *Matthews*, 1 Stewart, 384; *Howard* v. *Stephenson*, Mill's Constitutional, 408. Where a statute makes it indictable, knowingly to pass counterfeit money, a charge of passing counterfeit money, with an averment of knowledge, would be actionable, but not without it; *Church* v. *Bridyman & wife*, 6 Missouri, 191, 194.

6. *Perjury.*—"In order to constitute perjury, there must be a 'lawful oath administered in some judicial proceeding.' False swearing in a voluntary affidavit made before a justice of the peace, before whom no cause is depending, is not perjury, nor can it be punished by indictment:" per Tilghman, C. J., in *Shaffer* v. *Kintzer*, 1 Binney, 537, 542. "The legal idea of perjury," says Minor, J., "necessarily includes the several circumstances constituting the offence. The charge of being forsworn, or of having taken a false oath, unless connected by some necessary reference to the other circumstances constituting the offence, does not to common apprehension produce the conclusion that a perjury has been committed;" *Taylor* v. *Casey*, Minor, 258, 261. The question, therefore, whether a charge of false swearing is or is not actionable, depends upon whether it appears from the words themselves, or from the circumstances connected with them and averred in the introductory matter, that the charge related to an oath in some judicial proceeding, or necessarily conveyed to the mind of the hearer an imputation of perjury: and all the cases go upon this distinction: see *Stewart* v. *Cleaner*, 1 Harrington, 337; *Sheely* v. *Biggs*, 2 Harris & Johnson, 363; *Beswick* v. *Chappel*, 8 B. Monroe, 486. Words making a general charge of "perjury," are actionable in themselves, without any colloquium; *Hopkins* v. *Beedle*, 1 Caines, 347, 349; *Green* v. *Long*, 2 Id. 91; *Lee & wife* v. *Robertson*, 1 Stewart, 138; *Harris* v. *Purdy*, Id. 231; *Commons* v. *Walters*, 1 Porter, 377; *Hall* v. *Montgomery*, 8 Alabama, 510, 514; *Waggstaff* v. *Ashton*, 1 Harrington, 503; unless accompanied with such reference or explanation as shows that legal perjury was not possible, or was not intended; *Mahan* v. *Berry*, 5 Missouri, 21; 1 Rol. Abr. Act. on case Y. 41; and so are words that necessarily imply an imputation of perjury by referring to false swearing in a judicial proceeding, or to such false swearing as is indictable. Accordingly these expressions have been held to be actionable, without a colloquium: "You swore false at the trial of J.;" *Fowle* v. *Robbins*, 12 Massachusetts, 498; "I had a law suit with T. G. D. about a hog, and T. S. (the plaintiff) swore falsely against me, and I have advertised him as such;" *Magee* v. *Stark*, 1 Humphreys, 506; "you swore false in two particulars in court;" *Hamilton* v. *Dent*, 1 Haywood, 116; "he has sworn false to my injury six or seven hundred dollars;" *Jacobs* v. *Fyler*, 3 Hill's N. Y. 572; "he has sworn to a lie, and done it meaningly to cut my throat;" *Coons* v. *Robinson*, 3 Barbour's Supreme Court, 626, 632; and the following, as implying an indictable perjury; "you swore to a damned lie and you know it, for which you now stand indicted;" *Pelton* v. *Ward*, 3 Caines, 73; and words stating that the plaintiff swore falsely, and that the defendant will attend the grand jury about it; *Gilman* v. *Lowell*, 8 Wendell, 573; and words stating an

intention to commence a suit against the plaintiff for perjury; *Fox* v. *Vanderbeck*, 5 Cowen, 513, 515. Words charging the plaintiff with having sworn false on a certain trial before a justice of the peace, are actionable; *Wilson* v. *Harding*, 2 Blackford, 241: and it has been held that a charge of swearing false "on a trial, or the trial of a case between such and such persons, before Esquire or Squire" such an one, was actionable, with a colloquium laid and proved that the person named was a justice of the peace; *Canterbury* v. *Hill*, 4 Stewart & Porter, 224; and in another case, that such words would not be actionable with averment and proof of that fact, the term 'squire not sufficiently importing a justice of the peace; *Dalrymple* v. *Lofton*, 2 Spear, 588; S. C. 1 McMullan, 112: however, in other cases, the following words, "I cannot enjoy myself in a meeting with Sherwood, for he has sworn false, and I can prove it; and if you do not believe it, you can go to Esquire Bassett's and see it, in a suit between James L. Sherwood, plaintiff, and Richard P. Brown, defendant," were held to be actionable, unaided by a colloquium; *Sherwood* v. *Chace*, 11 Wendell, 38; and so were the words "you swore to a lie to-day, in a case tried before J. T., Esquire, against D. D., for killing a dog, and you offered to swear to a lie before," in *M'Donald* v. *Murchison*, 1 Devereux, 7; and "you have taken a false oath against me in a suit before Squire H., and swore me out of some money," innuendo of a suit before H., Esquire, in *Call* v. *Foreman*, 5 Watts, 331; and in the last of these it was decided that "Esquire," in a colloquium or innuendo, is sufficiently a designation of one as justice of the peace, that title being one commonly used: and upon the whole it would seem that if a trial of a judicial kind be referred to in the words, the title of Esquire will be a sufficient description of a justice of the peace, to make the words actionable in themselves. But where it is not made to appear by a colloquium that the words had reference to an oath in a judicial proceeding, or the colloquium shows that they were said in regard to a voluntary affidavit before a magistrate, or to some other proceeding before him not judicial, or before a tribunal not having jurisdiction, a mere charge of false swearing, as, to say "he has sworn falsely," or "he has sworn to a lie," or "he has taken a false oath," or "he is a forsworn man," is not actionable, nor would an innuendo of perjury make it so; *Holt* v. *Scholefield*, 6 Term, 690; *Hall* v. *Weedon*, 8 Dowling & Ryland, 140; *Shaffer* v. *Kintzer*, 1 Binney, 537, 541; *Parker* v. *Spangler & wife*, 2 Id. 60; *Hopkins* v. *Beedle*, 1 Caines, 347; *Vaughan* v. *Havens*, 8 Johnson, 109; *Pratt* v. *Price*, 11 Wendell, 127; *Watson* v. *Hampton*, 2 Bibb, 319; *Martin* v. *Melton*, 4 Id. 99; *Beswick* v. *Chappel*, 8 B. Monroe, 486; *Power* v. *Miller*, 2 M'Cord, 220; *Robertson* v. *Lea & wife*, 1 Stewart, 141, 143; *Hall* v. *Montgomery*, 8 Alabama, 510; *Cummins* v. *Butler*, 3 Blackford, 190; *Roella* v. *Follon*, 7 Id. 377; *Fitzsimmons* v. *Cutler*, 1 Aikens, 331; nor are the words, "He swore a false oath before 'Squire Andrews, and I can prove it," or "He has taken a false oath in 'Squire Jamieson's court," or "He swore to a lie before 'Squire Lamkin," actionable, without a colloquium referring them to a judicial proceeding before the magistrate; *Stafford* v. *Green*, 1 Johnson, 505; *Ward* v. *Clark*, 2 Id. 10; *Ashbell* v. *Witt*, 2 Nott & M'Cord, 364. But if there be a colloquium referring the discourse to a trial in court or before a justice of the peace, or other judicial officer, or arbitrators, where testimony is given on oath, and where perjury may be committed, a charge of false swearing is actionable, as, to say "he swore falsely," or "he swore a lie," or "you took a false oath," or "what he has sworn to is a lie:" *Rue* v. *Mitchell*, 2 Dallas, 58; *Crookshank* v. *Gray*, 20 Johnson, 344; *M'Kinly* v. *Robb*, Id. 351, 355; *Butterfield* v. *Buffum*, 9

New Hampshire, 156; *Sanderson* v. *Hubbard*, 14 Vermont, 462, 468; *Lyman* v. *Wetmore*, 2 Connecticut, 42, *n.*; *Harris* v. *Purdy*, 1 Stewart, 231; *Morgan* v. *Livingston*, 2 Richardson, 574; or to cry out while a witness is giving testimony in court, "you have sworn a manifest lie," or "That is false," "I believe it is false;" *Kean* v. *M'Laughlin*, 2 Sergeant & Rawle, 469; *Cole* v. *Grant*, 3 Harrison, 328: and whenever the language is thus in itself not actionable, and must be laid with a colloquium, the colloquium becomes a substantive part of the cause of action, and must be proved as laid; *Ashbell* v. *Witt*, 2 Nott & M'Cord, 364; *Aldrich* v. *Brown*, 11 Wendell, 596; *Emery* v. *Miller*, 2 Denio, 208; *Coons* v. *Robinson*, 3 Barbour's Supreme Court, 626, 632.

In Connecticut, a majority of the court were of opinion that false swearing in proceedings before an ecclesiastical tribunal was perjury, and therefore that an imputation of it was slanderous and actionable; *Chapman* v. *Gillet*, 2 Connecticut, 40; but this point has been decided in an opposite manner in Pennsylvania; *Harvey* v. *Boies*, 1 Pennsylvania, 12; dictum, per Tilghman, C. J., in *M'Millan* v. *Birch*, 1 Binney, 178, 186.

With regard to the materiality of the testimony necessary to make a charge of false swearing slanderous, the New York cases, at one time, had fallen into some apparent confusion: but the principle upon the subject, appears to be as follows: If the defendant, referring generally to some previous judicial proceeding, with which the bystanders are not shown to be exactly acquainted, say that the plaintiff swore falsely, it will amount to a charge of perjury and will be actionable, without reference to the consideration whether the false oath was or was not in a point material to the issue; *Stone* v. *Clark*, 21 Pickering, 51; *Butterfield* v. *Buffum*, 9 New Hampshire, 156, 163; *Tenney* v. *Clement*, 10 Id. 52, 58; *Harris* v. *Purdy*, 1 Stewart, 231; *Ramsey* v. *Thornberry*, 7 B. Monroe, 475; *Wilson* v. *Harding*, 2 Blackford, 241; *Jacobs* v. *Tyler*, 3 Hill's N. Y. 572; *Coons* v. *Robinson*, 3 Barbour's Supreme Court, 626; and see the Chancellor's opinion in *Power* v. *Price*, 16 Wendell, 450, 454; for, as a general rule, it is to be intended that what a witness has sworn to, in a judicial proceeding, is material, and the hearers cannot be expected to know the evidence given on trials which they have not been connected with; and the injury consists in the fact that the defendant ostensibly charged the plaintiff with perjury, and it is the effect of the words on the hearers that is to be considered. The defendant, however, as is remarked in the first of these cases, may at the time of charging the plaintiff with false swearing, add, that it was in a matter irrelevant and immaterial, which would show that a charge of perjury was not made: there is no doubt, also, that the reference to the testimony may be so precise and definite, and the testimony itself be so fully before the hearers at the time the words are uttered, that they can perceive that it is immaterial evidence which the defendant pronounces to be false; and in such a case, a charge of false swearing will not be actionable. Thus, if while the plaintiff is giving his testimony to a cause, the defendant cries out, at a particular point, "That is false," or "It is a lie; he is swearing to a lie," as in *M'Claughry* v. *Wetmore*, 6 Johnson, 82; *Bullock* v. *Koon*, 9 Cowen, 30; S. C. 4 Wendell, 531; *Hutchins* v. *Blood*, 25 Id. 413; or, while he is testifying, says, "Every word you have sworn is false," or says again, immediately afterwards, and while in the same house, the plaintiff "has sworn to a lie, and I can prove it;" *Ross* v. *Rouse*, 1 Wendell, 475; or if the defendant, in saying, in relation to a previous trial, "the plaintiff swore to a lie," is proved to have been understood as referring to a particular individual part, and to nothing else;

Crookshank v. *Gray*, 20 Johnson, 344; in all such cases, the materiality of the evidence referred to, becomes of importance, and if the defendant prove that the particular part of the evidence alluded to, or the whole evidence in the case, was immaterial and irrelevant, the action will not be sustained. It is enough, however, if the fact form a material circumstance in a chain of legal evidence; *Hutchins* v. *Blood*, 25 Wendell, 413. These distinctions have sometimes been overlooked, and it has been said, generally, that immateriality in the evidence would be a defence; *Dalrymple* v. *Lofton*, 1 M'Mullan, 112, 118. Where immateriality would be a defence there seems to be no doubt that the burden of showing that the evidence referred to was immaterial, rests on the defendant; *Jacobs* v. *Fyler*, 3 Hill's N. Y. 572, 574; *Coons* v. *Robinson*, 3 Barbour's Supreme Court, 626, 630, 631; which consider the Chancellor's opinion in *Power* v. *Price*, 16 Wendell, 450, 454, as overruling that of the Supreme Court in S. C. 12 Id. 500. There is, also, no question, that the want of an allegation of materiality, in the declaration, in the colloquium, which avers the trial and evidence, as also the want of an allegation of the justice having jurisdiction, and of the plaintiffs having been legally sworn, cannot be objected after verdict; *Niven* v. *Munn*, 13 Wendell, 48; *Chapman* v. *Smith*, Id. 75; *Sherwood* v. *Chace*, 11 Id. 38; *Dalrymple* v. *Lofton*, 1 M'Mullan, 112, 117; *Harris* v. *Purdy*, 1 Stewart, 231; *Commons* v. *Walters*, 1 Porter, 377, 384; *Wilson* v. *Harding*, 2 Blackford, 241; *Magee* v. *Stark*, 1 Humphreys, 506; *Palmer* v. *Hunter*, 8 Missouri, 512. In Arkansas, by statute it is actionable to charge a person with swearing falsely, whether the conversation refer to a judicial proceeding or not; act of 1837, Rev. St. 729; *Carlock* v. *Spencer & wife*, 2 English, 22.

And while the charge of a specific felony, or indictable crime, will be actionable, it seems to be equally settled that a general imputation of having committed a felony, or a crime involving disgrace and punishment, will be actionable; as to say, "You have been cropped for felony," *Wiley* v. *Campbell*, 5 Monroe, 396; or, "he is a convict; he was in the penitentiary;" *Smith* v. *Stewart*, 5 Barr, 372; or, "he is a returned convict;" *Fowler* v. *Dowdney*, 2 Moody & Robinson, 119; or, "You have committed an act for which I can transport you;" *Curtis* v. *Curtis*, 10 Bingham, 477; or, "You have done things with the company for which you ought to be hanged, and I will have you hanged before the 1st of August;" *Francis* v. *Roofe*, 3 Meeson & Welsby, 191.

The imputation of an indictable crime committed out of the jurisdiction of the state where the words are spoken, or the suit is brought, will be actionable; *Smith* v. *Stewart*, 5 Barr, 372; *Van Ankin* v. *Westfall*, 14 Johnson, 233; *Cefut* v. *Burch*, 1 Blackford, 400; *Parke* v. *Blackiston*, 3 Harrington, 373; see *Haight* v. *Morris*, 2 Halsted, 289; but unless it be an indictable offence at common law, it must be shown to be indictable in that state; *Ship* v. *M'Craw*, 3 Murphey, 463; *Wall* v. *Hoskins*, 5 Iredell's Law, 177; and if not indictable where alleged to have been committed, the charge will not be actionable because the offence is indictable where the words are uttered or sued on; *Barclay* v. *Thompson*, 2 Penrose & Watts, 148. To say that one committed a penitentiary offence, but that he was insane at the time he committed it, is not actionable; *Abrams* v. *Smith*, 8 Blackford, 96. The right of action for slander is transitory; and actionable words spoken in another state, imputing a crime indictable by common law or by any statute shown to exist where the offence is said to have been committed, may be sued upon, wherever the parties are; *Stout* v. *Wood*, 1 Blackford, 7; *Offutt* v. *Earlywine*, 4 Id.

460; *Linville* v. *Earlywine*, Id. 470.

But although an indictable crime is made the test, it is undoubtedly a mistake to suppose, as was done in *Harvey* v. *Boies*, 1 Penrose & Watts, 12, 14, and *Dalrymple* v. *Lofton*, 1 McMullan, 112, 118, that the ground of action is legal danger, and not social disgrace. "The gravamen in an action of slander," says Henderson, J., *Shipp* v. *M'Craw*, 3 Murphey, 463, 466; "is *social degradation.*" The risk of punishment, and the rule to test the question whether the words be or be not actionable, to wit, "does the charge impute an infamous crime," is resorted to, to ascertain the fact, whether it be a social degradation, and not whether the risk of punishment be incurred. So in *Eastland* v. *Caldwell*, 2 Bibb, 21, 23, it is said "The action is not exclusively founded upon the hazard of incurring a criminal prosecution, but upon the real or supposed injury to his character." See also *Van Ankin* v. *Westfall*, 14 Johnson, 233, and note to *Fowler* v. *Dowdney*, 2 Moody & Robinson, 120.

2. *Words imputing to another an offensive disease.*

It is generally agreed that words are actionable which impute some personal quality or condition which would exclude a man from society, and lead persons to avoid him; as, for example, a loathsome and infectious disease; *dicta* in *Colby* v. *Reynolds*, 6 Vermont, 489, 494; *Kinney* v. *Hosea*, 3 Harrington, 397, 401; *Burtch* v. *Nickerson*. In *Villers* v. *Monsley*, 2 Wilson, 403, 404, it seems to have been thought by Bathurst and Gould, Js., that a charge of having the *itch*, if written or printed, and published, would be actionable; but not if spoken. It appears from the older cases that imputations of having the leprosy or *lues venerea* have been deemed actionable; *Taylor* v. *Perkins*, Cro. Car. 144; *Crittal* v. *Horner*, Hob. 219. In *Bloodworth* v. *Gray*, 8 Scott's New, 9, also, it was decided, that to charge a person with having, at the time, the venereal disease, is actionable; "words imputing to another that he is at present afflicted with a disgusting and contagious disease are actionable in themselves," said Tindal, C. J., "inasmuch as they import a present unfitness to be admitted into society." And the same thing was decided in *Watson* v. *M'Carthy*, 2 Kelly, 57, in regard to an imputation of having the gonorrhœa. But to charge a person with *having had* a disease of this nature, is not actionable; *Carslake* v. *Mapledoram*, 2 Term, 473.

3. *Words tending to injure another in his official or business character.*

The above definitions apply to cases in which words are actionable generally, that is, when spoken of all men indifferently. But in addition to this, any defamatory words that necessarily, or naturally, tend to injure a man in his profession, office, or business, are actionable. See per Tilghman, C. J., in *M'Millan* v. *Birch*, 2 Binney, 184; *Johnson* v. *Robertson & wife*, 8 Porter, 486, 488; per Tindal, C. J., in *Angle* v. *Alexander*, 7 Bingham, 119, 122. According to the distinction ascertained by Bayley, B., in *Lumby* v. *Allday*, 1 Crompton & Jervis, 301, and approved in *Ayre* v. *Craven*, 2 Adolphus & Ellis, 2, and *Jones* v. *Littler*, 7 Meeson & Welsby, 423, and *Southee* v. *Denny*, 1 Exchequer, 196, the words, to be actionable, must impute some quality which necessarily impairs the plaintiff's professional or business character, as insolvency to a merchant, or drunkenness to a clergyman, or else must be spoken of him in his profession or business: Bailey, B., remarks, that in the definition of De Grey in *Onslow* v. *Horne*, 3 Wilson, 177, 186, "that words are actionable when spoken of one in an office of profit, which may probably occasion the loss of his office, or when spoken of persons touching their respective professions, trades and business, and

and do or may probably lead to their damage;" the word 'probably' is too indefinite and loose, unless considered as equivalent to 'having a natural tendency to,' and confined within the limits of showing the want of some necessary qualification, or some misconduct in the office. "Every authority," he adds, "which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade or business:" and accordingly he decided, that to say of the clerk of a gas company, "You are a fellow, a disgrace to the town, unfit to hold your situation, for your conduct with whores, &c.," was not actionable, because "the imputation does not imply the want of any of those qualities which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk;" *Lumby* v. *Allday*, 1 Crompton & Jervis, 301. And in like manner, it was adjudged in *Brayne* v. *Cooper*, 5 Meeson & Welsby, 249, that to say of a stay-maker, in his trade and business, that the business of a stay-maker does not keep him, but the prostitution of a female in the shop, is not actionable, for the words do not relate, said Lord Abinger, "to the plaintiff in his business, and we cannot consider them as used in any other sense than as a general imputation on his moral conduct." See also *Sibley* v. *Tomlins*, 4 Tyrwhitt, 90. If a quality is imputed to a man in his character, generally, the immediate effect of which is to injure him in his business or profession, as insolvency to a merchant or trader; *Davis* v. *Ruff*, Cheves' Law, 17; *Jones* v. *Littler*, 7 Meeson & Welsby, 423; or immoral conduct to a clergyman; *Chaddock* v. *Briggs*, 13 Massachusetts, 248, there need be no colloquium of the profession or business; but if the words would not be actionable, unless spoken of one in his profession, the declaration must allege that they were spoken of him in relation to that character, and it is not enough merely to allege that he held such a character, except where the words in themselves refer to him in that character; *Burtch* v. *Nickerson*, 17 Johnson, 217, 219; *Kinney* v. *Nash*, 3 Comstock, 177, 178; *Edwards* v. *Howell*, 10 Iredell, 211; *Mills* v. *Taylor*, 3 Bibb, 469; *Davis* v. *Davis*, 1 Nott & M'Cord, 290: but if the words themselves obviously or necessarily relate to professional conduct, no colloquium need be laid; *Hook* v. *Hackney*, 16 Sergeant & Rawle, 385; *Hoyle* v. *Young*, 1 Washington, 150. But words, though tending to injure one in his business, in order to be actionable without special damage, must reflect on the plaintiff's *character*; *Ingram* v. *Lawson*, 6 Bingham's N. C. 212. The office or business must be continuing at the time the words are spoken; *Bellamy* v. *Burch*, 16 Meeson & Welsby, 590. In cases of this kind the measure of damages is, the *probable* injury to the plaintiff in respect to his business or office; *Johnson* v. *Robertson & wife*, 8 Porter, 486, 488.

An action lies for words imputing insolvency, or implying want of credit and responsibility, when spoken of any one to whom, in the prosecution of his business, credit is of importance; because, such imputation must necessarily tend to injure him in his business; as, for example, of a merchant; *Mott* v. *Comstock*, 7 Cowen, 654: *Sewall* v. *Catlin*, 3 Wendell, 291, 295; *Davis* v. *Ruff*, Cheves, 17; or a brewer or distiller; *Jones* v. *Littler*, 7 Meeson & Welsby, 423; *Osttrum* v. *Calkins*, 5 Wendell, 263; or a drover, whose business is to buy cattle, drive them to market and sell them; *Lewis* v. *Hawley*, 2 Day, 495; or a farmer; *Phillips* v. *Hoefer*, 1 Barr, 62, 68; or an innkeeper; *Whettington* v. *Gladwin*, 5 Barnewall & Cresswell, 180: and in such cases, no colloquium of the business need be laid; *Davis* v. *Ruff*. Words imputing to a man fraudulent or indirect dealing in the

business whereby he gains his livelihood, are actionable; *Thomas* v. *Jackson*, 3 Bingham, 104; *Bryant* v. *Loyton*, 11 Moore, 344; as, to say to a merchant, "You have got *my* money on your shelves; you are a damned rogue;" *Davis* v. *Davis*, 1 Nott & M'Cord, 290; or, "I must tell you that you have received more tobacco than you have accounted for to the house;" *Hoyle* v. *Young*, 1 Washington, 150; see also, *Ingram* v. *Lawson*, 6 Bingham's N. C., 212.

In regard to a person whose business necessarily leads to dealing on credit, to which the keeping of books is incident, and whose success must therefore depend upon the character of his books, —to say of such a one, in regard to his business, that he keeps false books, is actionable, because it is calculated to impair confidence in his integrity, and injure his credit, which arises chiefly from his being reputed a fair dealer; and this applies to a merchant; *Backus* v. *Richardson*, 5 Johnson, 476, 483; and to a mechanic, such as a blacksmith: *Burtch* v. *Nickerson*, 17 Id. 217: but such words have been decided not to be actionable, when said of a sawyer of lumber and dealer therein, or a farmer and seller by retail of agricultural products raised by him, because in such employments, the selling on a credit, and to the public generally, is not usual, and the keeping of books is not necessarily incident to the business; *Rath* v. *Emigh*, 6 Wendell, 407, 409.

Words spoken of a physician, imputing ignorance or want of skill in his profession, are actionable in themselves; and comments on a particular case, which necessarily disparage the person's general character for capacity, are actionable; *Summer* v. *Utley*, 7 Connecticut, 258, 259, 262; for example, to say of a physician, "he has killed the child by giving it too much calomel," is actionable; *Johnson* v. *Robertson and wife*, 8 Porter, 486; but words imputing, not professional ignorance, or want of skill, but only want of professional dignity, as to say of a physician, "he is a two-penny bleeder," being mere words of contempt, are not; *Foster* v. *Small*, 3 Wharton, 138, 142. The imputation of misconduct not appearing really to be connected with his profession, such as a charge of adultery, though alleged to have been uttered "of and concerning his profession," is not actionable; *Ayre* v. *Craven*, 2 Adolphus & Ellis, 2; see *Southee* v. *Denny*, 1 Exchequer, 196.

To impute to a lawyer, dishonesty in his profession, or general incapacity; as, to say of him, in his professional capacity, that he is a cheat; *Rush* v. *Cavanaugh*, 2 Barr, 187, 189; or ironically, that he is an "honest lawyer;" *Boydell* v. *Jones*, 4 Meeson & Welsby, 446; or that he is no lawyer; *Day* v. *Buller*, 3 Wilson, 59, is actionable; but to impute ignorance or want of skill in a particular suit, has been held not to be; *Foot* v. *Brown*, 8 Johnson, 64; see also *Tobias* v. *Harland*, 4 Wendell, 537, 541; though an imputation of want of professional integrity in regard to a particular transaction would be; *Gaw* v. *Selden*, 6 Barbour's S. Ct., 416; and to say of one who is an attorney, but not of him in his business of attorney, that "he has defrauded his creditors, and has been horse-whipped off the course at Doncaster," is not actionable, because it does not touch him in his profession; *Doyley* v. *Roberts*, 3 Bingham's N. C., 835; see also *Phillips* v. *Jansen*, 2 Espinasse, 624.

To charge a clergyman with drunkenness or incontinence, is actionable, and the imputation need not be connected with a colloquium of his profession and calling; *Chaddock* v. *Briggs*, 13 Massachusetts, 248; *M'Millan* v. *Birch*, 1 Binney, 178; *Demarest* v. *Haring*, 6 Cowen, 76.

Anything which assails the integrity or capacity of a judge is actionable. To charge a judge with that which would not be a cause of impeachment or address, would be no more actionable than would be the same charge

against a private citizen; but to charge him, either by words or in writing, with lacking capacity as a judge, or with having abandoned the common principles of truth, or been guilty of corruption in office, by corrupt appointments to office, or generally with having done what would remove him from his seat, is actionable; *Robbins* v. *Treadway*, &c., 2 J. J. Marshall, 540; *Hook* v. *Hackney*, 16 Sergeant & Rawle, 385, 389.

Similar principles apply to every kind of official station. To say of a post-master, in respect of his official character, "he would rob the mail for 100 dollars," is actionable; *Craig* v. *Brown*, 5 Blackford, 44; see, however, *M'Cuen* v. *Ludlum*, 2 Harrison, 12. But as the gist of the action consists in injury to official character, the words to be actionable, must apply to the plaintiff's character or conduct in office, and must impute some official incapacity or misconduct. To say of a sheriff, in relation to his office of sheriff, "that moneys which he had collected on execution he had taken and converted to his own use, and that they could not be got out of his hands," is actionable, because it is a charge of malpractice in his office; *Dole* v. *Van Rensselaer*, 1 Johnson's Cases, 330: on the other hand, to say of a justice of the peace, "Squire O. is a damned rogue;" or, "There is a combined company to cheat strangers, and Squire Van T., has a hand in it: K. A., J. G., and Squire Van T. are a set of d——d blacklegs," &c., is not actionable, because such remarks do not relate to official character or conduct, or impute any neglect of official duty; *Oakley* v. *Farrington*, 1 Johnson's Cases, 129; *Van Tassel* v. *Capron*, 1 Denio, 249: and so far has this limitation been carried, that it has been held that if words charging a justice of the peace with corrupt conduct, are spoken in relation to a cause in which he had no jurisdiction, they are not actionable; *Oram* v. *Franklin*, 5 Blackford, 42: and for a similar reason, words relating to official conduct are not actionable if the office has ceased at the time the words are spoken; *Forward* v. *Adams*, 7 Wendell, 204. In regard to words of a member of the legislature, the case of *Hogg* v. *Dorval*, 2 Porter, 212, is directly in point with *Onslow* v. *Horne*, and is decided upon it; and upon the ground, taken in it, that words to be actionable in such a relation must refer to past *conduct*, and charge an actual breach of duty, or the commission of some wrong, and that an expression of opinion respecting another's *inclinations* or *intentions* is not actionable, it was decided that saying of a member elect of the legislature, "he is a corrupt old tory," is not actionable. In *Mayrant* v. *Richardson*, 1 Nott & M'Cord, 348, 350, it was decided that words imputing to one who was a candidate for Congress, that his understanding was impaired or his mind weakened by disease were not actionable; and it seemed in that case to be thought, that words imputing defect of *ability* only, in relation to offices either of profit or credit, were not actionable.

When the words are spoken or written, not of the trader or manufacturer, but of the quality of the articles he makes or deals in, they will not be actionable in themselves, unless they import that the plaintiff is guilty of deceit or mal-practice in the making or vending of them; *Jackson* v. *Russell*, 4 Wendell, 537, 543. To say what is disparaging of a tradesman's goods but does not reflect upon his character, is not actionable, without special damage; *Evans* v. *Harlow*, 5 Queen's Bench, 624.

4. *Words producing special damage.*

Where words are not actionable in themselves, or as necessarily tending to produce damage, the plaintiff must allege and prove that by reason of the speaking, he has sustained some damage; and the damage must be of a pecuniary nature; *Beach* v. *Ranney*, 2 Hill's N. Y., 310, 314. As to the precision with which, according to the

circumstances, the damage must be laid in the declaration, see *Hartley* v. *Herring*, 8 Term, 130, 133. An allegation that "divers of his neighbours have refused to have any transaction, acquaintance, or discourse with him," or, that the plaintiff was thereby greatly injured in his trade and business, and divers citizens, since the speaking and publishing of the words, have refused to purchase, &c., from him, and so the plaintiff is deprived of great gain and profit (*Tobias* v. *Harland*, 4 Wendell, 537, 540), is not a sufficient allegation of special damage, but is merely a general allegation of damages; *Hall* v. *Montgomery*, 8 Alabama, 510, 515; but the allegation that a particular person would not deal with the plaintiff, a commission merchant, was held sufficient special damage, in *Storey* v. *Challands*, 8 Carrington & Paine, 234; and that certain creditors, naming them, were induced, by a slanderous report that the plaintiff had run away, to proceed against him and break him up; *Prettyman* v. *Shockley*, 4 Harrington, 112.

It certainly, however, is not all words occasioning damage that are actionable; there must be something wrongful in them; at least they must be such as a man has not a clear right to utter. What class of remarks are, in their nature, so far not lawful that they are actionable when occasioning damage, the cases have not defined: such as reflect upon the moral character or conduct of the person, probably, always fall within the range. In a case where the question related to the imputation of an impaired mind to one who was a candidate for Congress, the Court said "the words must be of an opprobrious nature, and such as are calculated to lessen the person of whom they are spoken, in the opinion of the community: but where they are perfectly justifiable or innocent, no action will lie, although some injury may have resulted from them;" *Mayrant* v. *Richardson*, 1 Nott & M'Cord, 348, 353; and it seems to have been considered, there, that expressions of opinion about a man's abilities or accomplishments, though occasioning damage, could not be actionable. In *Hallock* v. *Miller*, 2 Barbour, 630, where the plaintiff had been charged with being engaged in serving writs upon anti-renters, whereby special damage was occasioned to his business, the Court said, that as such a charge did not import either an illegal or an immoral act, it was not actionable though accompanied by special damage; and that an action of slander would not lie for words imputing an act both legal and praiseworthy, though a loss or injury might be the consequence of the words.

The damage which is the cause of action, must have arisen before suit brought; *Keenholts* v. *Becker*, 3 Denio, 346, 349; and it was held in that case, that words spoken after suit brought, were not admissible for any purpose, because if they were not followed by special damage they were irrelevant, and if they were, a new action was the proper course. The damage must be such as naturally and immediately, or legally, results from the speaking of the words by the defendant; *Beach* v. *Ranney*, 2 Hill's N. Y., 310, 314; see *Knight* v. *Gibbs*, 1 Adolphus & Ellis, 43: the existence of reports of the same matters imputed by the defendant, whereby loss is occasioned, will not be sufficient, unless the report be traced to the defendant, and the injury be shown to have arisen from his speaking; *Sewall* v. *Catlin*, 3 Wendell, 291, 295; *Hastings* v. *Palmer*, 20 Id. 225. Damages occasioned by the wrongful acts of others, which are themselves actionable, will not sustain a suit for slander; *Vicars* v. *Wilcocks*, 8 East, 1; and though in *Moody* v. *Baker*, 5 Cowen, 351, a majority of the Court (Savage, Chief Justice, dissenting,) denied this principle and case, and held that the violation of a contract of marriage by a third person in consequence of the slander was legal damage; yet the principle is again fully recognised in *Beach* v. *Ranney*, 2 Hill's N. Y.,

310, which seems to destroy the authority of *Moody* v. *Baker*. So, the unauthorized repetition of the words by another, which would itself be an actionable offence, will not be special damage to sustain an action; *Ward* v. *Weeks*, 7 Bingham, 211, 215; *Stevens* v. *Hartwell*, 11 Metcalf, 542, 549; but where the words were repeated by the request and authority of the defendant, and thereby occasioned damages, or were repeated innocently and without intent to defame, as under some circumstances might be the case, so that the repetition would not be a substantive cause of action, it was thought in *Keenholts* v. *Becker*, 3 Denio, 346, 352, that they might be. No evidence can be received of any loss or injury which the plaintiff has received by the speaking of the words, unless it be specially stated in the declaration; *Hallock* v. *Miller*, 2 Barbour, 630.

The most usual instances in which the principle of special damage has been applied, are cases of imputing incontinence to an unmarried woman. Such an imputation has long been decided not to be actionable in itself, but Courts, regretting this strictness, have shown an inclination to give redress by holding that slight damage would sustain an action. Accordingly, although the allegation that the plaintiff has fallen into disgrace, contempt, and infamy, and lost her credit, reputation, and peace of mind, will not be sufficient; *Woodbury* v. *Thompson*, 3 New Hampshire, 194; nor that she is shunned by her neighbours, &c., *Beach* v. *Ranney*, 2 Hill's N. Y., 310, 314; as being the loss of nothing of measurable pecuniary value; yet an allegation of the loss of valuable hospitality and of a support or income derived from the bounty of others, will be sufficient; *Moore* v. *Meagher*, 1 Taunton, 40; *Olmstead* v. *Miller*, 1 Wendell, 506; *Williams* v. *Hill*, 19 Id. 305; or of the loss of health, and the consequent incapacity of transacting business; *Bradt* v. *Townley*, 13 Wendell, 253.

To this department, also, belong cases of what is called slander of title. An action for this is not properly an action for words spoken or written, but an action on the case for special damage sustained by reason of the speaking or publishing of the slander of the plaintiff's title; *Malachy* v. *Soper*, 3 Bingham's N. C., 371; and the special damage must be alleged, circumstantially, in the declaration; *Bailey* v. *Dean*, 5 Barbour's S. Ct., 297, 300. This action is in some respects, like an action of slander; and in others, like an action for malicious prosecution. On the one hand, as in an action for slander, the words which constitute the offence, must be set out exactly in the declaration; *Gutsole* v. *Mathers*, 1 Meeson & Welsby, 495; *Hill* v. *Ward*, 13 Alabama, 311. And on the other, the action cannot be maintained without showing malice and want of probable cause; and in regard to this, it rests on very nearly the same ground as an action for malicious prosecution. If what the defendant said or did was in pursuance of a *bonâ fide* claim or colour of title, which he was asserting honestly, and especially, if he was acting under the advice of counsel, though his title proves not to have been perfect, he will not be liable; *Hill* v. *Ward*; *Bailey* v. *Dean*. See *Kendall* v. *Stone*, 2 Sandford's S. Ct., 270, 283. In this action, the truth may be given in evidence under the general issue; *Kendall* v. *Stone*. See instances of this action in *Hargrave* v. *Le Breton*, 4 Burrow, 2422; *Smith* v. *Spooner*, 3 Taunton, 246; *Pitt* v. *Donovan*, 1 Maule & Selwyn, 439.

Legal definition of Libel. Distinction between the actionable nature of words spoken and written.

STEELE *v.* SOUTHWICK.

In the Supreme Court of New York.

ALBANY, AUGUST, 1812.

[REPORTED 9 JOHNSON, 214–216.]

A. was a witness in a cause between B. and C., and C. afterwards printed and published the following words of A. "Our army swore terribly in Flanders, said Uncle Toby; and if Toby was here now, he might say the same of some modern swearers. The man (meaning A.) is no slouch at swearing to an old story."

In an action brought by A. for a libel, it was held that these words, if they did not import a charge of perjury in the legal sense, yet they were libellous, as they held up the plaintiff to contempt and ridicule, as being so thoughtless or so criminal as to be regardless of the obligations of a witness, and therefore, as utterly unworthy of credit.

Where C. published a direct and positive contradiction of what a witness at a trial between B. and C. had sworn that A. had said; this was held not to be a libel, as it was not accompanied with any imputation of a crime in A.

THIS was an action for a libel. The first count stated that the plaintiff was sworn, and examined as a witness, in a cause tried at the circuit, in Albany, in which this defendant was plaintiff, and Harry Croswell defendant; that the plaintiff is a bookseller and stationer, in Albany, and has for a sign, a book-lettered "Bible;" and that the defendant, maliciously intending, &c., on the 5th December, 1809, printed, &c., in "The Albany Register," a certain false, &c., libel, of and concerning the plaintiff, &c., as follows: "Affidavits. Our army swore terribly in Flanders, said Uncle Toby; and if Toby was here now, he might say the same of some modern swearers. The man at the sign of the Bible (meaning the plaintiff), is no slouch at swearing to an old story," (meaning, &c.)

The second count stated, that the plaintiff was examined as a witness in a cause between the defendant and Croswell, and testified truly, &c.; that the defendant had told him, the plaintiff, that he, the defen-

dant, approved of Fox's maxim, to wit, "That the public was a goose, and that he was a fool who did not pluck a quill when he had an opportunity." Yet the defendant, intending, &c., to cause it to be believed that the plaintiff, in giving the evidence aforesaid, was guilty of perjury, did, on the 9th of January, 1810, publish, &c., a certain libel in "The Albany Register," as follows, to wit, "As complete evidence of his candour (meaning his Honour Mr. Justice Spencer, before whom the cause was tried), in the present case, for error there was none, I (the defendant) need only mention, that he told the jury, emphatically, that it was proved by Steele, that I had declared to him, that I approved of Fox's maxim, that the public was a goose, &c.; that this was a very profligate sentiment, and that if they believed the testimony of Steele, they could not, in estimating damages, conceive anything due to the feelings of a man capable of entertaining it, for that such feelings could not be injured; but while I acknowledge the correctness of this decision, and most sincerely and heartily concur in it, I am bound to declare, which I now do most solemnly, in the presence of an all-seeing God, my firm conviction, that I never made to Steele the declaration above stated. It is utterly impossible, from the barefaced absurdity, as well as from the abandoned profligacy, manifested by such a declaration, that I ever could have made it; and how that man's (the plaintiff's) imagination has wrought itself into a belief that I made it, is to me truly a subject of wonder, as it is of regret, that I find myself constrained, by what is due to my own honour, thus publicly and solemnly to deny what he has solemnly and publicly sworn to." By means whereof, &c.

There was a general demurrer to the whole bill, and a joinder in demurrer. The cause was submitted to the court, without argument.

Per Curiam. The plaintiff, in the first count, avers, that he had been called to testify, as a witness, in behalf of Harry Croswell, in a suit brought by the present defendant against the said Croswell, and that the defendant, afterwards, and with a view to injure the character and credit of the plaintiff, maliciously published the words stated in that count, in which the plaintiff is represented as swearing "terribly," and as being "no slouch at swearing to an old story." These words import that he swore with levity, and rashly, and inconsiderately, without due regard to the solemnity of the oath, or to the truth and accuracy of what he said.

If the words do not import perjury in the legal sense, they hold the plaintiff up to contempt and ridicule, as being so thoughtless, or so immoral, as to be regardless of the obligations becoming a witness, and, therefore, to be utterly unworthy of credit. In this view, the words are actionable, for a writing published maliciously, with a view to expose

a person to contempt and ridicule, is undoubtedly actionable; and what was said to this effect, by the judges of the C. B. in Villers v. Mensley (Wills. 403), is founded in law, justice, and sound policy. The opinion of the court, in the case of Riggs v. Denniston (3 Johns. Cas. 205), was to the same effect; and the definition of a libel, as given by Mr. Hamilton, in the case of The People v. Croswell (3 Johns. Cas. 354), is drawn with the utmost precision. It is a *censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals.* (Vide Root v. King, 7 Cowen, 613.) To allow the press to be the vehicle of malicious ridicule of private character, would soon deprave the moral taste of the community, and render the state of society miserable and barbarous. It is true, that such publications are also indictable, as leading to a breach of the peace; but the civil remedy is equally fit and appropriate, and as the jury assess the damages, it is, in most cases, the more desirable remedy, and one which gives most satisfaction.

The second count does not appear to contain actionable matter.

The defendant confines himself to a denial of the charge, and a vindication of himself, and as that denial is not accompanied with any imputation of a crime to the plaintiff, or anything like malicious or wanton ridicule of him, it does not appear to be anything more than a lawful vindication. But as the demurrer is to the whole bill, the plaintiff is entitled to judgment.

Judgment for the plaintiff.

It has long been settled, that there is a material difference between slander and libel, and that many things are actionable when written, or printed, and made public, which would not be actionable if spoken. See *Villers* v. *Monsley*, 2 Wilson, 403, 404; *Thorley* v. *Kerry*, 4 Taunton, 355; *M'Gregor* v. *Thwaites*, 3 Barnewall & Cresswell, 24, 33; *Van Ness* v. *Hamilton*, 19 Johnson, 349, 367; *Stone* v. *Cooper*, 2 Denio, 294, 299; *Hillhouse* v. *Dunning*, 6 Connecticut, 391, 408; *Colby* v. *Reynolds*, 6 Vermont, 489; *Shelton* v. *Nance, &c.*, 7 B. Monroe, 128; *Rice* v. *Simmons*, 2 Harrington, 417, 422, 423; *M'Corkle* v. *Binns*, 5 Binney, 340, 349, 353; *Williams* v. *Karnes*, 4 Humphreys, 9, 11; *Obaugh* v. *Finn*, 1 Arkansas, 110, 121. "There is a marked distinction in the books between oral and written slander," says Bayley, J., in *Clement* v. *Chivis*, 9 Barnewall & Cresswell, 172, 174. "The latter is premeditated, and shows design; it is more permanent, and calculated to do a much greater injury than slander merely spoken. There is an early case upon the subject, in which this distinction was adverted to, *King* v. *Lake*, (Hardr. 470,) where the libel charged the plaintiff with having presented a petition to the House of

Commons, "stuffed with illegal assertions, inaptitudes, imperfections; clogged with gross ignorances, absurdities, and solecisms." A special verdict was found; and upon argument, Hale, C. B., held, that "although such general words spoken once without writing or publishing them would not be actionable, yet here they being writ and published, which contains more malice, they are actionable." This appears to have been a cross action, arising out of the same dispute, as *Lake* v. *King*, (1 Saund. 120, 131. 1 Sid. 414;) but in the latter case it was held, that the action could not be maintained, on the ground that the alleged publication was a privileged communication. In a subsequent case, *Cropp* v. *Tilney*, (3 Salk. 225. Holt, 426,) *Holt*, C. J., says, "Scandalous matter is not necessary to make a libel; it is enough if the defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous." Some judges, indeed, have doubted the good sense of the distinction; for example, Mansfield, C. J., in *Thorly* v. *Kerry;* Best, C. J., in *Archbishop of Tuam* v. *Robeson*, 5 Bingham, 17, 21; Gibson, C. J., in *Deford* v. *Miller*, 3 Pennsylvania, 103, 104; Williams, C. J., in *Colby* v. *Reynolds*, 6 Vermont, 489, 493: yet many others have considered it well founded in reason, and have assigned the most satisfactory grounds for the distinction. "Words," says Tilghman, C. J., in *M'Clurg* v. *Ross*, 5 Binney, 218, 219, "are often spoken in heat, in haste, and with very little reflection or ill intention, and frequently forgotten or repented of as soon as spoken. But writing requires deliberation, and is therefore more injurious to the character attacked. We are apt to suppose that before a man reduces an accusation to writing, he has satisfied himself of the truth of it; and if he has not satisfied himself, his conduct is certainly very reprehensible. Besides, the scandal is more permanent and more widely diffused. So that whether we consider the injury itself, or the mind of the person by whom the injury is committed, a libel is entitled to less allowance than a slander by words." In like manner, Hosmer, C. J., remarks in *Stow* v. *Converse*, 3 Connecticut, 325, 342, "It is because the imputations are written, and may circulate extensively, and never be forgotten, that the law respecting libel is so different as it is from the rules relative to verbal slander." See also remarks of Barlow, Senator, in *Stone* v. *Cooper*, 2 Denio, 294, 303; and see *Fonville* v. *McNease*, Dudley's Law, 303, 310, and *Runkle* v. *Myer et al.*, 3 Yeates, 518, 519. "Scandals merely oral," says Burke, "could spread little, and must perish soon. It is writing, it is printing, more emphatically, that imps calumny with those eagle wings, on which, as the poet says, 'immortal slanders fly.' By the press they spread, they last, they leave the sting in the wound."

The legal description of a libel has been discussed in many cases, English and American. In *Villers* v. *Monsley*, 2 Wilson, 403, Wilmot, C. J., said, "if any man *deliberately or maliciously* publishes anything in writing, concerning another, which renders him *ridiculous*, or tends to hinder mankind from associating or having intercourse with him, an action well lies against such publisher:" and Bathurst, J., said, "the writing and publishing of anything which tends to make a man ridiculous or infamous:" and Gould, J., said, "the publishing anything of a man that renders him ridiculous, is a libel and actionable;" and in the principal case, it will be observed that the court remark that what was said by the judges in this case is founded in law, justice, and sound policy. In *Shipley* v. *Todhunter*, 7 Carrington & Payne, 680, 689, Tindal, C. J., said, that "any written communication which bears on the face of it any charge, or which tends to vilify another, is a libel." In

Woodward v. *Dowsing*, 2 Manning & Ryland, 74, Lord Tenterden, C. J., remarked, that "in case of written slander whatever tends to bring a party into public hatred and disgrace is actionable;" and in the same case, Holroyd, J., said, "that which tends to disgrace is a libel." "Undoubtedly, to write of a man what will degrade him in society, is actionable," said Bayley, J., in *Forbes* v. *King*, 1 Dowling, 672, 674: and in *M'Gregor* v. *Thwaites*, 3 Barnewall & Cresswell, 24, 33, and *Clement* v. *Chivis*, 9 Id. 172, the same judge declared the rule to be, that the publication of any written or printed matter, which tended to bring a man into hatred, contempt or ridicule, was actionable. In *Parmiter* v. *Coupland*, 6 Meeson & Welsby, 105, 108, Parke, B., said, "a publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel."

In *Steele* v. *Southwick*, it will be seen that the definition submitted by Mr. Hamilton, *arguendo*, in *The People* v. *Crosswell*, is approved of, and declared to be drawn with the utmost precision. In *Cooper* v. *Greeley*, 1 Denio, 348, 359, this definition was attacked by the counsel, as being too much extended, but was sustained by the court; and it was there said that "any written slander, though merely tending to render the party subject to disgrace, ridicule, or contempt, is actionable:" and in *Cooper* v. *Stone*, 24 Wendell, 434, a libel was defined by Cowen, J., to be "a contumelious or reproachful publication against a person; any malicious publication, tending to blacken his reputation, or expose him to public hatred, contempt, or ridicule:" see also *Crawford* v. *Wilson*, 4 Barbour's Supreme Court, 505, 515.

But the generality of these descriptions has received some limitation, so far as that state is concerned, by the decision of the Court of Errors in *Stone* v. *Cooper*, 2 Denio, 294, where the judgment of the Supreme Court was reversed. In that case, the Chancellor stated a distinction between an actionable and an indictable libel. After acknowledging the wider range of liability for written than for spoken matter, he added, "Still, it is not every false charge against an individual, even when the same is deliberately reduced to writing and published to the world, which is sufficient to sustain a private action to recover a compensation in damages for a libel. Some publications are deemed libellous so as to render the authors thereof liable to be punished criminally, in consequence of their tendencies to disturb the public peace, although no private injury will probably result to any one from such publications. Such are the cases of libels upon the dead, whereby the feelings of surviving relatives may be deeply wounded; the consequences of which would probably be attempts to inflict summary justice upon the authors of such libels if the laws had not provided the more peaceful remedy of a resort to a criminal prosecution. But to sustain a private action for the recovery of a compensation in damages for a false or unauthorized publication, the plaintiff in such action must either aver and prove that he has sustained some special damage from the publication of the matter charged against him; or the nature of the charge itself must be such that the Court can legally presume he has been degraded in the estimation of his acquaintance or of the public, or has suffered some other loss either in his property, character, or business, or in his domestic or social relations, in consequence of the publication of such charge." In an early Pennsylvania case, it was said that, "any written or printed words, which render a man ridiculous, or throw contumely upon him, are actionable: but it is otherwise of words spoken; and this distinction has been long settled;" *Runkle* v. *Myer et al.*, 3 Yeates, 518, 519; and in *M'Corkle* v. *Binns*, 5

Binney, 354, Tilghman, C. J., defined a libel to be "any malicious printed slander which tends to expose a man to ridicule, contempt, hatred, or degradation of character." In *Dexter et ux.* v. *Spear*, 4 Mason, 115, 116, Story, J., said that "any publication, the tendency of which is to degrade or injure another person, or bring him into hatred, ridicule, or contempt, or which accuses him or her of a crime punishable by law, or of an act odious and disgraceful in society, is a libel." The definitions adopted in some of the Tennessee cases are perhaps as satisfactory as any that have been offered: "Any malicious publication, expressed in printing, or writing, or by pictures or signs, tending to injure the character of an individual, or diminish his reputation, is a libel;" *Dunn* v. *Withers*, 2 Humphreys, 512, 513; *Milton* v. *The State*, 3 Id. 389, 395: "A libel or written defamation is the injurious detraction of any one by writing or equivalent symbols;" *Williams* v. *Karnes*, 4 Id. 9, 11. In Kentucky, in an early case, the rule was declared, that "words, when written, if they tend to degrade or disgrace, or to render odious or ridiculous the person of whom they are written, will be libellous and consequently actionable; and this distinction (it was said) between written and verbal slander, is abundantly established by the most unquestionable authorities;" *M'Gee* v. *Wilson*, 2 Bibb, 187, 188; and in *Shelton* v. *Nance*, &c., 7 B. Monroe, 128, this rule is confirmed and enforced. In South Carolina, it has been declared that "The essential ingredient of a libel is, that it should be a malicious publication; and where the obvious design and tendency of such a publication is to bring the subject of it into contempt and ridicule, it will be a libel, although it impute no crime liable to be punished with infamy;" *The State* v. *Henderson*, 1 Richardson, 180; but that to be actionable, the written or printed matter "must be such, as, in the common estimation of mankind, is calculated to reflect *shame* or *disgrace* upon the person, or hold him up as an object of *hatred*, *ridicule*, or *contempt*;" *Mayrant* v. *Richardson*, 1 Nott & M'Cord, 348, 349; *Fonville* v. *M'Ncase*, Dudley's Law, 303, 310; and in *The State* v. *Farley*, 4 M'Cord, 318, where the definitions of Mr. Hamilton and of Ch. J. Wilmot were approved, it was said that nothing but what is criminal, immoral, or ridiculous, can be libellous. In Vermont, in *Colby* v. *Reynolds*, 6 Vermont, 489, 493, the court said that, "a publication which renders a person ridiculous merely, and exposes him to contempt, which tends to render his situation in society uncomfortable and irksome, which reflects a moral turpitude on the party and holds him up as a dishonest and mischievous member of society, and describes him in a scurrilous and ignominious point of view,—which tends to impair his standing in society, as a man of rectitude and principle, or unfit for the society and intercourse of honourable and honest men, is considered as a libel." In Delaware, in the case of *Rice* v. *Simmons*, 3 Harrington, 417, 429, the subject was elaborately investigated, and it was decided "that written slander, to be actionable, must impute something which tends to disgrace a man, lower him in or exclude him from society, or bring him into contempt or ridicule; and that the court must be able to say from the publication itself, or such explanations as it may admit of, that it does contain such an imputation, and has legally such a tendency: but mere general abuse and scurrility, however ill-natured and vexatious, is no more actionable when written than spoken, if it do not convey a degrading charge or imputation;" and Booth, C. J., referring to this case, subsequently, in *Layton* v. *Harris*, 3 Id. 406, 407, says, "a libel is a malicious publication in printing, writing, signs, and pictures, imputing to another something which has a tendency to injure his reputation, to disgrace or degrade

him in society, lower him in the esteem and opinion of the world, or bring him into public hatred, contempt, and ridicule." In Massachusetts and Connecticut, the notion of actionable and indictable libel seem to have been confused together. In *Commonwealth* v. *Clap*, 4 Massachusetts, 163, 168, the case of an indictment, Parsons, C. J., substantially repeating Serjeant Hawkin's definition of a libel in a criminal point of view, said "A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule;" and in *Clark* v. *Binney*, 2 Pickering, 113, 115, a civil action for libel, the court, per Lincoln, J., referred to this as embodying "the most clear and precise definition of a libel, as applicable to personal actions;" and said, that "to the correctness of this definition no objection can now be urged." See, also, *Commonwealth* v. *Wright*, 1 Cushing, 46, 62. So in *Hillhouse* v. *Dunning*, 6 Connecticut, 192, 407, which was an action for libel, the court, per Peters, J., said "A libel is malicious defamation, expressed in print or writing, or by signs or pictures, tending to blacken the memory of the dead, with an intent to provoke the living, or to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt, or ridicule;" and in *The State* v. *Avery*, 7 Id. 267, 268, which was an indictment, the same judge said, in language not much varied from the other case, "A libel is a malicious defamation of any person by printing, writing, signs or pictures, tending to blacken the memory of the dead, with intent to provoke the living, or injure the reputation of the living, provoke him to wrath, or expose him to hatred, contempt, or ridicule." The latter appears to be a very correct definition of an indictable libel; but it is clear that a publication tending to blacken the memory of the dead, for the purpose of provoking the living, though indictable, is not the subject of a civil action.

As instances of words which are actionable, when written or printed and made public, and which would not be, if merely spoken, the following may be referred to. A letter written to a third person calling one "a villain," was held to be actionable, in *Bell* v. *Stone*, 1 Bosanquet & Puller, 331; the Court saying that "any words written and published, throwing contumely on the party, were actionable." To charge another, in a published writing, with having the itch and stinking of brimstone, was decided to be actionable, in *Villers* v. *Monsley*, 2 Wilson, 403, because it tends to hinder mankind from having intercourse with him; and Bathurst and Gould, Js., said that for speaking such words, without more, an action would not lie; and the latter said, that for speaking the words *rogue* and *rascal* of any one, an action will not lie, but if those words should be written of another, and published maliciously, he doubted not an action would lie. In *The Archbishop of Tuam* v. *Robeson*, 5 Bingham, 17, it was held that to charge through a newspaper that a protestant archbishop attempted to convert a catholic priest by bribes was actionable; and Best, C. J., said, that "in a libel any tendency to bring a party into contempt or ridicule is actionable, and, in general, any charge of immoral conduct, although in matters not punishable by law." A publication charging that the plaintiff had been guilty of gross misconduct, and had insulted females in a bare-faced manner, has been held libellous; *Clement* v. *Chivis*, 9 Barnewall and Cresswell, 172: see, also, *Boydell* v. *Jones*, 4 Meeson & Welsby, 446, 450. It will be seen in *Steele* v. *Southwick*, that a printed charge of swearing falsely, though not in a judicial proceeding, is actionable. The publication of a charge of falsehood is also libellous; *Cooper* v. *Stone*, 24 Wendell, 434, 441; and it was held in *Colby* v. *Reynolds*, 6

Vermont, 489, that to charge in a newspaper that the plaintiff made and circulated a false, scurrilous, and indecent report about the defendant, was actionable; and in like manner, in *Shelton* v. *Nance, &c.*, 7 B. Monroe, 128, the Court said, "we cannot doubt that written words imputing to the plaintiff the invention and circulation of a report calculated to injure the character and standing of a third person, and which he himself afterwards disproved, must tend to degrade the plaintiff, and bring him into ridicule, and render him odious," and they are actionable as a libel. A writing which imputes to the plaintiff, a master brewer, filthy and disgusting practices in preparing his liquors, is libellous in itself, if applied to the plaintiff personally or in the exercise of his trade; *White* v. *Delavan*, 17 Wendell, 49: see *Ryckman* v. *Delavan*, 25 Id. 186. In *Hart* v. *Reed*, 1 B. Monroe, 166, 168, it was held that a charge of *dishonesty*, orally made, would not be actionable, because it does not necessarily import a criminal act; but it was said that if it was made in writing, it might be libellous, because it tends to degrade. A publication imputing to the plaintiff the expression of blasphemous opinions, has been held libellous; *Stow* v. *Converse*, 3 Connecticut, 325, 342. A publication charging a candidate for the legislature with having been guilty of making a corrupt and selfish bargain as a member of the legislature; *Powers* v. *Dubois*, 17 Wendell, 63; or asserting that the plaintiff had in former years been guilty of smuggling; *Stillwell* v. *Barter*, 19 Id. 487; or charging a magistrate with corrupt conduct in office; *Turrill* v. *Dolloway*, 25 Id. 426; is actionable, and in case of written matter such a charge is actionable if made after the office is wholly terminated, because an imputation of former official misconduct is an injury to present character, which is the ground of the action, but an action of slander for words injuring one in his official character could not be maintained if the office had ceased at the speaking of the words; *Cramer* v. *Riggs*, 17 Id. 209.

On the other hand, to publish of one, that his mind is impaired by disease, was held not to be libellous, in *Mayrant* v. *Richardson*, 1 Nott & M'Cord, 348, 349; because it tended to produce not hatred or contempt, but rather compassion. And in *Stone* v. *Cooper*, 2 Denio, 294, where the Supreme Court had held that a publication charging the plaintiff with anxiety to get money speedily for shaving purposes, was libellous, a majority of the Court of Errors reversed the judgment; and the Chancellor said that shaving, in its ordinary sense, meant merely the buying of notes at a discount beyond the debt and interest, which was neither illegal nor discreditable. In *Robinson* v. *Jermyn and others*, 1 Price, 11, a notice posted up in these words: "The Rev. J. R., and Mr. J. R., inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room," was held not to be a libel, as not necessarily assailing the moral character of the persons, but only alleging that their society was not agreeable to the members. See, also, *Armentrout* v. *Moranda*, 8 Blackford, 426.

A publication, reflecting on the character of the dead, with malicious intent to injure the family of the deceased, or provoke them to wrath, is indictable; but it should be alleged in the indictment, that the publication was made with intent to throw scandal on the family or descendants of the person, or to induce them to break the peace; *The King* v. *Topham*, 4 Term, 126.

In both an action and an indictment for a libel, the gravamen consists in the unlawful *publishing*; the composing of a libel without publishing it, is not actionable nor indictable, and the publishing, without composing, is; *Weir* v. *Hoss & wife*, 6 Alabama, 882, 888; *Metcalfe* v. *Williams*, 3 Littell,

387, 390. Any one who knowingly communicates a libel, or causes it to be communicated, is a publisher of the libel; *Layton* v. *Harris*, 3 Harrington, 406; and the communication of a libel to any one person is a publication; *The King* v. *Amphilit*, 4 Barnewall & Cresswell, 35; *Lewis* v. *Few*, 5 Johnson, 1, 34; see, however, *Smith* v. *Wood*, 3 Campbell, 323; see, also, *Armentrout* v. *Moranda*, 8 Blackford, 426; and a sale by the clerk or servant of a bookseller or printer, in the ordinary course of duty, is a publication by his principal; *Rex* v. *Almon*, 5 Burrow, 2688; *Respublica* v. *Davis*, 3 Yeates, 128, 131. One who sends a manuscript to the printer of a periodical publication, and does not restrict the printing and publishing of it, and it is accordingly printed and published, is a publisher of the writing; *Burdett* v. *Abbot*, 5 Dowling, 165, 201; as to the evidence sufficient to make the writer answerable as publisher, see *Bond* v. *Douglas*, 7 Carrington & Payne, 626; *Regina* v. *Lovett*, Id. 462; *Adams* v. *Kelly*, Ryan & Moody, 157. As a general principle, the writer of a libel that is published, will be taken to be the publisher, unless proof to the contrary be given; *Giles* v. *The State of Georgia*, 6 Georgia, 276. The proprietor of a newspaper, though not privy to the publication, is answerable, both civilly and criminally, for libels appearing in his paper; *Rex* v. *Walter*, 3 Espinasse, 21; *King* v. *Topham*, 4 Term, 126; *Rex* v. *Gutch, &c.*, Moody & Malkin, 433, 437; *Andres* v. *Wells*, 7 Johnson, 260; *King* v. *Root*, 4 Wendell, 114, 136. In *Smith* v. *Ashley*, 11 Metcalf, 367, however, on the authority of a dictum in *Dexter et ux.* v. *Spear*, 4 Mason, 115, it was held that the publisher is not answerable in an action, if he did not know, at the time of publication, that the action was libellous. A bookseller who sells a journal, or a porter who carries it round, is not answerable if he does not know that what he circulates is libellous; but the burden of showing ignorance rests on him; *Chubb* v. *Flanagan*, 6 Carrington & Payne, 431, 435; *Day* v. *Bream*, 2 Moore & Payne, 54. In an indictment, a publication in the district of which the court has jurisdiction, must be proved; but the insertion of a piece, at the defendant's request, in a paper printed in one county, which usually circulates in an adjoining county, and which, on the occasion in question, was circulated there, is a publication by the defendant in the latter county; *Commonwealth* v. *Blanding*, 3 Pickering, 304, 310.

A publication to the party himself, by a letter sent to him, is not sufficient to sustain an action; *Phillips* v. *Jansen*, 2 Espinasse, 624; *Fonville* v. *McNease*, Dudley's Law, 303, 310; *McIntosh* v. *Matherley*, 9 B. Monroe, 119; but sending a letter to any other person is; *Ward* v. *Smith*, 6 Bingham, 749; and even if sent only to the plaintiff's wife; *Schenck* v. *Schenck*, Spencer, 209, 210; and the production of a letter with a post-mark upon it, is prima facie evidence of a publication, and that the letter was received by the person to whom it was addressed; *Shipley* v. *Todhunter*, 7 Carrington & Payne, 680; *Warren* v. *Warren*, 1 Crompton, Meeson & Roscoe, 250; and evidence that the defendant knew that letters addressed to the plaintiff, and not marked "private," were usually opened and read by his clerk, is sufficient ground for the jury to infer that the writer intended the letter should come to the hands of a third person, and if it did so, this would be a publication; *Delacroix* v. *Thevenot*, 2 Starkie, 63: and in *Callan* v. *Gaylord*, 3 Watts, 321, 324, it was said that depositing a libellous letter in the post-office, if it come to anybody's hands, is a publication. Sending a sealed letter to the party himself, containing libellous matter, is sufficient to sustain an indictment, of which the ground is a tendency to provoke a breach of the peace; *The State* v. *Avery*, 7 Connecticut, 267, 269; but

then, according to *Hodges* v. *The State*, 5 Humphreys, 112, it must be averred in the declaration that it was sent with intent to provoke a breach of the peace. See further, as to what is a publication in law, *The King* v. *Burdett*, 4 Barnewall & Alderson, 95; *M' Coombs* v. *Tuttle*, 5 Blackford, 431, 432; *Simpson* v. *Wiley et al.*, 4 Porter, 215. In Mississippi, by a statute, "all words, which from their usual construction and common acceptation, are considered as insults, and lead to a breach of the peace," addressed to the party himself, are made actionable; see *Davis* v. *Farrington*, Walker, 304; *Warren & wife* v. *Norman & wife*, Id. 387; *Scott* v. *Peebles*, 2 Smedes and Marshall, 546.

Upon a consideration of the various cases upon the subject, we may conclude that *any publication injurious to the social character of another, and not shown to be true, or to have been justifiably made, is actionable, as a false and malicious libel.* Malice, in an action of this kind, consists in intentionally doing, without justifiable cause, that which is injurious to another; and everything injurious to the character of another, is, in this action, taken to be false, until it is shown by plea to be true. Therefore, every publication injurious to character is, in law, false and malicious, until the presumption of falsehood is met, by plea of the truth, or the presumption of malice is removed by showing a justifiable occasion or motive. The ground of all legal liability for words spoken or written, consists in injury to character. We have then this general view of the entire range of this action. Any written words, in their nature and tendency, injurious to social character, by any imputation whatever, and any spoken words injurious to character by the imputation of an immoral and indictable offence, are actionable, generally: other words, spoken or written, are not actionable, unless injurious to official or professional character, or productive of actual damage. An indictable libel consists in knowingly and intentionally (which is maliciously), publishing anything injurious to the character of the living or the dead, and tending to produce a breach of the peace.

Of the principles of construction, pleadings, and evidence in Slander and Libel.

VAN VECHTEN *v.* HOPKINS.

In the Supreme Court of New York.

NEW YORK, NOVEMBER, 1809.

[REPORTED 5 JOHNSON, 211–230.]

Whether a libel was published of and concerning the plaintiff, or whether by the person mentioned in the libel the plaintiff was intended, is a question of fact for a jury to decide.

Where libellous matter is charged against some particular person, who is so ambiguously described, that the person meant cannot be identified, without the aid of extrinsic facts, there, by the introduction of proper

averments *and a* colloquium, *the words taken in connexion with the whole libel, may be rendered sufficiently certain to support the action, so as to render it proper to permit the whole to go to the jury as a question of fact, under the direction of the judge; who may, however, if the evidence appears to him too vague and inconclusive to warrant a verdict for the plaintiff, order a nonsuit.*

In an action for libel, the plaintiff cannot prove by witnesses, that, from reading the libel, they believe the person intended in the libel, was the plaintiff.(a)

An innuendo *cannot be proved; but where an* averment *or* colloquium *introduces extrinsic matter into the pleadings, that is a proper subject of proof.*

THIS was an action for a *libel.* The declaration contained two counts, one for writing, composing, and publishing, and the other for printing and publishing the alleged libel. The first count was as follows:

"Abraham Van Vechten complains of David I. Hopkins, in custody, &c., for that whereas the said Abraham now is, and hitherto hath been, a good, faithful, and honest citizen of the state of New York, and of a good name, fame, and reputation, and at the time of making, devising, composing, writing, and publishing the false, scandalous, and malicious libel, hereinafter first-mentioned, of and concerning the said Abraham, and a long time before he, the said Abraham, had been duly appointed by the honourable the council of appointment for the said state, to, and held, the office of recorder of the city of Albany, in the county of Albany, and had, at an election held in and for the city and county aforesaid, to wit, on the last Tuesday of April, in the year of our Lord one thousand eight hundred and five, being duly elected a member of the assembly in the legislature of said state, in and for the said city and county, for the term of one year from the first day of July, in the year aforesaid, and held, exercised, and enjoyed the office or place of a member of the said assembly, in pursuance of such election, that is to say, at the city and county aforesaid: Yet the said David, not regarding the premises aforesaid, but contriving and maliciously intending to draw and bring the said Abraham into disgrace, contempt, and ignominy with the faithful and honest citizens of the said state in general, but more particularly with the honourable the said council of appointment, and the electors for members of the legislature of the said state, and to cause it to be believed, that the said Abraham, as a member of the assembly as aforesaid, had entered into and was concerned in a corrupt league and confederacy with divers members of the said legislature, and other

(a) Gibson v. Williams, 4 Wend. Rep. 320. Beardsley v. Maynard, Ib. 337.

citizens of the said state, to promote, by base, corrupt, and venal means, and for sinister purposes, the election of Morgan Lewis, esquire, who, at the time of making, devising, composing, writing, and publishing the said false, scandalous, and defamatory libel hereinafter first-mentioned, was nominated, and stood a candidate, at an election thereafter to be held, and since holden in and for the said state, to wit, on the last Tuesday of April, in the year of our Lord one thousand eight hundred and seven, for the office of governor of the state, to wit, on the thirtieth day of March, in the year last aforesaid, at the city of Albany aforesaid, and in the county aforesaid, did make, devise, compose, write, and publish, and cause to be made, devised, composed, written, and published, a certain false, scandalous, and malicious libel, of and concerning him, the said Abraham, according to the tenor following, that is to say: State of New York, ss. City and county of New York. I, Henry Meigs, notary public in and for the state of New York, duly commissioned and sworn (a certain Henry Meigs, then being a notary public, in and for the state of New York, meaning), do hereby (by the notarial attestation of the said Henry Meigs to the said false, scandalous, and malicious libel, hereafter stated, meaning) certify, that personally came and appeared before me (the said Henry, as a notary aforesaid, meaning), David I. Hopkins, of Morristown, New Jersey, lately from the college of Middlebury, state of Vermont (the said David meaning), who (the said David meaning) being duly sworn by me (the said Henry, as a notary aforesaid, meaning), saith, that some time in March, or the beginning of April, 1806 (the month of March or April, in the year of our Lord one thousand eight hundred and six, meaning), he (the said David meaning) went to the office of Abraham Van Vechten, esquire (the office of the said Abraham meaning), in Albany (in the said city of Albany meaning), in company with Major John Lansing (a certain John V. A. Lansing, of the town of Watervliet, in the said county of Albany, meaning), at the said office (the office of the said Abraham, meaning), there arose some conversation between Major Lansing and Mr. Van Vechten (the said John and Abraham meaning), in the course of which (the said conversation meaning), Major Lansing (the said John meaning) made several severe remarks and animadversions upon the political character of Governor Lewis (the said Morgan Lewis meaning), in consequence of which remarks Mr. Van Vechten (the said Abraham meaning) said to him (the said John meaning), these severe remarks and animadversions which you (the said John meaning) have made respecting Governor Lewis (the said Morgan Lewis meaning), will not do, for we (the said Abraham averring, that himself and other citizens of the state, belonging to the political party denominated federalists, where thereby meant and intended) have agreed to support him (the said Morgan Lewis mean-

ing) at the ensuing election (the election for Governor in the state aforesaid, to be held on the last Tuesday of April then next ensuing meaning). Mr. Van Vechten (the said Abraham meaning) then produced a written instrument, which he (the said Abraham meaning) put into the hands of Major Lansing (the said John meaning), who (the said John meaning) read it (the said written instrument meaning). Major Lansing (the said John meaning) then laid it (the same instrument meaning) down upon the table, and went into conversation with Mr. Van Vechten (the said Abraham meaning). This deponent (the said David meaning), while these gentlemen (the said John and Abraham meaning) were conversing, turned over the said instrument of writing, which (the same instrument meaning) purported to be an agreement containing articles of coalition. The first (meaning the first of the said articles) was an engagement by several leading federal men, whose names were thereto (to the said articles of coalition meaning) subscribed, to support with all their strength and influence, the next election (the election on the last Tuesday of April last-mentioned meaning) of Governor Lewis (the said Morgan Lewis meaning). (The said Abraham averring, that by the said several leading federal men, whose names were to the said articles of coalition subscribed, to support, with all their strength and influence, the next election of Governor Lewis, himself, the said Abraham, and several other leading men of the political party denominated federalists, as aforesaid, were meant and intended.) In consideration of this federal article of agreement (the aforesaid articles of coalition meaning), there was an article (in the said articles of coalition meaning), stating that the friends of Governor Lewis, whose names were thereto subscribed (the friends of the said Morgan Lewis, whose names were subscribed to the said articles of coalition meaning) should exert all their power and influence (the power and influence of the last-mentioned subscribers meaning) to cause the election of S. Van Rensselaer, esquire (Stephen Van Rensselaer, of the town of Watervliet, in the said county of Albany, esquire, meaning), to the office of governor, in the gubernatorial election of 1810 (the election for governor, to be held in and for the state aforesaid, in the year of our Lord one thousand eight hundred and ten, meaning). This deponent (the said David meaning) believes that there were as many names subscribed to the said agreement (the said articles of coalition meaning) as fifteen or twenty, principally *quid* and federal members of the legislature (the said Abraham averring, that by the *quid* members of the legislature aforesaid were meant and intended the subscribers to the said articles of coalition, who were members of the legislature of the state aforesaid, belonging to the political party attached to the said Morgan Lewis, denominated quids, and that by the federal members of the legislature aforesaid were meant and in-

tended the subscribers to the said articles of coalition who were members of the said state, and attached to the political party aforementioned, denominated federalists). That this deponent (the said David meaning) being on terms of intimacy with Mr. Lansing (the said John meaning), had frequent conversation with him (the said John meaning) after the circumstances above stated had taken place (the circumstances as in the libel herein before stated meaning), and in these conversations (the last-mentioned conversations meaning) this deponent (the said David meaning) often heard Major Lansing (the said John meaning) explicitly state, that the coalition (the aforesaid coalition meaning) between the friends of the governor (the friends of Governor Lewis meaning) and the federal party (the said Abraham averring that himself and other citizens of the said state, belonging to the political party denominated federalists, were thereby meant and intended) was the only way and means of again restoring the federal party (the citizens of the said state belonging to the political party denominated federalists, as aforesaid, meaning) to power (the government of the said state meaning); and that the federal party (the said Abraham and other citizens of the said state belonging to the political party denominated federalists, as aforesaid, meaning) was assured of the support and influence of the Livingston family (the relatives by marriage of the said Governor Lewis meaning), for the same object above-mentioned (the restoring of the federal party to power as aforesaid meaning).

By reason whereof, &c. The damages were laid at 5,000 dollars.

The cause was tried at the Albany circuit, in October, 1808, before Mr. Justice Spencer.

At the trial, it was proved, that the defendant was the author and publisher of the libel; that the plaintiff, at the time when the corrupt agreement is charged to have been made in the libel, and, at the publication thereof, was recorder of the city of Albany, and, at the former period, was a member of the assembly of this state; and that he is the only person of the name of Abraham Van Vechten in the city of Albany; and kept an office there.

The plaintiff then offered to prove, by a witness, that from reading the libel, he applied it to the plaintiff, and understood him to be the person intended, as one of the federal members of the legislature, who had subscribed to the corrupt agreement charged in the libel; but this evidence was overruled by the judge, on the ground that it was the province of the court to determine, from a perusal of the libel, whether it was the intention of the defendant to charge the plaintiff as being one of the members of the legislature who subscribed the corrupt agreement; it being admitted by the plaintiff's counsel, that there were no circumstances, within the knowledge of the witness, except what he ob-

tained from reading the paper itself, to influence his belief as to the person intended. The judge also decided, that the libel itself did not afford sufficient evidence of the charge, that the plaintiff was one of the members of the legislature who subscribed to the corrupt agreement mentioned. The plaintiff's counsel excepted to the opinion of the judge; and a nonsuit was directed to be entered, with leave to the plaintiff to move to set it aside, and for a new trial.

Henry, for the plaintiff. The question is not whether the matter set forth in the declaration is a libel, or will support the action; but whether parol or extrinsic evidence to show the pertinency of the libel, or the person intended, is admissible; and whether that is a question of fact for a jury, or is to be decided by the court. I contend that it belongs exclusively to the jury to say who was the person intended by the libel. The words imply an imputation against certain persons, described as leading federal men, without naming any individual; it is the peculiar province of a jury to determine whether the plaintiff is intended.

The person intended is not made out in the plaintiff's declaration, by *innuendoes*, but by averments. The fact was thus put in issue, and must be tried. If the issue was improper or illegal, still it must be tried; and the defendant, if he thinks fit, may afterwards move in arrest of judgment. Where a fact is put in issue, by the pleadings, and is sent down to be tried at nisi prius, under a delegated authority, it must be tried by the jury, and cannot be decided by the judge. The court can only decide on a demurrer, or in arrest of judgment. Where there is an uncertainty as to the person, that is made certain by an averment; and that being a substantive fact in issue, it must be tried. If a person be libelled by signs, pictures, or hieroglyphics, so that no doubt can be entertained by the court, who was the person intended, yet the fact who was the person intended must be proved by witnesses. (4 Bac. Abr. 453. Libel (A. 3), 2 Barnard, K. B. 138, 166.) There must be an averment as to the person intended; for it is not the subject of an *innuendo*. A writing may be libellous without reflecting on any particular person. A scandalous publication concerning three or four, may be punished on the complaint of one of them. (Popham, 252, 254. 2 Burr. 984. 3 Mod. 139. Ld. Raym. 879.) Though a publication against the whole community, or against all ecclesiastics, would not be a libel; yet if it be against the *bishops*, or a particular class of men, it will be libellous. (3 Salk. 224, pl. 5. 2 Str. 788. Hawk. B. 1, c. 73, § 9.) An indictment will lie for such a libel as a public offence; and any individual who can show by proof, that he was one of the persons intended to be defamed, may maintain an action.

Foot and *Skinner*, contra. There is no distinction between written or unwritten slander, as to the point now before the court. Words written must be as specific and certain, as to the person intended, as words spoken. If words are spoken of one of the servants of J. S., without designating which, no action lies. The rule is the same in an action for a libel. Where there is an ambiguity arising on the face of the writing, the court must decide on the meaning; but where the ambiguity arises from anything extrinsic, or *dehors* the writing, it may be explained by witnesses. A witness is never produced to prove a fact, which the court and all the world know as well as himself. All the knowledge of the witness, in the present case, was derived from the paper; and is a witness to be introduced to explain the meaning of the English language? There is no averment that the plaintiff was a leading federalist. An averment is not to be made out or helped by an *innuendo*. (8 East, 427.) Does, then, the paper, in itself, clearly import that the plaintiff was the person intended? No reader can fairly bring the words home to the plaintiff, individually.

The doctrine as to the manner in which a libel is to be made out, is fully stated in the case of The King v. Horne. (Cowp. 672.)

The court having, as we contend, a right to judge from the face of the libel, as it is set forth in the pleadings, whether it is a libel of and concerning the plaintiff, the question arises, whether the judge, in this case, decided rightly. How can this libel be applied to the plaintiff, more than to any other leading federalist? Can the court know judicially what are the political principles of the plaintiff, or to what political party he belongs?

Again, it should appear that the plaintiff was a member of the legislature, at the time of the publication of the alleged libel. In fact, he was not a member of the legislature at that time, and so he could not be libelled as such.

On general principles, this action cannot be maintained. If the present plaintiff can recover against the defendant, then every leading federalist, and every friend of Governor Lewis, who was a member of the legislature, may have an action against him, and he be thus overwhelmed with a thousand suits.

In the case of a *nuisance*, an individual cannot have his action, without showing special damage. The proper remedy is by indictment, where special damage cannot be proved. This distinction will apply to the cases which have been cited to show that the present action is maintainable, for they were all cases on indictments.

Shepherd, in reply, observed, that if the court are to decide who is the person meant in the libel, it would be useless to insert any averment or *innuendo*, as to that fact in the declaration. It is said that the decla-

ration is defective, in not stating the fact that the plaintiff was a leading federalist, and the person intended; and yet it is argued, that if the fact had been averred, the jury could not decide on the truth of the averment. If the doctrine contended for by the defendant's counsel is to prevail, the trial by jury in cases of libels would be virtually abolished, for the truth of every *innuendo* and averment would be decided by the court. It is not necessary that the person intended to be libelled should be named in the publication; he may be described by certain characteristic or peculiar marks; and the court are to make the application. It is understood to be the constant practice at nisi prius, in suits for libels, to call witnesses to say whether, from perusing the paper, they believed the plaintiff to be the person intended. The propriety of such testimony has never before been questioned.

VAN NESS, J. The decision of the questions arising in this case, will be greatly facilitated by first defining the meaning and office of an *averment*, a *colloquium*, and an *innuendo*. The use in pleading an *averment*, is to ascertain *that* to the court, which is generally or doubtfully expressed; so that the court may not be perplexed *of whom* or *of what*, it ought to be understood; and to *add* matter to the plea to make doubtful things clear. (System of Pleading, 121.) A *colloquium* serves to show that the words were spoken in reference to the matter of the averment. An *innuendo* is explanatory of the subject matter sufficiently expressed before; and it is explanatory of such matter only; for it cannot extend the sense of the words beyond their own meaning, unless something is put upon the record for it to explain.(*a*) This may be illustrated by Barham's case (4 Coke's Rep. 20). Barham brought an action for the defendant's saying of him, "Barham burnt my barn," (*innuendo*) "a barn with corn." The action was held not to lie; because burning a barn, unless it had corn in it, was not felony. "But if, in the introduction, it had been averred that the defendant had burnt a barn full of corn, and that in a discourse about that barn, the defendant had spoken the words charged in the declaration, an *innuendo* of its being the barn full of corn would have been good; for by coupling the *innuendo* in the libel with the introductory averment, it would have been complete." (De Grey, Ch. J., in Rex v. Horne, Cowp. 184.) Here the extrinsic fact that the defendant had a barn full of corn, is the *averment*. The allegation that the words were uttered in a conversation in reference to that barn, is the *colloquium;* and the explanation given to the words thus spoken, is the *innuendo*. (See also Hawkes v. Hawkey, 8 East, 427.) The application of these principles to the present case will be seen in the sequel.

(*a*) See Milligan v. Thorn, 6 Wend. Rep. 412, and the cases there cited.

The averment of extrinsic matter, in this declaration, was for the purpose of showing that the libel was published, as it is expressly alleged to have been, "*of and concerning the plaintiff.*" And whether it was so published or not, is a question of fact, which it is the province of the jury, and not of the court, to decide.

This has been so held in a great number of instances; and is so reasonable and just a rule, that it cannot fail of receiving universal assent. Were the law not so, the jury, in case of libels, would be nothing, and the court everything. In England, until lately, the court assumed the exclusive right to determine whether the writing charged was or was not libellous. If the meaning and application of the libel is also to be determined by the court, it would be going one step further; and nothing would remain for the jury but the single, and the rarely disputed fact of publication.

In the very lucid opinion, delivered by Lord Ch. J. De Grey, in the House of Lords (in the case of The King v. Horne), which contains a complete analysis of the law on this subject, he observes, that "it may happen that a writing may be so expressed, and in such clear and unambiguous words, as that it may amount of itself to a libel. In such a case, the court wants no circumstances to make it clearer than it is of itself. But if the terms of the writing are general, ironical, or spoken by way of allusion or reference, although every man who reads such a writing may put the same construction upon it, it is by understanding something not expressed in direct words, and it being a matter of crime, and the party liable to be punished for it, there wants something more. It ought to receive a judicial sense, whether the application is just; and the *fact* or the *nature of the fact* on which *that* depends, *is to be determined by a jury.*" In the case of The King v. Andrews (9 St. Tr. 679), which was one of the many prosecutions that followed the rebellion in 1745 (when it is presumed the judges of the *English* courts did not relax in asserting the rights which constitutionally appertained to their offices), the prisoner was indicted for publishing a treasonable libel, in vindicating the rights of the pretender to the *British* throne. An objection was made, that it was not shown with sufficient certainty, that the pretender was meant to be designated by the words, "The Chevalier," as he was called in the libel. Lord Ch. J. King, in his charge to the jury, commenting on this objection, observes, "The case here is a positive charge that the book the prisoner wrote relates to the pretended Prince of *Wales;* and *the matter of fact you are to try is whether it is so or no.*" In another part of his charge he says, "that the matter of fact *you* are to consider," &c. To the same effect are many other cases in the books. (Roberts v. Campden, 9 East, 93, and the cases there cited. Oldham v. Peake, 2 Wm. Bl. Rep. 959.)

I do not, however, mean to deny that cases exist in which the words in themselves were held to be so vague and uncertain, as that it could not be intended they were spoken of *any person;* and where, for that reason, they could not be made actionable by an averment. I agree, too, that the court, and not the jury, are to judge whether such uncertainty exists in the case now under consideration. Such, for example, are the cases of Leawkner v. Godnam (3 Bulst. 249), and Johnes v. Dovers (Cro. Eliz. 496). There are other cases again in which, as in the case now under consideration, the words in themselves amount to a libellous charge upon some particular person, but where that person is so ambiguously described, as that, without the aid of extrinsic facts, his identity cannot be ascertained; but where, by the introduction of proper averments, and a *colloquium*, the words may, notwithstanding, be rendered sufficiently certain to maintain an action. Such is the case of Baker v. —— (Bulst. 72), Wiseman v. Wiseman (Cro. Jac. 107). The case of Roberts v. Campden also recognises the same doctrine. The certainty in the latter kind of cases is arrived at, by taking into consideration both the extrinsic facts stated in the averments, and *colloquium*, and the whole of the libel, all of which must be submitted to the jury, under the direction and charge of the judge, as in other cases. The evidence may sometimes be so inconclusive as not to entitle the plaintiff to carry the cause to the jury, and in that event it would be the duty of the judge to order a nonsuit. With these exceptions and qualifications, the application or allusions in a libel are questions of fact, and the decision belongs exclusively to the jury.

This brings me to the consideration of the true question in this cause, viz., Was there sufficient evidence in this case to warrant the jury to find that the plaintiff was intended to be charged as being one of the parties to the corrupt agreement stated in the libel? If this should be decided against the plaintiff, a new trial would be useless; for, notwithstanding it is the right of the jury to determine this fact, yet if, in the opinion of this court, they would not be authorized by the evidence to find for the plaintiff, we should set the verdict aside. Before I proceed to consider this question, it is necessary to state certain rules of law, which are to govern in the determination of it. In the case of The King v. Horne, already often adverted to, it is laid down, "that as the crime of a libel consists in conveying and impressing injurious reflections upon the minds of the subject; if the writing be so understood by all who read it, the *injury is done* by the publication of these injurious reflections, *before* the matter comes to the jury and the court. And if courts of justice are bound by law to study by any one possible or supposable case or sense, in which the words used might be innocent, such a *singularity of understanding might screen an offender*, but it would

not recall the words, or remedy the injury. It would be strange to say, but more so to give out, as the law of the land, that a man should be allowed to *defame* in one sense, and *defend* himself by another." (De Grey, Ch. J.) In the same case, Lord Mansfield lays down the same rule. (See also, as to this point, Lord King's charge to the jury, in The King v. Andrews; and Woolnoth v. Meadowes, 5 East, 463.) With these rules for our guide, let us consider the facts stated in the libel, and the proof given at the trial. The plaintiff, it was proved, was a member of the legislature. The libel states that when Lansing, in the plaintiff's office, made several severe remarks on the political character of Governor Lewis, the plaintiff told him, by way of caution, "These severe remarks which you have made won't do, for *we* have agreed to support him at the ensuing election." The obvious import of the word *we*, as here used, taken into connexion with what precedes and follows it, and as it would be understood by all the world, is, that the plaintiff was one of those who had agreed to support Governor Lewis. Immediately after the plaintiff had communicated to Mr. Lansing the existence of this agreement, he is represented to have produced the written articles of the coalition, subscribed by 15 or 20 persons, principally *quid* and *federal* members of the legislature (a description which may embrace the plaintiff), which he submitted to Lansing's perusal. For what purpose? Most clearly, I think, as containing the evidence of the agreement previously spoken of, and to which the plaintiff avowed himself to be a party. But the libel does not stop here. The plaintiff is said to have *produced* the written agreement; and hence it appears that he was intrusted with the custody of it. Does not this fact, connected with the other circumstances, lead the mind irresistibly to conclude that he was intended to be charged as being a party to it? Upon this brief statement of the facts, I think the defendant's intention is so palpably clear and certain, as to preclude the possibility of a difference of opinion respecting it. Indeed, it strikes me that there is not even the appearance of an attempt to disguise it; and such, I presume, would and ought to have been the conclusion of the jury, if the case had been left to them, as, according to my view of the law, it ought to have been. Upon this ground, I am of opinion that there ought to be a new trial.

There is another point in the case, upon which, in the view I have taken of the subject, it would not be necessary for me to express an opinion. As it may, however, embarrass the parties, on a future trial (if there should be any), it may as well be disposed of. I allude to the exclusion by the judge, of the testimony of the witness who was called to say, that from reading the libel, *he* applied it to the plaintiff. This evidence was properly overruled. The intention of the defendant is

not the subject of proof, by witnesses, in the way here attempted. It is the mere opinion of the witness, which cannot, and ought not, to have any influence upon the verdict. I consider the evidence as inadmissible, because it goes to prove the correctness of an *innuendo*. This kind of evidence, I know, has frequently, though I think erroneously, been admitted at *nisi prius*. From what has been said before, of the nature and use of an *innuendo*, technically so called, it is clear that it cannot be the subject of proof by witnesses: Not so of an *averment* and *colloquium*, which introduces into the pleading extrinsic matter, which is the proper subject of proof. This is fully stated by Mr. Pollexfen, who was afterwards chief justice of the Common Pleas, in his able argument in Rosewell's case. (3 St. Tr. 1058, 1059.) "I never knew," says he, "an *innuendo* offered to be proved;" and his doctrine was admitted both by the court, and by the attorney-general, in his reply.

My opinion, therefore, is, that the nonsuit should be set aside, and a new trial be awarded.

KENT, Ch. J., THOMPSON, J., and YATES, J., were of the same opinion.

SPENCER, J. My brethren think that I erred, at the circuit, in nonsuiting the plaintiff; and that it should have been submitted to the jury to determine, whether, from the whole matter contained in the libel, the plaintiff was charged with being one of the persons who had subscribed the articles of coalition. If the libel warrants the idea, that the plaintiff was charged with subscribing the articles of coalition, then, undoubtedly, instead of nonsuiting the plaintiff, the jury should have been charged to find a verdict for him.

The rejection of the witness called at the trial, to give a construction to the libel, unaided by any circumstances within the knowledge of the witness, except what he obtained from reading the libel, my brethren think correct; and indeed it seems to me, that to permit a witness to be heard on the construction of a paper, and to give his opinion, in aid of the court and jury, is against every principle of law. It would be giving up the prerogative of the court, and this, too, most unnecessarily. The legal effect of every paper produced in evidence, is matter for the decision of the court; and why it is not equally so upon a libel, when its construction and import come in question, I am at a loss for a reason.

It would appear to me to follow, as a necessary consequence, if the rejection of the witness coming to construe the libel was correct, that then, the construction appertained to the court, as matter of law. Let me not be understood to say, that it is the business of the court, in all

cases of libels, conclusively to give that construction; for whenever there are matters of fact, arising from the *innuendoes*, which become contested, then it is peculiarly within the province of the jury to pass on those facts. In the present case, there were no such facts; for the only matters of fact proved, *dehors* the libel, were, that the plaintiff, at the time when the defendant charges in the libel to have seen the corrupt agreement at the plaintiff's office, as well as at the publication of the libel, was recorder of the city of Albany, and at the former period, was also a member of the Assembly of this state, and that the plaintiff was the only person of the name of Abraham Van Vechten, resident in the city of Albany, and that he kept an office there. These facts were not ascertained, and what, then, were the jury to decide? Whether from the terms of the libel, upon a fair and just construction of its several parts, the plaintiff was implicated as one of the subscribers to the articles of coalition; and on what did this depend? Most undoubtedly upon the libel itself. In every view in which I can consider the case, it appears to me, that it became a question for the court to decide, what was the legal import of the libel, and whether the plaintiff was implicated as one of the subscribers to the corrupt agreement.

What would have been the defendant's situation, had the construction of the libel been submitted to the jury, and had they found for the plaintiff? There are *innuendoes* in this declaration, not proved upon the trial, which might possibly have produced a motion in arrest of judgment. I mean the *innuendo* in which the plaintiff avers that himself and several other leading federalists were meant and intended.

The principles in relation to actions for defamatory words, as well as upon libels, are well settled; that the person slandered or libelled must be certain, and that if words are uncertain, and do not designate any particular person, no averment shall make them actionable (Roll. Abr. 81, l. 25, 79); and that where words are ambiguous and equivocal, and require explanation, by reference to some extrinsic matter, to make them actionable, it must not only be predicated that such matter existed, but also that the words were spoken of and concerning that matter. (8 East, 431. Cowp. 648.) If a person should say of three witnesses, one of you is perjured, none of them shall have an action. (Roll. Abr. 81, l. 25.) So in the familiar case, where the person was charged with burning a barn, *innuendo*, a barn full of corn, the *innuendo* was held to be irrelevant, and incapable of enlarging the words which were uncertain. Having premised this much, I proceed to consider the libel. It is supposed the plaintiff's alleged reply to Mr. Lansing, after rebuking him for his remarks on Governor Lewis, "for we have agreed to support him at the ensuing election," and the alleged production of the instrument, containing articles of coalition, the first of which was an engage-

ment by several leading federal men, whose names were thereto subscribed, to support, with all their strength and influence, the next election of Governor Lewis, in consideration of which the friends of Governor Lewis, whose names were thereto subscribed, should exert all their power and influence to cause the election of S. Van Rensselaer, in the gubernatorial election of 1810, taken together, import that by the said several leading federal men, whose names were subscribed to the articles, the plaintiff was meant and intended, and is fairly designated.

Under the circumstances, as stated in the libel, what is the import of the expressions imputed to the plaintiff, "for we have agreed to support him at the ensuing election?" It must be remembered, that this was urged by the plaintiff as a reason, according to the libel, why Mr. Lansing should not persevere in his remarks and animadversions upon the political character of Governor Lewis. And then the inquiry arises, in what sense the plaintiff must have spoken, as he is alleged to have done to Mr. Lansing; whether in his individual capacity, or as one of a political sect, with whom Mr. Lansing was associated. It appears to me, indubitably, that the expressions, upon the most natural construction, import that the political party, to which both the plaintiff and Mr. Lansing belonged, had agreed to support Governor Lewis at the then ensuing election; and not that the plaintiff, and some others of the party, had individually agreed to support him. The supposed production of the instrument by the plaintiff, to verify his allegation, that that agreement had been made, does not necessarily implicate the plaintiff, if my construction is right, that the terms he is supposed to have made use of, point to the political party to which he, Mr. Lansing, belonged; for if several leading federal men had made that agreement, the plaintiff's position, "for we have agreed to support him at the ensuing election," was as well maintained as though the plaintiff himself had subscribed the paper.

The libel is considered as implicating the plaintiff as one of the subscribers to the corrupt agreement, by force of the expressions, that it was an agreement by several leading federal men, whose names were thereto subscribed. Now there is no proof in the case to what political party the plaintiff belonged, or that he was a leading federal man; so that for aught that appears, the plaintiff is not of the description of those who are alleged to have subscribed the agreement. The declaration, indeed, contains the averment, that by the several leading federal men mentioned in the libel, the plaintiff and several other leading federalists were meant and intended. Whether the manner in which this is introduced into the declaration, being there inserted as an *innuendo*, and not as a prefatory fact, would have entitled the plaintiff to give evidence that he was a leading federalist, I need not now examine,

because no such evidence was offered or overruled. To set aside the nonsuit, on the ground that the cause should have been submitted to the jury, upon the evidence offered, is not only saying that it does not appertain to the court to construe papers given in evidence, and to decide on their import and effect, when there are no extraneous facts in controversy; but it is also saying, that the expressions supposed to have been used by the plaintiff, for "we have agreed to support him at the ensuing election," imply not only that the plaintiff subscribed the articles of coalition, but that he was a leading federal man. These inferences appear to me unnatural and unwarranted by the expressions. I therefore remain of the opinion that the nonsuit was properly directed.

New trial granted.

At one period, before the time of Lord Holt, the rule in actions for slander was, that words were to be construed *in mitiore sensu*, the object being to suppress litigation: afterwards, in some of the cases, it was said that the words should be taken *in malam partem*, where they would bear it, the policy being to afford legal remedies, and thereby prevent violent redress: see *Bloss* v. *Tobey*, 2 Pickering, 327. But the rule now firmly and universally settled is, that words are to be taken in their plain and natural import, and will be understood by courts and juries in the same way in which they would be understood by the rest of mankind, and according to the sense in which they appear to have been used, and the ideas which they are adapted to convey to those to whom they are addressed. The ordinary signification and acceptation of words, and the understanding of the hearers, fix the meaning in slander. *Woolnoth* v. *Meadows*, 5 East, 463; *Roberts* v. *Camden*, 9 Id. 93, 96; *Chaddock* v. *Briggs*, 13 Massachusetts, 248, 254; *Demarest* v. *Haring*, 6 Cowen, 76, 87; *Cornelius* v. *Van Slyck*, 21 Wendell, 70; *Coons* v. *Robinson*, 3 Barbour's Supreme Court, 626, 633; *Brown* v. *Lamberton*, 2 Binney, 35, 37; *Bloom & wife* v. *Bloom*, 5 Sergeant & Rawle, 391, 392; *Walton* v. *Singleton*, 7 Id. 449, 451; *Beirer* v. *Bushfield*, 1 Watts, 23; *Butterfield* v. *Buffum*, 9 New Hampshire, 156, 159; *Cole* v. *Grant*, 3 Harrison, 328, 331; *Davis* v. *Johnson*, 2 Bailey, 579; *Cooper* v. *Perry*, Dudley, 247; *Stoddart* v. *Linville*, 3 Hawks, 474; *M'Brayer* v. *Hill*, 4 Iredell's Law, 136; *Hamilton* v. *Smith*, 2 Devereux & Battle, 274; *Logan* v. *Steele*, 1 Bibb, 593; *Jones* v. *McDowell*, 4 Id. 188; *Hogg* v. *Dorrah*, 2 Porter, 212; *Wilson* v. *Harding*, 2 Blackford, 241; *Watson* v. *Nicholas*, 6 Humphreys, 174, 175; *Giddens* v. *Mirk*, 4 Georgia, 364, 372. "The rule," said the court in *Dorland* v. *Patterson*, 23 Wendell, 422, "is that the defendant is accountable for the import of the words as it will naturally be understood by the hearer; and explanatory circumstances known to both parties, speaker and hearer, are to be taken into account as part of the words." "Slander imports an injury," said Shippen, C. J., in *Rue* v. *Mitchell*, 2 Dallas, 58, 59, "and the injury must arise from the manner in which the slanderous language is understood."

The actual meaning of the words in

the particular case, and the effective sense in which they were understood, as a matter of fact, is a consideration for the jury; but the question, what constitutes a crime or offence, the imputation of which is slanderous, is of course a matter of law for the court. The meaning of words is therefore a mixed question of fact and law, involving the joint action of court and jury. So far as the words are of doubtful signification, and are capable of different meanings according to the circumstances under which they are used, and the transaction to which they relate, it is for the jury to determine in what sense they were used; *Goodrich* v. *Woolcott*, 3 Cowen, 231, 240; *Cook* v. *Bostwick*, 12 Wendell, 48; *Hays* v. *Brierly*, 4 Watts, 392. If, according to the manner and occasion of speaking, and the reference of the speaker as understood by the hearers, the words are capable of two meanings, one of which is actionable and the other innocent, it is for the jury to say in what sense the words were uttered and understood; *Hays & wife* v. *Hays*, 1 Humphreys, 402; *Jones* v. *Rivers*, 3 Brevard, 95; *Cregier* v. *Brunton*, 2 Richardson, 396; *Welsh* v. *Eakle*, 7 J. J. Marshall, 424. "Where there is room for the least criticism upon their import," it has been said, *Ex parte Bailey*, 2 Cowen, 479, "it is properly a question for the jury, whose decision is conclusive." But though it is for the jury, absolutely, to determine the reference of the language, and the sense in which, in matter of fact and understanding, it was used, it is a question for the court whether the sense and meaning in which the words were used, amount to the crime or offence charged in the declaration: see *M'Kinly* v. *Robb*, 20 Johnson, 351, 355; *Laine* v. *Wells*, 7 Wendell, 175. The respective functions of the court and jury in cases of this kind, are very accurately illustrated in *Dexter* v. *Taber*, 12 Johnson, 239. The words charged in the declaration, as slanderous, were, "You are a thief." The witnesses who proved the speaking of the words, went on to explain in what connexion, and in reference to what subject, the words were spoken; and it then appeared that the language used by the defendant was, "You are a thief, you stole hoop-poles and saw-logs from off Delancey's and Judge Myers's land:" and the witnesses said, that they supposed that the words spoken alluded to the cutting of standing timber. The judge told the jury, that it was for them to decide, whether the words, as proved, amounted to a charge of theft, or trespass only; that if, by the words, the defendant meant to charge the plaintiff with secretly taking timber already cut into hoop-poles and saw-logs, it was a charge of theft; but if they meant only that the plaintiff had secretly cut and carried away timber from off the land, in order to make hoop-poles, &c., it amounted to a charge of trespass only; and in that case, the words were not actionable. The jury found for the defendant, and the instruction and finding were sustained by the court above. "It was correctly stated to the jury," said the court, "that if the defendant intended to charge the plaintiff with taking hoop-poles and saw-logs already cut, it was a charge of felony: but if he only meant to charge him with cutting and carrying them away, it was only charging him with having committed a trespass. And in what sense the words were intended to be used, was for the jury to determine."

The question for the jury is, not what the party meant according to some reservation in his own mind, but what he meant to make other people believe,—what he expected would be understood by those to whom the words were addressed; and for the meaning of the words, as they are understood by others, he is responsible; *Read* v. *Ambridge*, 6 Carrington & Payne, 308, 309; *Shipley* v. *Todhunter*, 7 Id. 680; *Kennedy* v. *Gifford*,

19 Wendell, 296, 300; *Smith & Smith et ux.* v. *Miles*, 15 Vermont, 245; *Sawyer* v. *Eifert*, 2 Nott & M'Cord, 511; *Hugley* v. *Hugley*, 2 Bailey, 592, 593; *Morgan* v. *Livingston*, 2 Richardson, 574. "The true rule is, that words are to be understood in the sense which they are calculated to impress on the hearers' minds;" *Hays & wife* v. *Hays*, 1 Humphreys, 402. An averment of the meaning of the defendant cannot be proved by witnesses stating their general opinion or belief as to his meaning; the witnesses must state facts, from which the jury, under direction of the court, will draw the inference; *Gibson* v. *Williams*, 4 Wendell, 320, 325, 326, 327: for, if the words, in their ordinary sense, in connexion with the accompanying circumstances, bear the meaning ascribed to them in the declaration, the jury will so find; but if not, the witness's understanding (which in such a case would be a simple misconception) ought not to control the jury; as that would make the defendant's liability depend, not on his own intent and purpose, but on the misunderstanding or morbid imagination of one or more of his hearers; *Snell* v. *Snow*, 13 Metcalf, 278, 282. However, in *McLaughlin* v. *Russell*, 17 Ohio, 475, 481, it was held that witnesses acquainted with the parties may state their opinion as to the persons intended to be designated by the defendant's words or writing.

If words, amounting in themselves to slander, by imputing some crime, have been uttered, it is no defence to show that there existed such circumstances of fact or of law, that the plaintiff did not or could not commit the crime, unless such circumstance was stated, or appeared and was known, at the time of speaking the words, and qualified their meaning as then understood, so as to make it evident that, as used, they did not impute the crime, and were not, under the circumstances, adapted to be so understood; as, if one be charged with perjury, or with the murder of a particular person, or with stealing, and the fact (not stated, nor understood, with the charge) be, that the false swearing was about some immaterial matter, or the person is living, or never existed, or the alleged stealing be of something of which the plaintiff was tenant in common; in all such cases, the defendant is responsible for the general and natural meaning of his language, as apprehended by his hearers: for words clearly slanderous, as understood, cannot be explained by reference to something which the bystanders knew not of. *Heming* v. *Power*, 10 Meeson & Welsby, 564; *Carter* v. *Andrews*, 16 Pickering, 1; *Stone* v. *Clark*, 21 Id. 51, 53; *Deford* v. *Miller*, 3 Penrose & Watts, 103; *Eckart* v. *Wilson*, 10 Sergeant & Rawle, 44; *Williams* v. *Miner*, 18 Connecticut, 464, 473; *Shagart* v. *Carter*, 1 Devereux & Battle, 8; *Tenney* v. *Clement*, 10 New Hampshire, 52, 57; *Dalrymple* v. *Lofton*, 1 M'Mullan, 112, 117; *Becket* v. *Sterrett*, 4 Blackford, 499, 501; *Watson* v. *Nicholas*, 6 Humphreys, 174. If, however, the defendant, at the time of making a general charge which would be actionable in itself, goes on to explain it as relating to something not capable of being the crime which in terms he imputes, or if facts and circumstances known to the hearers, and in relation to which they understand that the words are used, render the imputed crime impossible, the words are not actionable. For example, if one says, "He is a thief aud cut trees from my land," the latter explanation would qualify the previous epithet, and the words would amount to an imputation of trespass, not felony, and would therefore not be actionable: or, if an express charge of perjury be made, but be explained or understood at the time as relating to an extra-judicial oath, which is not perjury, the whole matter taken together would not be a

slander. And where the qualification thus depends upon extrinsic facts and circumstances, it is for the jury to determine the actual meaning; *Thompson* v. *Bernard*, 1 Campbell, 48; *Williams* v. *Stott*, 1 Crompton & Meeson, 675; *Shipley* v. *Todhunter*, 7 Carrington & Payne, 680; *Van Rensselaer* v. *Dole*, 1 Johnson's Cases, 279; *Dexter* v. *Taber*, 12 Johnson, 239; *Smith & Smith et ux.* v. *Miles*, 15 Vermont, 245; *Gill* v. *Bright*, 6 Monroe, 130; *Pegram* v. *Styron*, 1 Bailey, 595; *Shecut* v. *M'Dowel*, 1 Const. Rep. 1st series, 35; S. C. 3 Brevard, 38; *Cregier* v. *Burton*, 2 Richardson, 396. But to amount to an explanation, the qualification must extend as far as the hearing of the words; and therefore if a charge of felony is made, for example, "You have stolen my wood;" it is not enough to prove that the *witnesses*, or some of the bystanders, understood it as relating to a transaction which was not a larceny; it must be shown, either that an explanation was made by the defendant at the time, or that *all* the hearers understood it as relating to a transaction not felonious; *Phillips* v. *Barber*, 7 Wendell, 439; *Hankinson* v. *Bilby*, 16 Meeson & Welsby, 442 : and a witness cannot be permitted to say whom or what he was induced by current rumours or the conversations of others, to suppose that the defendant meant; *Allensworth* v. *Coleman*, 5 Dana, 315. Moreover, no explanation or qualification, made subsequently, will take away the actionable character of a charge originally slanderous; *Lathan* v. *Berry*, 1 Porter, 10. In all cases of this kind, it is for the jury to say what was the meaning of the words as understood by the hearers; *Becket* v. *Sterrett*, 4 Blackford, 499, 501.

It is said by De Grey, C. J., in *Onslow* v. *Horne*, 3 Wilson, 117, 186, that to make an imputation slanderous, "the charge upon the person spoken of, must be precise." The meaning is, not that the language averring the party to have been guilty must be precise, but that the crime alleged must be precise; that is, as explained in Sir William Blackstone's report of the same case, 2 Blackstone, 753, "a general charge of wickedness would not be sufficient." To call a man a "rogue," or a "d–d rogue," is not actionable; *Caldwell* v. *Abbey*, Hardin, 529; *Idol* v. *Jones*, 2 Devereux, 162. See *Walton* v. *Singleton*, 7 Sergeant & Rawle, 449, 452. So, a charge of "plundering a library," would not of itself be slanderous, because, though it conveys the notion of a wrongful acquisition, it does not express the nature of the wrong done; *Carter* v. *Andrews*, 16 Pickering, 1, 9. A general charge of "felony," however, appears to be actionable; *Wiley* v. *Campbell & Smith*, 5 Monroe, 396; or of having been convicted and sent to the penitentiary; *Stewart* v. *Stewart*, 5 Barr, 372.

With regard to the precision with which the charge must be fixed upon the person, it is settled, that the crime or offence need not be charged in direct and positive terms : it need not be affirmatively averred : it may be as effectually made by ambiguous insinuation, by expressing a suspicion or delivering the words as matter of hearsay, or by way of interrogation or exclamation, as by way of affirmation; and it may be made by conditional words, or words in the future tense. The only inquiry is, whether, according to the natural and fair construction of the language used, in connexion with the preliminary circumstances mentioned in the colloquia, the persons in whose presence and hearing the language was used, had a right to believe that it was the defendant's intention to make the charge. *Gorham* v. *Ives*, 2 Wendell, 534, 536; *Gibson* v. *Williams*, 4 Id. 320; *Kennedy* v. *Gifford*, 19 Id. 296; *Cornelius* v. *Van Slyck*, 21 Id. 70; *Rundell* v. *Butler*, 7 Barbour's S. Ct. 260; *Bornman* v. *Boyer*, 3 Binney, 515; *Cole* v. *Grant*, 3 Harrison, 328, 331; *Schenck* v.

Schenck, Spencer, 209; *Drummond* v. *Leslie*, 5 Blackford, 453, 455; *Sawyer* v. *Eifert*, 2 Nott & M'Cord, 511; *Hart* v. *Reed*, 1 B. Monroe, 166. If a person says, that he "believes," or "he has reason to believe," that another has committed a particular crime, it is actionable; *Miller* v. *Miller*, 8 Johnson, 74; *Bechler* v. *Steever*, 2 Wharton, 314, 329; *Logan* v. *Steele*, 1 Bibb, 593; *Giddens* v. *Mirk*, 4 Georgia, 364; *Waters* v. *Jones*, 3 Porter, 442. If the matter be stated as common report or common belief, it is still actionable; *Mason* v. *Mason*, 4 New Hampshire, 110; *Treat* v. *Browning*, 4 Connecticut, 409, 414; *Smalley* v. *Anderson & wife*, 4 Monroe, 368; *Waters* v. *Jones*, 3 Porter, 442. In point of law, also, it is immaterial whether the slanderer expects to be believed or not; it is no excuse for an assault on character, that the speaker really was not in earnest, and did not intend that his hearers should credit his aspersions; *Hatch* v. *Potter et ux.*, 2 Gilman, 725, 728. To say of a person, "Tell him, he is riding a stolen horse, and has a stolen watch in his pocket," is a charge of theft, and actionable in itself, on the ground that the words are to be taken in their natural sense; *Davis* v. *Johnson*, 2 Bailey, 579. To say of one, that he "was whipped for hog-stealing," is an accusation of hog-stealing, with the addition that he was whipped for it; *Holley* v. *Burgess*, 9 Alabama, 728. And to say, "You have been cropped for felony;" *Wiley* v. *Campbell*, 5 Monroe, 396; or "he is a convict," or "he was in the penitentiary;" *Smith* v. *Stewart*, 5 Barr, 372. So, to write of another, "He is so inflated with £200 or £300 which he has made in my service,—God only knows whether honestly or otherwise,"—is a charge of dishonesty, and is libellous; *Clegg* v. *Laffer*, 10 Bingham, 250. But in all cases, the matter, of which the charge constitutes the offence, must be imputed to the plaintiff; if it be uncertain of whom the words were spoken, the action is not maintainable; *Harvey* v. *Coffin*, 5 Blackford, 566, 567. Where the plaintiff's name is not printed in a libel, but there are asterisks for it, "the question for the jury is, whether the libel designates the plaintiff in such a way as to let those who know him, understand that he was the person meant: it is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff, can make out, that he is the person meant;" *Bourke* v. *Warren*, 6 Carrington & Payne, 307.

In determining whether spoken or written matter amounts to a slander or a libel, the construction must be upon the whole language used; and in that way, language in one part of a sentence which would not be actionable of itself, may be so affected by expressions in another, as to become actionable. See *Graves* v. *Waller*, 19 Connecticut, 90, 94; *Williams* v. *Gardner*, 1 Meeson & Welsby, 244. Accordingly, the following language, "I have lost a calf-skin out of my cellar the day that you and B. (the plaintiff) got the leather, and there was nobody in the cellar that day but you, B., and G., and I do not blame you nor G., but B. must have taken it," has been decided to amount to a charge of stealing, because of the secret and blameable manner in which the taking is imputed; *Bornman* v. *Boyer*, 3 Binney, 515. In like manner, the words, "who gave you orders to feed my straw to your cattle? You *did* take it, for it could be seen at the back of the barn;" and "You fodder your cattle on my straw. What have you done you old scoundrel? You went and made a slaughter-house of my barn, and are acting dishonestly in everything you are doing about the place;" have been deemed actionable as importing theft, as the taking is spoken of as something secret, blameable and dishonest; *M'Kennon* v. *Grew*, 2 Watts, 352. So, "I have made the charge against him, and I shall go on with it," with a colloquium of the oath

and evidence of a person in a judicial proceeding, amounts to a charge of perjury, and as such is actionable; *Thompson* v. *Lusk*, 2 Watts, 17, 20. So in regard to written matter, a paragraph headed "Threatening Letters.—The Middlesex Grand Jury have returned a true bill against a gentleman of some property, named French," was held to be actionable, because it would ordinarily be understood as meaning that the Grand Jury had found a true bill against French for sending threatening letters; and a bill of indictment for sending a threatening letter must import an unlawful threatening letter; *Harvey* v. *French*, 1 Crompton & Meeson, 11, 18. See, also, *Hughes* v. *Rees*, 4 Meeson & Welsby, 204.

In order that words may be actionable, and written matter either actionable or indictable, it must have an individual application; see *The King* v. *Alme & Nott*, 3 Salkeld, 224. Where slanderous or libellous matter is uttered or published against a class of persons, or a profession, body, or order of men, and does not import a specific application tending to individual injury, a member, not specially designated, cannot maintain an action; *Sumner* v. *Buel*, 12 Johnson, 475; and one reason is, that the body may have justly incurred the censure, and yet an individual in it may be acknowledged to be free from reproach. Where, however, many persons are severally included in the same attack, the plaintiff is not the less entitled to redress, because others are injured by the same act; and the question will always be, whether the charge bears upon the plaintiff *personally*, though among others, and whether, upon the whole, the declaration avers, with sufficient certainty, that the plaintiff, individually, is slandered or libelled; *Ellis* v. *Kimball*, 16 Pickering, 132; *Ryckman* v. *Delavan*, 25 Wendell, 186, controlling *White* v. *Delavan*, 17 Id. 49. The words, "Your children are thieves, and I can prove it," and, "you are a gang of murderers—you killed T., and you know it," have been held sufficiently individual, to give any one of the persons referred to a separate action; *Gidney* v. *Blake*, 11 Johnson, 54; *Chandler* v. *Halloway*, 4 Porter, 18.

As the question, whether the declaration contains a good cause of action, is always matter of law, it is for the court to determine, on demurrer, or on motion in arrest of judgment, whether the whole matter charged in the count, amounts to slander: see *Bornman* v. *Boyer*, 3 Binney, 515, 519. If the words set forth, do, in themselves, that is, in their general legal meaning, or in the particular meaning intended by the speaker, as inferred from their connexion with other words used at the same time, which are also set out in the declaration import a charge against the plaintiff, which is sufficient to constitute slander, they are actionable in themselves, and no other matter need be averred; and the sufficiency of the words to sustain the action, is matter of law for the court: see *Woolnoth* v. *Meadows*, 5 East, 463; *Roberts* v. *Camden*, 9 Id. 93; *Carter* v. *Andrews*, 16 Pickering, 1, 7; *Worth* v. *Butler*, 7 Blackford, 251; *Stucker* v. *Davis*, 8 Id. 415; *Thirman* v. *Matthews*, 1 Stewart, 384; *Brittain* v. *Allen*, 3 Devereux, 167. But if the words, in themselves, do not constitute such complete imputation against the plaintiff, as amounts in law to a slander upon him, it is necessary to aver, in the declaration, such extrinsic facts as, taken with the words, cause them to amount to a slander upon him. An averment that the words were used of and concerning a particular person, or particular circumstances or subject matter, is called a colloquium. If the language be ambiguous, or ironical, or technical, or conventional, or be used by way of allusion or reference, and in its general meaning would not necessarily be slanderous, but becomes so only in respect to the meaning in which it was used and understood in the particular case,

or in which it is understood by the class of persons among whom it is uttered, then the facts which determine or show such meaning, or understanding, must be averred on the record by way of inducement or introduction to the words set forth; and there must be a positive averment, or colloquium, that the discourse was of and concerning those circumstances; without which, the inducement would be unavailing; for, the innuendo is incompetent to such a purpose: and if the words, in connexion with such special circumstances modifying their meaning and understanding, do convey an imputation that is slanderous, they are actionable. In short, whenever the words in their legal construction, that is, in their natural and inherent signification, do not amount to a slanderous imputation, such matter or fact as, taken with them, causes them to amount to an imputation of that nature, must be averred by way of inducement: and these averments are of traversable matter, and may be proved or disproved. The office of an innuendo is, by reference to the matter averred, that is, either the words alone, or the words and circumstances together, to explain the effect of the words used, so as to point out that they are slanderous: it is equivalent to "*scilicet*" or "*id est;*" and is merely a statement of a reasonable inference from what is alleged in the foregoing part of the count: it cannot be proved on the trial: of course, it cannot enlarge, extend, or add to, the sense or effect of the words set forth, nor refer to anything not in the declaration: see *Alexander* v. *Angle*, 1 Crompton & Jervis, 143; S. C. 7 Bingham, 119; *Goldstein* v. *Foss*, 2 Younge & Jervis, 146; S. C. 4 Bingham, 489; *M'Gregor* v. *Gregory*, 11 Meeson & Welsby, 287, 295; *O'Brien* v. *Clement*, 16 Id. 159, 167; *Hearn* v. *Stowell*, 12 Adolphus & Ellis, 719; *Brown* v. *Gosden*, 1 Common Bench, 728; *Fowle* v. *Robbins*, 12 Massachusetts, 489, 490; *Bloss* v. *Tobey*, 2 Pickering, 320; *Carter* v. *Andrews*, 16 Id. 1; *Snell* v. *Snow*, 13 Metcalf, 278, 282; *Andrews* v. *Woodmansee*, 15 Wendell, 232; *Gibson* v. *Williams*, 4 Wendell, 320, 324; *Kinney* v. *Nash*, 3 Comstock, 177; *Shaffer* v. *Kintzer*, 1 Binney, 537; *M'Clurg* v. *Ross*, 5 Id. 218, 220; *Fitzsimmons* v. *Cutler*, 1 Aikens, 33; *Ryan and wife* v. *Madden*, 12 Vermont, 51, 55; *Harris* v. *Burley*, 8 New Hampshire, 256; *Bartow* v. *Brands*, 3 Green, 248, 249; *Cole* v. *Grant*, 3 Harrison, 328, 330; *Joralemon* v. *Pomeroy*, 2 Zabriskie, 271; *Giddens* v. *Mirk*, 4 Georgia, 364, 366; *Hays* v. *Mitchell*, 7 Blackford, 117; *Patterson et al.* v. *Edwards et al.*, 2 Gilman, 720, 723; *Sheely* v. *Biggs*, 2 Harris & Johnson, 363; *Stantley* v. *Brit*, Martin & Yerger, 222; *Dyer* v. *Morris*, 4 Missouri, 214; *Church* v. *Bridgman and wife*, 6 Id. 191, 194; *Watts* v. *Greenlee*, 2 Devereux, 115; *Caldwell* v. *Abbey*, Hardin, 529; *Gale* v. *Hayes*, 3 Strobhart, 452; *Martin* v. *Melton*, 4 Bibb, 99; *Watson* v. *Hampton*, 2 Id. 319; *Beswick* v. *Chappel*, 8 B. Monroe, 486, 488; *Taylor* v. *Kneeland*, 1 Douglass, 68, 73; *Maxwell & wife* v. *Allison*, 11 Sergeant and Rawle, 343. As to the mode of declaring when the libel is ironical, see *Boydell* v. *Jones*, 4 Meeson & Welsby, 446, 450. It is competent, however, for the pleader to aver that the words were uttered with intent to convey a particular meaning, and that they were understood to convey that meaning, by the persons in whose presence they were uttered; and these averments, being substantive allegations of facts, must be proved: and this is probably the best way of declaring when there is any ambiguity in the language: *Woolnoth* v. *Meadows*, 5 East, 463, 470; *Sweetapple* v. *Jesse*, 5 Barnewall & Adolphus, 27; *Goodrich* v. *Woolcott*, 3 Cowen, 231, 239; 5 Id. 714, on error; *Gibson* v. *Williams*, 4 Wendell, 320, 324; *Andrews* v. *Woodmansee*, 15 Id. 232, 235; see *Kennedy* v. *Gif-*

ford, 19 Id. 296, 299; where Cowen, J., is surely mistaken in saying that the averment in *Goodrich* v. *Wolcott*, how the words were meant and understood, was no more than a common innuendo. But in this mode of declaring, the introductory averments and colloquia must be such as fairly to warrant the meaning which the pleader imputes. It has been held, that to state the charge "he swore to a lie," without any colloquium, but an averment that the defendant meant thereby, and was understood by the bystanders, to charge the plaintiff with perjury, was not good even after verdict: *Palmer* v. *Hunter*, 8 Missouri, 512.

It has been held, indeed, in Indiana, that though extrinsic matters of fact are usually averred in distinct allegations, yet they may be incorporated with the colloquium; *Ricket et ux.* v. *Stanley*, 6 Blackford, 169; *Hays* v. *Mitchell*, 7 Id. 117; but this is certainly an inconvenient method, as confusing matter of fact, with mere inference. In *Thompson* v. *Lusk*, 2 Watts, 17, 20; *M'Kennon* v. *Greer*, Id. 352; and *Hays* v. *Brierly*, 4 Id. 392; Gibson, C. J., goes so far as directly to argue in favour of allowing an innuendo to perform the office of an averment, in fixing the meaning of the words: but these cases are not authorities for such a doctrine, because in all of them the words were in themselves, with the colloquia set forth, undoubtedly actionable; and the opinions of the Chief Justice are opposed by *Packer* v. *Spangler & wife*, 2 Binney, 60; *M'Clurg* v. *Ross*, 5 Id. 218; *Maxwell & wife* v. *Allison*, 11 Sergeant & Rawle, 343, 344; and *Tipton* v. *Kahle*, 3 Watts, 90, 93, where Sergeant, J., says, that "no innuendo, though found by the jury, can render the defendant liable for words not in themselves actionable."

In regard to ambiguous language, it was laid down by Cowen, J., in *Kennedy* v. *Gifford*, 19 Wendell, 296, 299, that, "It is not because the words *may* have a meaning different from what they import, or because they are of doubtful meaning, that the declaration must show specially such extrinsic facts as give them point; but when they are such as *cannot*, of themselves, be slanderous." And in *Gregory* v. *Lewis*, 8 Queen's Bench, 841, 851, the court said, that the innuendo in that case did not "exceed its proper function and office; which is, where the words are susceptible of a harmless, and also, of an injurious meaning, to point to that meaning which is injurious, and therefore actionable; and, that being found by the jury, the verdict is right. In the case of *Clegg* v. *Laffer*, 10 Bing. 250, words which might fairly be understood as being indifferent and harmless, or as imputing dishonesty to the plaintiff, had the latter meaning attributed to them by an innuendo, without any preliminary matter whatever; and the Court of Common Pleas was of opinion, that there was no valid objection to that innuendo." But these views appear to be somewhat loose. In *Clegg* v. *Laffer*, which was the case of a libel, there was an imputation of dishonesty, in a form of indirect suggestion or question, and the only doubt appears to have been, as to the sufficient directness of the charge: and Bosanquet, J., said, "The rule is clear, that words must be taken in their ordinary sense, and there can be no doubt upon the effect of these words." And in *Gregory* v. *Lewis*, the natural inherent meaning of the words was clearly slanderous. The true distinction appears to be, that if the ambiguity is inherent, that is, if the words in their general sense, are equally capable of two meanings, one slanderous and the other innocent, so that a hearer must wait for some other matter, before he can fix the meaning with such certainty as the law deems requisite, the words will be insufficient without an averment of facts fixing their meaning; and the court will not sustain words as being slanderous in themselves, unless by their general and

intrinsic meaning they bear a slanderous sense; see *Feise* v. *Linder*, 3 Bosanquet and Puller, 372; *Brown* v. *Brown*, 14 Maine, 317; but if the ambiguity is extrinsic, that is, if the words in their general signification are slanderous, but in reference to particular circumstances and usage may be harmless, the court would deem them sufficient, and it would be for the jury to say in what sense they were used, and a verdict would of course be given for the defendant if he showed that the words were intended and understood in a harmless sense; or it seems, as was held by Lord Ellenborough, and is sustained by *Parker* v. *M' Queen*, 8 B. Monroe, 16; (see, however, *Allen* v. *Crofoot*, 7 Cowen, 46;) that the defendant might show by special plea, that he had used the words in a sense in which they were not actionable: in other words, when matter of fact is required to give to words the precision of legal slander, it must be averred by the plaintiff in the declaration, but the matter of fact which takes from words a character of slander, must be shown by the defendant, by plea, or evidence under the general issue: see *Roberts* v. *Camden*, 9 East, 93, 96; *Chaddock* v. *Briggs*, 13 Massachusetts, 248, 255; *Crawford* v. *Wilson*, 4 Barbour's Supreme Court, 505, 514; *Read* v. *Ambridge*, 6 Carrington & Payne, 308, 309; *Penfold* v. *Westcotte*, 2 New Reports, 335. Or, as it is expressed by Lord Abinger in *Hughes* v. *Rees*, 4 Meeson & Welsby, 204, 207, in case of a libel, "If, according to their *natural import*, the words are libellous,—although they might be explained away,—the verdict of the jury is conclusive, but not otherwise. Where they are ambiguous in themselves, the verdict of the jury will not help them." "Whenever the words are apparently innocent in their meaning," said Bronson, J., in *Turrill* v. *Dolloway*, 17 Wendell, 426, 429, "they can only be made actionable, if at all, by a distinct averment that they were published and intended to be understood in a criminal sense; *Andrews* v. *Woodmansee*, 15 Wendell, 232. Averments of this kind must be proved on the trial, and like all other questions of fact, must be passed upon by the jury. The rule is substantially the same, where the words are of doubtful or equivocal import, and may be understood either in a criminal or an innocent sense. The jury must say in what sense they are used."

Where the words have different meanings and applications, an innuendo, if it be good, will have the effect of determining upon which meaning and application, the plaintiff intends to rely; and therefore, if the innuendo be good, he cannot at the trial abandon it, and rely upon a different sense and reference of the words; *Smith* v. *Carey*, 3 Campbell, 461; *Sellers* v. *Till*, 4 Barnewall and Cresswell, 655; *Williams* v. *Stott*, 1 Crompton and Meeson, 675, 687; *Mix* v. *Woodward*, 12 Connecticut, 264, 290. If, however, an innuendo is too large, as charging a meaning of which the preceding matter is not legally capable, and the matter is actionable without the innuendo, the innuendo after verdict, and upon motion in arrest of judgment, may be rejected as surplusage; *Roberts* v. *Camden*, 9 East, 93, 95; *Harvey* v. *French*, 1 Crompton and Meeson, 11, 18; *Beirer* v. *Bushfield*, 1 Watts, 23; *Shultz* v. *Chambers*, 8 Id. 300, 302. See *Commonwealth* v. *Snelling*, 15 Pickering, 321, 335; *Gage* v. *Shelton*, 3 Richardson, 243. But this principle of rejecting the innuendo as surplusage applies only where the words in themselves are actionable, and the innuendo is merely useless, and does not change the sense or take away the meaning, in which the words without the innuendo would be actionable.

It is frequently stated in the cases, that a verdict in favour of the plaintiff establishes the truth of the innuendoes; see *Peake* v. *Oldham*, Cowper, 275, 277; *Mott* v. *Comstock*, 7 Cowen, 654; and that the truth of the innuendoes is admitted by demurrer, or by judg-

ment by default; *Tillotson* v. *Cheetham*, 3 Johnson, 56, 61. But this maxim must be understood with reference to the limited office of the jury, as judges of fact only. Whether an innuendo is good in law, that is to say, whether it is fairly warranted by the language set forth, in connexion with the inducement and colloquium, is certainly matter of law: see *Solomon* v. *Lawson*, 8 Queen's Bench, 828, 837: and supposing it to be good, it may consist of matter of fact, or of matter of law. So far as it expresses the application and reference of the language, in respect to the person and subject of the discourse, it is matter of fact; and if the innuendo be good in law, a verdict will find the truth of it; see *Lindsay* v. *Smith*, 7 Johnson, 359, 360: but so far as it expresses matter of law, and undertakes to aver, that certain language amounts to an imputation of a certain crime, the finding of the jury does not touch the correctness of the innuendoes.

The principles as to the construction of the matter alleged, and as to the mode of declaring, above stated in regard to slander, are equally applicable to actions and indictments for libel. Language, written, as well as oral, is to be understood by the court and jury in its natural and ordinary meaning; *Turrill* v. *Dolloway*, 25 Wendell, 426; and "shall be construed and understood in the sense in which the writer or speaker intended it; if, therefore, obscure or ambiguous language is used, or language which is figurative or ironical, courts and juries will understand it according to its true meaning and import, and the sense in which it was intended, to be gathered from the context, and from all the facts and circumstances under which it was used;" *Commonwealth* v. *Kneeland*, 20 Pickering, 206, 216; see, also, *Cooper* v. *Greely*, 1 Denio, 348, 358. "It is quite clear from all the modern authorities," said Lord Tenterden, C.J., in the Exchequer Chamber, in a case of libel, "that a court must read words in the sense in which ordinary persons, or in which we ourselves out of court, reading the paragraph, would understand them:" *Harvey* v. *French*, 1 Crompton & Meeson, 11, 18. If the libel does not distinctly mention the party, or if it is ironical, there must be distinct averments of the meaning and application of the libel, which must be determined by the jury; and an innuendo will not be sufficient; *Rex* v. *Horne*, Cowper, 184; *Commonwealth* v. *Child*, 13 Pickering, 198; *Tillotson* v. *Cheetham*, 3 Johnson, 56, 60; *Miller* v. *Maxwell*, 16 Wendell, 9; *Mix* v. *Woodward*, 12 Connecticut, 264, 281; *Goodrich* v. *Davis*, 11 Metcalf, 474, 480; *State* v. *Henderson*, 1 Richardson, 180. "When that which is termed a libel," said the court in *Hall* v. *Blandy*, 1 Younge & Jervis, 480, 490, "does not necessarily upon the face of it import a libel, it is requisite to connect it with certain facts, by way of inducement, in order that, so explained, it may amount to a libel, and that there may be sufficient certainty, that what is therein stated, relates to the plaintiff in the action." The rules relating to the averment of extrinsic facts, and to the office of the innuendo, are well illustrated in *Van Vechten* v. *Hopkins*. See also *Goldstein* v. *Foss*, 2 Younge & Jervis, 146; S. C., 4 Bingham, 489; 6 Barnewall & Cresswell, 154.

"It is now a well-settled rule of law, applicable as well to indictments, as to actions for libel and slander," says the Court in *Commonwealth* v. *Snelling*, 15 Pickering, 321, 335, "that it is not the office or province of an innuendo to enlarge or point the effect of the language used by the defendant; and if the indictment cannot be sustained on the ground of the natural and common meaning of the language, in its usual acceptation, or as pointed and rendered significant by the previous averments of extraneous facts, and the *colloquia* referring to them, it cannot be aided by asserting, ever so strongly, by way of innuendo, the offensive meaning of

the language. Such averment, in the form of an innuendo, is not a traversable fact. If the indictment is good without the innuendo, it may be rejected as surplusage; if it is not good without it, the innuendo cannot make it so."

With regard to the respective functions of the judge and jury, in determining whether a publication is libellous; previously to Mr. Fox's Libel Act, the subject had been one of great controversy in England. The practice was to leave to the jury two questions, 1, whether the defendant was the publisher, and 2, whether the innuendoes were made out; referring to the court to consider whether the writing was a libel or not; see *The King* v. *Shipley*, Douglas, 73; *The King* v. *E. Topham*, 4 Term, 126, 127. That act, passed 32 Geo. 3, c. 60, was a declaratory one, and put prosecutions for libel on the same footing as other criminal cases, and enacted that the jury may give a general verdict of guilty, or not guilty, upon the whole matter in issue, and shall not be directed by the court to find the defendant guilty, merely on proof of the publication of the paper by the defendant, and of the sense ascribed to it in the indictment. And although this act was confined to criminal proceedings, yet the practice is now similar in civil actions. In the recent case of *Parmiter* v. *Coupland*, 6 Meeson & Welsby, 105, 108, Parke, B. said, "It has been the course for a long time for a judge, in cases of libel, as in other cases of a criminal nature, first to give a legal definition of the offence, and then to leave it to the jury to say, whether the facts necessary to constitute that offence are proved to their satisfaction; and that whether the libel is the subject of a criminal prosecution, or civil action. A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule, is a libel. Whether the particular publication, the subject of inquiry, is of that character, and would be likely to produce that effect, is a question upon which a jury is to exercise their judgment, and pronounce their opinion, as a question of fact." In *Baylis* v. *Lawrence*, 11 Adolphus & Ellis, 920, the same practice was approved in the Queen's Bench: but Lord Denman, C. J. added, that there is one case in which a pure question of law may arise; for if the judge and jury think the publication libellous, still, if on the record, it appears not to be so, judgment must be arrested: and see to this effect, *Hearne* v. *Stowell*, 12 Adolphus & Ellis, 719, and *Hughes* v. *Rees*, 4 Meeson & Welsby, 204, 206. In deciding on doubtful language the jury are to be guided not by intention but tendency; *Fisher* v. *Clement*, 10 Barnewall & Cresswell, 472; the damages will be aggravated by proof of intention to injure, but the first question for the jury on a trial for libel, is whether the publication is injurious to the character of the plaintiff; *Chalmers* v. *Payne*, 2 Crompton, Meeson & Roscoe, 156, 157, 158. In Massachusetts, in the late case of *Goodrich* v. *Davis*, 11 Metcalf, 474, 480, the practice stated in these cases appears to be recognised; and in *Usher* v. *Severance*, 20 Maine, 9, 17, a civil action for libel, it is said, that "in every case it is believed to be the province of the jury under the instruction of the court, to determine the import of the language used." In New York, in *The People* v. *Croswell*, 4 Johnson's Cases, 337, the Supreme Court were equally divided on the question whether at common law the court or the jury were to pronounce as to the writing being a libel; Kent and Thompson, J's., being of opinion that it belonged to the jury, and Lewis, C. J. and Livingston, J., that it was a matter for the court. This led to the passing of a declaratory act on April 6th, 1805, sess. 28, c. 90, similar in this respect to Mr. Fox's Act. By the 8th section of the 7th article of the new constitution of that state, the jury were declared in all

prosecutions or indictments for libel to have the right to determine the law and the fact; and in *Dolloway* v. *Turrill*, 26 Wendell, 383, the Court of Errors decided that this was applicable to civil, as well as criminal cases. In *Snyder* v. *Andrews*, 6 Barbour's S. Ct., 43, 60, it was said that the safer practice was for the Judge to define what is a libel in point of law, and then leave it to the jury to say whether the case falls within that definition. In Pennsylvania, by the 7th section of the Bill of Rights, "in all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases."

The inducement in one count, that is, the averment of those extrinsic facts which show that the words are slanderous or libellous against the plaintiff, will serve for other counts, if they are made to refer to it; *Loomis* v. *Swick*, 3 Wendell, 205; *Nestle* v. *Van Slyck*, 2 Hill's N. Y., 282, 286; *Canterbury* v. *Hill*, 4 Stewart & Porter, 224; *Shultz* v. *Chambers*, 8 Watts, 300; per Lord Abinger, in *Hughes* v. *Rees*, 4 Meeson & Welsby, 204, 206.

When the plaintiff is referred to in the *third* person, and his name is not mentioned in the words set forth, it is necessary to aver a colloquium *of and concerning* the plaintiff, and then to aver that the words were spoken *of and concerning* him; and both of these are required. If the declaration aver a colloquium of and concerning the plaintiff, but does not aver that the words were spoken of and concerning him, the omission of the latter averment will be bad on special demurrer; *Titus* v. *Follet*, 2 Hill's N. Y., 318; but not after verdict, nor probably on general demurrer; *Nestle* v. *Van Slyck*, Id. 282: but the want of both, that is, a complete omission of a colloquium of and concerning the plaintiff, would be bad after verdict, and no innuendo could help it; *Milligan* v. *Thorn*, 6 Wendell, 412; *Sayre* v. *Jewett*, 12 Id., 135; *Cave* v. *Shelor*, 2 Munford, 193; and in an action for libel, each specification must be averred to be "of and concerning" the plaintiff; *The State* v. *Brownlow et al.*, 7 Humphreys, 63; and in *Clement* v. *Fisher*, 7 Barnewall & Cresswell, 459, 462, it was decided on error, that an allegation, merely, that the defendant published, of and concerning the plaintiff, a libel containing the following matter, without alleging that the particular matter set out was of and concerning the plaintiff, was insufficient, when there was nothing in the matter itself which clearly applied to the plaintiff, nor any distinct innuendo applying it. But when the words are addressed to the plaintiff in the second person, it is enough to aver a colloquium with the plaintiff, without averring that the words were said of and concerning him, for that is implied of course. And if the plaintiff's name is mentioned in the words, it is enough after verdict; *Brown* v. *Lamberton*, 2 Binney, 35, 37. When the words are not actionable except in connexion with an averment, and such averment is made, the omission of a colloquium *of and concerning* the matter alleged, would be fatal after verdict; *Cummins* v. *Butler*, 3 Blackford, 190: but where they are themselves actionable, when connected with the plaintiff, it is enough to aver that they were "of and concerning" him, without averring that they were "of and concerning," such a matter; *O'Brien* v. *Clement*, 4 Dowling & Lowndes, 563.

It has already been stated, that the omission of an innuendo could probably not be taken advantage of after verdict: it was said, however, in *Roella* v. *Follon*, 7 Blackford, 377, that it is so only where the words are actionable in themselves, and that, where the words are not actionable in themselves, but only by the aid of a colloquium, an omission of the innuendo is bad after verdict: a distinction which does not seem to be well founded.

In actions of slander and libel, it is

not necessary to allege that the utterance or publication was *malicious;* at least, the omission is good after verdict; *Bromage* v. *Prosser*, 4 Barnewall & Cresswell, 247, 254; *King* v. *Root*, 4 Wendell, 114, 138; *Miles* v. *Oldfield*, 4 Yeates, 423, 426; *Taylor* v. *Kneeland*, 1 Douglass, 68; but in the last case it was said, that it would be bad on special demurrer. In *Rowe* v. *Roach*, 1 Maule & Selwyn, 304, it was held, on general demurrer, that, where a publication was averred to be malicious, injurious, and unlawful, the omission of an allegation that it was false, was not objectionable.

In actions of slander, except in the case of imposing the crime of felony, which is a form that has acquired a definite meaning in the law, and signifies a legal charge of felony before a magistrate; *Blizard* v. *Kelly*, 2 Barnewall & Cresswell, 283; per Gibbs, C. J., in *Wood* v. *Brown*, 1 Marshall, 522, 523; *Hill* v. *Miles*, 9 New Hampshire, 9, 12; *Haselton* v. *Weare*, 8 Vermont, 480;—it is not enough to state in the declaration the effect of the words uttered, or that the defendant charged the plaintiff with the commission of such a crime; the words themselves, in which the slander is conveyed, must be set forth in the declaration, and the omission is bad after verdict, and on error; and this applies equally to cases of special damage; *Cook* v. *Cox*, 3 Maule & Selwyn, 110; *Gutsole* v. *Mathers*, 1 Meeson & Welsby, 495; *Ward* v. *Clark*, 2 Johnson, 10, 12; *Blessing* v. *Davis*, 24 Wendell, 108; *Parsons* v. *Bellows*, 6 New Hampshire, 289; *Bassett* v. *Spofford*, 11 Id., 127; *Haselton* v. *Weare*, 8 Vermont, 480; *Browne* v. *Browne*, 14 Maine, 317. In Pennsylvania, the law seems to be brought to the same point, by *Yundt* v. *Yundt*, 12 Sergeant & Rawle, 427, which appears effectively to overrule *Kennedy* v. *Lowry*, 1 Binney, 393, 395, though some doubts seem to be expressed in *Tipton* v. *Kahle*, 3 Watts, 90, and *Long* v. *Fleming*, 2 Miles, 104. In Massachusetts, however, a different practice prevails; it is there held, that the declaration may aver that the defendant charged the plaintiff with such a crime; which refers the whole matter to the court and jury at the trial; and, if either party apprehends surprise from the offer of proof of facts which he cannot anticipate, he may ask for a specification, or bill of particulars: see *Nye* v. *Otis*, 8 Massachusetts, 122; *Whiting* v. *Smith*, 13 Pickering, 364; *Pond* v. *Hartwell*, 17 Id., 269; *Allen* v. *Perkins*, Id. 369; *Clark* v. *Munsell*, 6 Metcalf, 374; *Dunnell* v. *Fiske*, 11 Id., 551: and this practice seems to have been sanctioned in South Carolina; *Grubbs* v. *Kyzer*, 2 M'Cord, 305. Where the words were spoken in a foreign language, the proper mode of declaring is, to state the words in the foreign language, and to aver their signification in English, and that they were understood by the hearers; *Wormouth* v. *Cramer*, 3 Wendell, 394; *Hickley* v. *Grosjean*, 6 Blackford, 352; *Zenobio* v. *Axtell*, 6 Term, 162; *Yundt* v. *Yundt*. Different sets of words spoken or written at one time, and importing the same charge, may be included in one count for slander or libel; *Rathbun* v. *Emigh*, 6 Wendell, 407; *Milligan* v. *Thorn*, Id. 413; *Churchill* v. *Kemble*, 3 Ohio, 409; but not distinct calumnies published at different times; *Hughes* v. *Rees*, 4 Meeson & Welsby, 204, 206; *Chatham* v. *Tillotson*, 5 Johnson, 430.

In regard to the proof of words; the rule is, that the words must be proved substantially as they are laid; it is not enough to prove words of the same effect or import, or conveying the same idea; the words must be substantially the same words, and it is not sufficient that they contain substantially the same charge, but in different phraseology; equivalent words of slander will not do; *Olmsted* v. *Miller*, 1 Wendell, 506, 509; *Wormouth* v. *Cramer*, 3 Id., 394; *Bassett* v. *Spofford*, 11 New Hampshire, 127; *Linville* v. *Earlywine*, 4 Blackford,

470; *Watson* v. *Musick*, 2 Missouri, 29; *Cooper* v. *Marlow*, 3 Id., 134; *Berry* v. *Dryden*, 7 Id., 324; and words alleged in English will not be supported by proof of words in another language; *Keerholts* v. *Becker*, 3 Denio, 346, 348. It is not always necessary, however, to prove all the words laid in the declaration; such of the words as do not form an integral part of the slander, and do not qualify the slander, need not be proved, provided those which are proved embody the slander, and are sufficient to sustain the cause of action; but such part as essentially constitutes the slander, must be proved precisely as laid; *Maitland* v. *Goldney*, 2 East, 426; *Orpwood* v. *Barker*, 4 Bingham, 261; *Conpagnon* v. *Martin*, 2 Blackstone, 790; *Fox* v. *Vanderbeck*, 5 Cowen, 513, 515; *Loomis* v. *Swick*, 3 Wendell, 205; *Purple* v. *Horton*, 13 Id., 1; *Nestle* v. *Van Slyck*, 2 Hill's N. Y., 282; *Nichols* v. *Hayes*, 13 Connecticut, 156, 162; *Creelman* v. *Marks*, 7 Blackford, 281, 282; *Iseley* v. *Lovejoy*, 8 Id., 462; *Moore* v. *Bond and Wife*, 4 Id., 458; *Wheeler* v. *Robb*, 1 Id., 330; *Hogg* v. *Wilson*, 1 Nott & M'Cord, 216; *Morgan* v. *Livingston*, 2 Richardson, 574; *Poppenheim* v. *Wilkes*, 1 Stobhart, 275; *Slocumb* v. *Kuykendall*, 1 Scammon, 187; *Patterson et al.* v. *Edwards et al.*, 2 Gilman, 720, 723; *Chandler* v. *Halloway*, 4 Porter, 18; *Williams & Wife* v. *Bryant & Wife*, 4 Alabama, 44; *Teague* v. *Williams*, 7 Id., 844; *Easley* v. *Moss*, 9 Id., 266; *Scott* v. *M'Kinnish & Wife*, 15 Id., 662, 664; *Johnston* v. *Tait*, 6 Binney, 121; *Hume* v. *Arrasmith*, 1 Bibb, 165. And while the proof of speaking is for the jury, the correspondence between the words spoken and laid is for the court; *Foster* v. *Small*, 3 Wharton, 138, 142. A witness is not allowed to state his impression or construction of the words that were used; *Williams* v. *Miner*, 18 Connecticut, 464, 467; *Harrison* v. *Bevington*, 8 Carrington & Payne, 708, 710. It is a general rule, also, that the words must be proved in form as they are laid; words laid in the second person will not be supported by proof of words spoken in the third person, nor *versa vice;* Buller's Nisi Prius, 5; *Stannard* v. *Harper*, 5 Manning & Ryland, 295; *M' Connell* v. *M' Coy*, 7 Sergeant & Rawle, 223, overruling *Tracy* v. *Hopkins*, 1 Binney, 395, *note; Foster* v. *Small*, 3 Wharton, 138, 142; *Cock* v. *Weatherby*, 5 Smedes & Marshall, 333; *Culbertson* v. *Stanley*, 6 Blackford, 67, 68; *Wolf* v. *Rodifer*, 1 Harris & Johnson, 409; *Williams* v. *Harrison*, 3 Missouri, 411; though the contrary has been held in Kentucky; *Huffman* v. *Shumate*, 4 Bibb, 515; *Darley* v. *Gaines*, 1 Dana, 529: nor will words laid affirmatively be supported by evidence of words spoken interrogatively; *Barnes* v. *Holloway*, 8 Term, 150; *Yeates* v. *Reed*, 4 Blackford, 463, 465; *Long* v. *Fleming*, 2 Miles, 104; see, however, *Commons* v. *Walters*, 1 Porter, 377; but if the words are proved to have been spoken affirmatively as laid, it makes no difference that they were spoken in answer to a question; *Jones* v. *Chapman*, 5 Blackford, 88. In *Walters* v. *Mace*, 2 Barnewall & Alderson, 756, the words "This is my umbrella, and he stole it from my back door," were decided not to be sustained by proof of saying, in a house where the umbrella was not, "It is my umbrella, &c." With regard to a variation in the positiveness of the assertion, the English cases are more strict than the American: the former hold that, if a positive affirmation is laid, and the affirmation as proved, is qualified by the expression, "I have heard," or "I understand," it is a fatal variance: *Smith* v. *Knowelden*, 2 Scott's New Reports, 657; *Cook* v. *Stokes*, 1 Moody & Robinson, 237: but some American cases have held that it is not a variance, if a positive assertion in the declaration, is qualified in the proof by such language, as, "I believe that," &c.; *Beechler* v. *Steever*, 2 Wharton, 314,

329; or, "If report be true;" *Smith* v. *Stewart*, 5 Barr, 372; or "If I am not misinformed;" *Treat* v. *Browning*, 4 Connecticut, 409, 414: for other cases where differences have been held fatal, see *Brooks* v. *Blanshard*, 1 Compton & Meeson, 779; *Shepherd* v. *Bliss & Wife*, 2 Starkie, 510; *Tempest* v. *Chambers*, 1 Id. 67; *Hancock* v. *Winter*, 7 Taunton, 205; and where they have not been so held, see *Robinson* v. *Willis*, 2 Starkie, 194; *Dancaster* v. *Hewson*, 2 Manning & Ryland, 176; *Nichols* v. *Hayes*, 13 Connecticut, 156, 163. If words have been used, which in themselves import a charge of perjury, it is not necessary to prove that they referred to any suit, nor even that any suit was pending; but if there be a charge of false swearing, which the colloquium refers to a particular suit, that suit and a false swearing in it must be proved as laid; *Emery* v. *Miller*, 1 Denio, 208.

The rules are quite the same in regard to libel. The libel may either be set out entire, according to its tenor, or only those parts which are relied on as actionable may be stated in the declaration; (as to the form of doing which see *Tabart* v. *Tipper*, 1 Campbell, 350, 353, and *Weir* v. *Hoss & wife*, 6 Alabama, 882;) but either way, the words themselves must be set out; *Wood* v. *Brown*, 6 Taunton, 169. It must be alleged that the matter complained of was "to the tenor following" or "in these words" or "as follows;" and if it be "in substance as follows," it is bad on demurrer, or in arrest of judgment; *Wright* v. *Clements*, 3 Barnewall & Alderson, 503; *Solomon* v. *Lawson*, 8 Queen's Bench, 823, 829; *The State* v. *Brownlow, et al.*, 7 Humphreys, 63; *Commonwealth* v. *Wright*, 1 Cushing, 46, 64; and the words must be proved precisely as they are laid in the declaration; *Whittaker* v. *Freeman*, 1 Devereux, 271, 285; *Walsh* v. *The State*, 2 McCord, 248; *Harris* v. *Lawrence et al.* 1 Tyler, 156. Where only extracts from the libel have been set out, the defendant has a right to read the whole publication in evidence; *Cooke* v. *Hughes*, Ryan & Moody, 112; *Morehead* v. *Jones*, 2 B. Monroe, 210: it will not be a variance though the libel in evidence contains matter not set out in the declaration, provided the meaning be not varied; *Mc Coombs* v. *Tuttle*, 5 Blackford, 431, 432; but if the omitted parts make a material alteration in the sense, and explain and render innocuous what is in the declaration, the variance will be fatal; *Rutherford* v. *Evans*, 6 Bingham, 451, 458; *Weir* v. *Hoss & wife*, 6 Alabama, 882; and when a libel is set out, not in hæc verba, but as containing the following matter, proof of the publication of part of the actionable or libellous matter charged would be sufficient; *Metcalfe* v. *Williams*, 3 Littell, 387, 390: it is also competent for the plaintiff to abandon prosecution, or enter a nolle prosequi as to part of the libel; *Stow* v. *Converse*, 4 Connecticut, 18, 27. If the libel in evidence contain different words, there is a variance; but if the verbal or literal deviations do not make different words, there is no variance; *Weir* v. *Hoss & wife*, 6 Alabama, 882. The allegation of any fact in the slander or libel dispenses with proof of that fact on the part of the plaintiff should it become necessary to him; *Bagnall* v. *Underwood*, 11 Price, 621, 632; *Yrisarri* v. *Clement*, 3 Bingham, 432; *Gould* v. *Hume*, 3 Carrington & Payne, 625, 627. In actions of slander and libel, a new trial is never granted on account of the magnitude of the damages given by the jury, unless the excess is so outrageous as to evince passion, prejudice, partiality or corruption; *Tillotson* v. *Cheetham*, 2 Johnson, 63; *Jarvis* v. *Hatheway*, 3 Id. 180, 183; *Coleman* v. *Southwick*, 9 Id. 45, 51; *Exparte Bailey*, 2 Cowen, 479; *Paddock* v. *Salisbury*, Id, 811; *Neal* v. *Lewis*, 2 Bay, 204; *Neilson* v. *Emerson*, Id. 439; *Simpson* v. *Pitman*, 13 Ohio, 365; but when the

verdict can be referred to no rational principle, but there must have been on the part of the jury, if not corruption, at least some entire misapprehension of the facts of the case, or of the law upon which the damages were to depend, it is not only the right, but the duty of the court to grant a new trial; *Steever* v. *Beehler*, 4 Miles, 146, 152; *Nettles* v. *Harrison*, 2 McCord, 230; *Swearinger* v. *Bush*, 4 Yeates, 322, 325. See the subject at large in *Coffin* v. *Coffin*, 4 Massachusetts, 1, 41, &c.

Of the defences to an action for Slander or Libel.

HOWARD *v.* THOMPSON.

In the Supreme Court of New York.

UTICA, JULY, 1839.

[REPORTED, 21 WENDELL, 320–336.]

Of the circumstances which will excuse a citizen in making a communication to the government in which a subordinate officer of the department is charged with peculation and fraud.

By the Court, COWEN, J.(*a*) This is an action in which the plaintiff, Howard, complains, that while he held the office of inspector of the customs and keeper of the public stores of the United States, the defendant falsely libelled him by addressing certain letters to the secretary of the treasury, charging and offering to prove that the plaintiff had been guilty of fraud in the execution of his trust as such keeper; specifying particularly the converson of timber belonging to the United States in 1832. The secretary of the treasury was the officer who had legal cognizance of the complaint, and the power of removing the plaintiff on its being substantiated. For some reason, however, the investigation, which we must presume was duly made, proved so unsatisfactory to the secretary, that he thought it his duty to deliver up the letters to the plaintiff; and they were used by him as evidence to the jury. The defendant had given notice with his plea, that he would prove the truth of his charge in bar; and seems to have entertained the confidence of being able to do it, till, on the trial, he became so doubtful of success in convincing the jury, that on the plaintiff's resting, he avowedly abandoned the attempt, and staked his defence: 1, upon the unwarrantable nature of the prosecution, and 2, on evidence that, though he might

(*a*) The reporter's statement has been omitted.

have been mistaken, yet the circumstances were such as to have afforded at least *probable cause* for the representations he had made. The first ground was presented in the form of a motion for a *nonsuit*, insisting that the plaintiff must, as in the ordinary case of a malicious prosecution, show a want of probable cause. The judge thought otherwise, holding that the proof given of the defendant's ill-will towards the plaintiff was enough to carry the cause to the jury. This presents the first question which we are called upon to examine. Does a complaint addressed by a citizen to the proper tribunal against another, from motives of ill-will towards the latter, subject the complainant to an action of slander, as for a libel, unless it be apparent that it was without probable cause? It may be put still more shortly: is it subject to be prosecuted as a libel? Must it not be pursued as a malicious prosecution or complaint?

This is not precisely like the case of a written communication between private persons, concerning their own affairs, nor was it addressed to a man, or a set of men, chosen by a voluntary society, a bishop or presbytery for example, and having, by common consent among the members, a power to redress grievances. It is, therefore, not necessary to inquire whether, in such instances, an action for a libel may not be brought in the common form. It has generally been so brought; and, though the communication has been deemed *prima facie* privileged, yet I believe where ill-will towards the plaintiff has appeared, or motives of interest, and the defendant has failed in proving at least probable cause, the action has generally been sustained. The rule in respect to such mere private communications seems to have been laid down very sensibly by Mr. Justice J. Parke, in Cockayne v. Hodgkisson, 5 Carr. & Payne, 543. The defendant had made representations by letter to Lord Anglesey against his game-keeper. In an action by the latter, the defendant failed to prove the truth, relying on the good faith with which he made the communication. The judge left it to the jury, mainly on the letter itself, whether it was such as a man would write merely wishing to put Lord Anglesey on his guard, and cause him to institute an inquiry; or whether the defendant was actuated by malice, and wished to supplant the plaintiff. In the former case, he said the defendant was entitled to a verdict; in the latter, the plaintiff. This, too, was after very clear proof that the defendant *had been told the stories* which he had written to Lord Anglesey, and seems to have had probable cause. He had also been requested by Lord Anglesey to give him information of anything wrong. The letter was put on the naked footing of a libel; for it was said the defendant could not prove its truth without a plea of justification; which is clearly otherwise where an action is brought for a malicious prosecution.

The principle of the case cited, and a number of others which preceded it, is very obvious. The private business of society could not be conducted without the liberty of speaking and writing in the honest pursuit of its purposes, even though, under other circumstances, the words would be slanderous; and though all that is said be a mistake, yet the words shall not, for that reason alone, be actionable. The distinction was a good deal considered in Bromage v. Prosser, 4 Barn. & Cress. 247, where it was allowed in a case of oral slander. And see Holt on Libels, 197, also Delaney v. Jones, 4 Esp. R. 191. But actual ill-will towards the plaintiff may raise a presumption in the mind of the jury, that the appearance of a lawful purpose was assumed in order to injure him. When they are brought to believe this, it is their duty to find that the defendant acted in fraud of the law, which gives the privilege, and award damages against him. Whenever the communication is, for this or any other cause, taken out of the protective rule, the law acts upon it directly as a slander.

The rule is known to be different where the communication made or caused, is in itself the institution of a *judicial inquiry*. There, if it be apparently pertinent, it is absolutely exempt from the legal imputation of *slander;* and the party injured is turned round to a different remedy, an action for *malicious prosecution;* wherein he is bound to prove in the first instance, not merely that the communication was made in bad faith; but that it was not countenanced by probable cause. Such is the familiar instance of a criminal complaint addressed to a judicial magistrate or a grand jury, which results in a warrant or an indictment. 1 Curzon's Hawk. 554. The same thing may be said of any other definite or specific step in the progress of the cause; as the presentment of the bill in open court by the grand jury, *id.*, or the publication of it by the clerk or prosecuting attorney upon arraignment. And yet many things may occur incidentally in the course of the cause, which would subject the speaker to an action for slander. Such are slanderous words spoken untruly and impertinently by witnesses or by counsel; Ring v. Wheeler, 7 Cowen, 725. Such words communicated in writing would be the subject of an action, as a libel. The ordinary prosecutor of an indictment may doubtless make himself liable in an action of slander in the same way, by what he may incidentally say of the case. Serjeant Hawkins lays down the rule of exemption, as it stands upon the cases in respect to the definite proceedings in a cause, without any qualification. But he throws out the idea upon his own authority, that a malicious prosecution may subject the guilty participators in it to an action, as for a libel. Hawk. P. C. B. 1, ch. 28, § 8. He does not, however, pretend to be countenanced by authority; and it would be very difficult to apply the suggestion even to the prosecutor of an indictment any more than to the

ministers of justice. See *per* Best, J., in Fairman v. Ives, 5 Barn. & Ald. 648. Sound policy would seem to exempt the prosecutor, to the same extent as the grand jury. Either is liable to an action for corruptly procuring an indictment; but to treat it directly as a libel, would be quite as effectual in discouraging due inquiries concerning crime, when applied to the former, as to the latter. The law, therefore, seems to require, in such case, a remedy more specific in form, and calling for more evidence to sustain it, than it receives as sufficient in an action for an ordinary libel.

Another class of writings has, in practice, been pursued as *libels*. These are such as contain false and scandalous matter, addressed to executive, administrative, or other officers, entrusted with the power of appointment to or removal from inferior offices; and seeking either to prevent appointments or promote removals, on charges importing want of integrity, or other causes of unfitness. Such was a petition to the council of appointment, praying the removal of a district attorney, Thorn v. Blanchard, 5 Johns. R. 508; a deposition made with the view of presenting it to the Governor of Pennsylvania, containing charges against a justice of the peace, Gray v. Pentland, 2 Serg. & Rawle, 23; and a memorial to a board of excise, remonstrating against the granting of a tavern license, Vanderzee v. M'Gregor, 12 Wendell, 545. In regard to such writings, there is certainly no authority for saying that, in form, the injured party shall be put to his action for a malicious prosecution, complaint or remonstrance; nor would it, perhaps, be safe to interpose such a restriction. Although the reason for giving countenance to information may be of as much force as that in respect to judicial prosecutions for crime, yet the precautions against ill-founded charges and irregularities in conducting them are much less; nor is there any restraint by settled precedents and forms of proceeding. To this intermediate class between judicial prosecutions and privileged communications in regard to matters having no immediate connexion with the functions of government, the letters in question belong. The form of the action we take to be correct, but this is certainly not decisive of what shall be deemed full proof to sustain it. Must the plaintiff show not only malice but want of probable cause, the same as if the action had been technically for a malicious prosecution? The evidence established no publication at large, none in the newspapers, no reading to the neighbours. The letters were addressed to the officer having the power, and on whom rested the duty to remove, if the cause assigned were found by him to be true; and they were forwarded directly to him. Nothing impertinent can be imputed to them. There is not the least doubt that, so far, they were, for the reasons assigned in Thorn v. Blanchard, and other cases already cited in connexion with that, as

much without the doctrine of *libel* as an *indictment*. They were equally, not to say still more so, upon the reasoning of Fairman v. Ives and other English cases hereafter to be noticed; for some of the latter, I think, take them absolutely out of the doctrine, under any qualificated. They very nearly resemble the printed book sought to be prosecuted in Rex v. Baille, 2 Esp. N. P. 91, Gould's ed. of 1811. It contained an account of the abuses of Greenwich Hospital, treating the officers of that institution, and Lord Sandwich in particular, who was then first lord of the admiralty, with much asperity; but copies were distributed among the governors of the hospital only. On motion for a criminal information, Lord Mansfield stopped the prosecution on the point that such a proceeding did not amount *even to a publication*. He put it on the ground that the distribution had been confined to persons who were, from their situation, called on to redress the grievances complained of, and had, from their situation, power to do it. If this was not a *publication*, certainly no private action could have been maintained, as for a libel. Holt on Libels, 290, N. Y. ed. 1818. The party must have been turned over to an action for a malicious prosecution of the complaint, in which form he must have shown, on his own side, a want of probable cause. It is better, perhaps, that such a form of action should not be exacted. There is room, I think, for saying, on principle and authority, that on showing enough to take away the privilege, that is to say, when the party has defrauded the rule which confers it, he is a false libeller. The rule is void as to him. What facts work a nullity? It does not follow that, because we allow an action of slander, the defendant should, therefore, be put to justify, as in the ordinary action, by proving the truth. That is not so even as to writings which concern private matters. On its appearing that they are privileged, the defendant is protected under the general issue, until malice is shown. When we come to information, in which not only the interests of the private citizen as related to the country, but those of the nation itself are concerned, the difficulty of turning a case against him wherein he is presented as *prima facie* in the path of honest duty, certainly ought not to be less; and both the prevailing opinions in Thorn v. Blanchard, which was decided by the court of errors, required more. They held that the action, though in form for a libel, was in the nature of a malicious prosecution. *L'Hommedieu*, senator, said the council of appointment being a court, if he might so call it, to hear all complaints against officers, &c., there is an implied protection for the complainants, unless it can be proved that the complaints were malicious. 5 Johns. R. 527. *Clinton*, senator, carried these premises out more distinctly to their consequences. He said it was incumbent on the plaintiff to prove that the petition was *false*,

malicious, and *groundless;* and he goes into the reasons at length, repeating and illustrating the position. Id. 529, et seq.

The case of Gray v. Pentland, before the supreme court of Pennsylvania, was of the same character; and I understand all the judges as admitting that the suit, though in form of a libel, was in the nature of an action for a malicious prosecution: though they do not, like the opinions in Thorn v. Blanchard, throw, in express terms, the *onus* of showing want of probable cause on the plaintiff. Fairman v. Ives, 5 Barn. & Ald. 642, was an action for a libel. The paper complained of was a representation by a creditor of the plaintiff, a half-pay officer, addressed to the secretary at war, charging him with fraudulently evading the payment of a debt. All the court agreed that, if the representation was honestly made, that was a defence under the general issue. *Holroyd*, J., mentioned as an analogous case, words spoken by a barrister in the course of a cause, in which he said, "it may not, perhaps, be sufficient to allege and show even that the words are false and malicious, without also alleging and showing that they were uttered without reasonable or probable cause." *Best*, J., said he did not think there was a sufficient *publication* to support the action; and mentioned the case of Greenwich Hospital; but adds, "if the communication be made maliciously *and without probable cause*," an action will lie. In Vanderzee v. M'Gregor, 12 Wendell, 545, there was a failure to prove either malice or want of probable cause; and the court said the plaintiff could not recover without proving *express malice*. It was unnecessary to go farther. The court professedly acted upon the authority of Thorn v. Blanchard; and they could not mean to imply that you may recover on showing malice, where there appears to have been probable cause, contrary to the strong expressions in that case, nor even to deny that the plaintiff must himself show a want of probable cause. In the principal case, there was nothing to throw a shade of suspicion upon the motive. It was the simple remonstrance of a neighbour against the licensing of a tippling shop, which is, I must say, somewhat unfortunately, still recognised as an object of legal protection, *lucri causa*. It was a call to withhold the privilege of peddling popular poison from hands which were believed to have abused that privilege. It is to be feared that there are too many real, not to say melancholy, causes of personal offence against dealers in alcohol; cases of private suffering which may engender hatred and malice in those who are reached by its influence; and shall their state of mind, where they act upon probable appearances, though mistaken in the fact, be imputed to them as a fraud *per se* upon the protective rule? In Fairman v. Ives, the creditor showed, in his letter to the secretary at war, that he must have been greatly provoked by the apparently mean evasion which the half-

pay officer had practised to avoid the payment of his honest debt; and though it turned out that the creditor was mistaken, the court held him protected by *probable cause*, without regard to his state of mind. He was there personally interested; and the supposed provocation had rankled into a sinister desire to punish the delinquent—express malice of a severe complexion; yet the protective rule was held to be unbroken. In this case, too, as we have seen, Best, J., like Lord Mansfield in the case of Greenwich Hospital, denied that the paper had been *so published* as to make it a libel. That is clearly going farther than did Clinton, senator, in Thorn v. Blanchard; for he thus not only demands the same measure of proof as in action for a malicious prosecution, but the same form of action *mutatis mutandis*, while Thorn v. Blanchard is content with the proof.

If the action is to be regarded as standing on the same footing as the evidence, with one for a malicious prosecution, I need hardly go into the authorities to prove that whatever degree of malice may be shown, it is still necessary to go farther, and establish want of probable cause. The cases of Purcel v. M'Namara, 1 Camp. 199, Incledon v. Berry, id. 203, note (*a*) with id. 206, note (*a*) and the authorities there cited, are full to the point. The cases to the same point are yet more fully collected in 2 Selw. N. P., Philad. ed. 1839, p. 1079, note (2). And *vide per* Nelson, J., in Weaver v. Townsend, 14 Wendell, 193. I confess I am strongly inclined to think that the same quantum of proof is necessary in actions for this class of libels, and that the plaintiff should, therefore, have been nonsuited; although I admit the judge was right in saying there was such proof as might be taken into the consideration of the jury on the question of express malice.

But admitting the *onus* to lie on the defendant, the cases cited agree most clearly, that actions for petitions or remonstrances addressed to the appointing power, being *quasi* for a malicious prosecution, will not lie where it comes out on the whole evidence, that there was probable cause. I refer particularly to Thorn v. Blanchard, and Gray v. Pentland, with the general remark that they are entirely sustained, at least in this, by the whole body of British authority. Adequate references will be found in Thorn v. Blanchard. The marginal notes to Gray v. Pentland state that such libels are "excused if they did not originate in malice *and* without probable cause." Tilghman, Ch. J. there took the view most favourable to the plaintiff, yet remarked: "Anything which satisfies the jury that the proceedings did not originate in malice *and* without probable cause, is sufficient to excuse him." 2 Serg. & Rawle, 30.

At any rate, all the cases which have spoken to the point, hold that probable cause, when shown by the defendant, will make out a complete

defence; or is receivable in mitigation: and so much, at least, was agreed by the learned judge, who tried the cause now before us. It was received in mitigation where the libel was published by the editor of a newspaper against an elective officer, after he had succeeded in his election. Vid. King v. Root, 4 Wendell, 114, 139, 143. Some courts have held that, even in the ordinary action of slander, the defendant may show in mitigation, that a person *told him* what he uttered as a slander, especially where the slander, in terms, professes to be founded on a hearsay. Kennedy v. Gregory, 1 Binn. 85. It will never do to say that where there are circumstances raising strong suspicion of official misconduct, the friends of the officer, or persons indifferent alone, shall come within the protection. It is important that others more ready to complain, should be equally favoured. There is no reason if they bear actual ill will to the plaintiff, why this should remove from them what would be, of itself, a complete shield to the rest of the community. This brings us to the only remaining question in the case.

Suppose I am mistaken as to the *onus*, was there not here proof of probable cause? Or, at least, so much evidence that the judge was not warranted in withdrawing the question for the jury?

The plaintiff himself admits that he took the timber entrusted to him as keeper of the public stores, and converted it to his own use, in building a dwelling-house. The defendant saw, or at any rate was informed of the fact by a neighbour, who suggested that it would be well to communicate the fact to the government. This the defendant did, at the same time drawing his own reference that the act was done fraudulently. Admitting for the present, that the plaintiff had a right thus to convert the timber, can it be said that his conduct was so entirely pure on its face, as to raise no misgivings in the minds of his neighbours? They knew him for a public trustee; and saw him converting to his own use, a portion of what he had in charge. They knew nothing of the manner in which he had acquired a title. Suppose one of them had seen a carrier start with a box of goods; and overtaking him on his way, far from the eye of his bailor, had afterwards seen him in the act of breaking bulk, and selling a part of the goods. Such a juncture of circumstances would, in a court of justice, be *prima facie* evidence of larceny; and could it be said that the spectator would be open to a malicious prosecution should he procure an indictment? If his neighbour, happening to see the same thing, should inform him of it, and urge a prosecution, this would heighten his suspicion. It would operate as an additional cause for the prosecution. Indeed, had he merely heard of the circumstance from the observer, it is by no means certain that he would not be justified in giving information to the magistrate. In Cockayne v. Hodgkisson, before stated, the judge put it to the jury to

say, whether the defendant had been told by a third person what he had communicated in the libel; and whether he believed it; and we have seen that the same thing has been received as mitigating evidence in actions for common libels and slanderous words. It would not differ the case, that the carrier had secretly bought of his bailor, the articles which he took from the box, unless the defendant had been informed of the purchase. Weaver v. Townsend, 14 Wendell, 192, which was a case of malicious prosecution, turned on the fact that the defendant knew the plaintiff had a *prima facie* title to the property, for stealing which the defendant had caused him to be indicted.

I do not see that the case at bar comes materially short of the supposed carrier's, except in the degree of the offence. In that, the circumstances would raise a suspicion of larceny; in this a suspicion of embezzlement. That the act was done openly, is by no means conclusive to the mind, nor has it much force, unless it appear that the owner was present or known by the peculator, to have means of promptly detecting and punishing him. With others it might be regarded as a mere affectation of conscious innocence. If the property taken was trifling in amount, with some, that might lull suspicion, while with others it might increase it, and be considered as an index to greater spoilations. "If," says Washington, J., in Wilmarth v. Mountford, 4 Wash. C. C. R. 79, 84, the plaintiff, "by his folly or his fraud, exposed himself to a well-grounded suspicion, the prosecution had, at least, probable cause for its basis, and this is sufficient to defeat the action."

It appears to me that the judge in this view of the matter was most clearly bound, at least, to have left the question to the jury. If it was to be decided as matter of law, and that is generally so with the question of probable cause, where the facts are undisputed, Dallas J., in Hill v. Yates, 2 B. Moore, 80, 82; Pangburn v. Bull, 1 Wendell, 345; Gorton v. De Angelis, 6 Wendell, 418; then, I think, he should have told the jury that probable cause had been established.

But it is objected that the defendant was too late in his offer to show probable cause, after he had set up on the record, that he would prove the truth. It is a sufficient answer to say that the judge did not think so, and the defence proceeded on the ground that the proof was admissible. If the defendant had been denied that view, *non constat* but he might have pursued his notice of justification by giving farther evidence of its truth. But independent of the course thus taken, we have seen enough to say that the objection is founded on a misapplication of the cases. It is indeed generally true that such a justification, where the defendant fails to prove it, may be used as evidence of express malice; and it is too late to waive it at the trial, and resort to mistake. Patty v. Stetson, 15 Mass. R. 48. Walworth, chancellor, in King v. Root, 4

Wendell, 139, 140. Clinton v. Mitchell, 3 Johns. R. 144. Lent v. Butler, 3 Cowen, 370. But the rule is coextensive with those cases only where probable cause is matter of mitigation merely. In actions for a malicious prosecution, or *quasi* such, where it makes a bar, the reason ceases. It was never held, that because a man pleads in bar specially, or gives notice of special matter, he shall be cut off from another defence which is receivable under the general issue. The contrary has often been held. Levy v. Gadsby, 3 Cranch, 180, 186. Smith v. Gregory, 8 Cowen, 114. Fulton Bank v. Stafford, 2 Wendell, 483. Bradley v. Field, 3 id. 272.

But more. It is not quite easy to see, that on the plaintiff's own showing, his case was exempt from a still stronger view, had the defendant chosen to pursue it. Swartwout, the collector, had given the plaintiff leave to take the timber, and the letters alluded to him as a party to the frauds that were going on. He was called as a witness, but certainly did not make the plainest case of the matter against actual embezzlement. Admitting him to have had a right to sell the timber at auction, or otherwise, for the best price he could get; that did not authorize him to *give*, any more than it did the plaintiff to *take it*, in exchange for an article of mere luxury, or at most, convenience, viz.: the bath house which the plaintiff volunteered to build for the United States. Nor was the manner of payment by any means the most prudent. Telling the plaintiff to carve for himself, till he was satisfied, might certainly have been no more than was due from Mr. Swartwout to him as an honest neighbour, had the timber in question belonged to him in his own right. Holding for the public, it at least laid the proceeding open to invidious remark; nor can I collect that Swartwout took any precaution to limit the amount within the measure of a *quid pro quo*. In short, a *carte blanche* was given to the plaintiff, first for himself, and secondly in favour of the poor inhabitants, for the purposes of fuel. I repeat, that all this might have been very well as a disposition of Mr. Swartwout's own property; but that it was not technical embezzlement when applied to the public property, is by no means clear. It might not have been morally so; but it was an instance of such gross neglect in a few things, as might well lead a citizen, jealous of the public rights, to question whether the same practices had not been extended to many things by the same men. Though itself a "trifle light as air," it disclosed a principle which might have operated as "confirmation strong" that more extensive peculation had been committed in secret, especially when taken in connexion with the late poverty of the plaintiff, his small wages, his extravagant living and the now splendid mansion, in the erection of which he was employing the property of the nation. These things are asserted in the letter, and not contradicted by the proof. I

admit, that in the ordinary action of slander, they would be presumed false. In this we have seen the presumption is reversed, and I therefore mention them.

Had all the circumstances of this case been disclosed to the treasury department, I can hardly believe that its upright, able, and sagacious head would have voluntarily surrendered these letters to be used as evidence. In Gray v. Pentland, the court held that they could not compel the governor to produce the paper, nor would they allow parol evidence to be given of its contents. Being a complaint properly addressed to him as a visitorial magistrate, the court held, upon the ground of policy, that they would not control the exercise of his discretion, nor would they allow its intended effect to be evaded by the introduction of secondary evidence. In this they were fully sustained by the decisions at Westminster Hall, and several cases which might be cited from American books. I know that the right of remonstrance may be abused; and I cannot doubt that the secretary was pressed with what the defendant's counsel admitted at the bar: the great public services and elevated character of the plaintiff. Had the defendant printed and published his remonstrance, the case would have been far different; his privilege then would have been lost. Even the privilege of parliament is forfeited by a member publishing a slanderous speech or a slanderous report. But, for aught that appears, these letters have performed no other office than furnishing a sort of information, vital, above all things, to the safe operation of the fiscal department of the government. At any rate, whatever may be the general merit of the plaintiff, and however innocent he may be in the particular matter, we cannot hold the defendant criminal for thus communicating what the plaintiff has been so unfortunate as to give him probable cause for supposing to be true.

New trial granted.

There are two kinds of defence, which constitute a complete bar to recovery in actions of slander and libel: one, which is called a justification, consists in showing the entire truth of the charge, and this must always be specially pleaded: the other consists in showing such circumstances as take away malice from the utterance or publication, by showing a just occasion and an authorized motive for the speaking or writing: and matter of the latter kind may either be shown under the general issue; *Lillie* v. *Price*, 5 Adolphus & Ellis, 645; *O'Brien* v. *Clement*, 15 Meeson & Welsby, 435, 437; *Woodward* v. *Lander*, 6 Carrington and Payne, 548, 549; *Torrey* v. *Field*, 10 Vermont, 353, 414; *Chapman* v. *Calder*, 2 Harris, 365, 369; or, may be specially pleaded, by showing that the speaking or writing was on a lawful occasion, and was made under a belief of its truth and without malice, or, at least, honestly and *bonâ fide*; *Smith* v. *Thomas*, 2 Bingham's N. C.

372, 381; *Hastings* v. *Lusk*, 22 Wendell, 410, 416; *Dunn* v. *Winters*, 2 Humphreys, 512; *Torrey* v. *Field*. This latter kind of defence is founded upon the consideration, that the business of society could not be conducted without the liberty of speaking and writing, in the honest pursuit of its lawful purposes: see *Howard* v. *Thompson*, 21 Wendell, 320, 324; and it has nothing to do with the truth of the charges, but only with the rightfulness of the occasion, and the integrity of the motive, of their utterance.

(1.) *In regard to a justification.*

When the defendant relies upon the truth of his charge, as a bar to recovery, he must plead it specially, and cannot give it in evidence under the general issue; *Underwood* v. *Parks*, 2 Strange, 1200; *Barns* v. *Webb*, 1 Tyler, 17; *Waggstaff* v. *Ashton*, 1 Harrington, 503, 506; *Henson* v. *Veatch*, 1 Blackford, 370; *Arrington* v. *Jones*, 9 Porter, 139; *Douge* v. *Pearce*, 12 Alabama, 128, 130; *Thompson* v. *Bowers*, 1 Douglass, 322; *Taylor* v. *Robinson*, 29 Maine, 323, 327; *Smith* v. *Smith*, 8 Iredell, 29, 33. "No rule can be more firmly established than that the defendant cannot give in evidence the truth of the imputation, without pleading such truth as a justification. Since the case of *Underwood* v. *Parks*, there has never existed a doubt on the subject." Per Tindal, C. J., in *Manning* v. *Clement*, 7 Bingham, 362, 367.

As this defence is deemed an odious one, the rules in relation to it, are strict. The justification must be of the specific charge in the declaration; and it must be as broad as that charge is; if it go beside it, or fall short of it, it is nought; it must be, in point of law, identical with it: *Weaver* v. *Lloyd*, 2 Barnewall & Cresswell, 678; *Mountney* v. *Walton*, 2 Barnewall & Adolphus, 673; *Smith* v. *Parker*, 13 Meeson & Welsby, 458; *Andrews* v. *Vanduzer*, 11 Johnson, 38; *Sterling* v. *Sherwood*, 20 Id. 204; *Skinner* v. *Powers*, 1 Wendell, 451; *Stillwell* v. *Barter*, 19 Id. 487, 490; *Cooper* v. *Barber*, 24 Id. 105, 107; *Frederitze* v. *Odenwalder*, 2 Yeates, 243; *Stow* v. *Converse*, 4 Connecticut, 18, 33; *Mix* v. *Woodward*, 12 Id. 264, 281; *Torrey* v. *Field*, 10 Vermont, 353; *Gage* v. *Robinson*, 12 Ohio, 250; *Matthews* v. *Davis & wife*, 4 Bibb, 173; *Swann* v. *Rary*, 3 Blackford, 298; *Kent* v. *David*, Id. 301, 303. It is necessary to justify, both, the words, and the actual meaning of them. On the one hand, it is not enough to justify the words, literally; the charge must be justified in its full, legal, and effective sense; *Edsall* v. *Russell*, 5 Scott's New, 801, 814; S. C. 2 Dowling's N. S. 641; *Smith* v. *Packer*, 2 Dowling & Lowndes, 394; *O'Brien* v. *Bryant*, 4 Id. 341; *Fidler* v. *Delavan*, 20 Wendell, 57; *Ricket* v. *Stanley*, 6 Blackford, 169; *Snow* v. *Witcher*, 9 Iredell, 346; and on the other hand, it is not enough merely to justify the sentiment contained in the words; the plea must justify the same words that are in the declaration, or, at least, so many of them as are actionable; *Skinner* v. *Grant*, 12 Vermont, 456, 462. If, however, the plea justify the truth of the material and substantial imputation contained in a libel, it will not become insufficient, because it does not extend to every epithet or term of general abuse which may accompany the imputation; *Morrison* v. *Harmer*, 3 Bingham, N. C. 759, 767. Where a libel is divisible, a part, separable from the rest, may be justified, and "not guilty" pleaded as to the residue; *Clarkson* v. *Lawson*, 6 Bingham, 587; *Clarke* v. *Taylor*, 2 Bingham's N. C. 654, 664; *M'Gregor* v. *Gregory*, 1 Meeson & Welsby, 287.

Although the charge which is made the foundation of the action, is general, a general plea of the truth of the matters set forth in the declaration is not good: the particular acts done by the plaintiff, which the defendant relies upon as constituting the charge, must be set forth, that the court may judge whether the facts warrant the charge which has been made; *J'Anson* v.

Stuart, 1 Term, 748; *Jones* v. *Stevens*, 11 Price, 235; *O'Brien* v. *Clement*, 4 Dowling & Lowndes, 343; *Hickinbotham* v. *Leach*, 2 Dowling, N. S. 270; S. C. 10 Meeson and Welsby, 361; *O'Brien* v. *Clement*, 16 Id. 159, 165; *Van Ness* v. *Hamilton*, 19 Johnson, 349, 368; *Torrey* v. *Field*, 10 Vermont, 353, 408. See, however, *Cooper* v. *Greeley*, 1 Denio, 348, 364.

Where some crime is charged in the slander or libel, and there is a justification of the truth of it, the plea must contain the same degree of certainty and precision, as are required in an indictment for the crime; and must be supported by the same proof that is required on an indictment for the crime. Thus, in regard to a charge of perjury, a justification must show, that the false swearing was in a judicial proceeding, where a lawful oath had been administered, and in a material point, and was absolute and wilful; and the plea must be sustained by the oaths of two witnesses, or by one witness and corroborating circumstances. *Woodbeck* v. *Keller*, 6 Cowen, 118; *Bissell* v. *Cornell*, 24 Wendell, 354, 357; *Hopkins* v. *Smith*, 3 Barbour's Supreme Court, 599, 602; *Steinman* v. *M'Williams*, 6 Barr, 170, 177; *Parke* v. *Blackiston*, 3 Harrington, 373, 378; *M'Glemery* v. *Keller*, 3 Blackford, 488; *Offutt* v. *Earlywine*, 4 Id. 460; *Byrket* v. *Monohon*, 7 Id. 84; *Lanter* v. *M'Ewen*, 8 Id. 495, 496; *Wonderly* v. *Nokes*, Id. 589; *Crandall* v. *Dawson*, 1 Gilman, 556; *Coalter* v. *Stuart*, 2 Yerger, 225; *Jenkins* v. *Cockerman*, 1 Iredell, 309. In New York, Massachusetts, Pennsylvania, and some other states, notice of the special matter may be given with the general issue, with the same effect as if pleaded; and the rule is, that such a notice must contain as distinct an allegation of the grounds of the defence as would be stated in a special plea, although it need not have the technicality of a special plea: it need not partake of the form of a special plea, but all the substantial facts necessary to constitute a good special plea must be averred; *Shepard* v. *Merrill*, 13 Johnson, 475; *Mitchell* v. *Borden*, 8 Wendell, 570; *Bissell* v. *Cornell*, 24 Id. 354, 357; *Brickett* v. *Davis*, 21 Pickering, 404, 406; *Devinells* v. *Aikin*, 2 Tyler, 75; *Thompson* v. *Bowers*, 1 Douglass, 322. The record of the plaintiff's conviction for the crime has been held to be primâ facie evidence of the truth of the plea, if the defendant in the civil action was not a witness on the trial of the indictment; but it is not conclusive evidence of guilt; and is not even admissible, if the party was a witness; *Maybee* v. *Avery*, 18 Johnson, 352; see *Symons* v. *Blake*, 2 Crompton, Meeson & Roscoe, 416. As to the right of the defendant in an action for slander or libel, who has pleaded the truth of the matter, to file a bill of discovery in chancery, and compel his adversary to admit the truth of the allegations in the alleged libel, see *March* v. *Davidson*, 9 Paige, 580. A discovery can never be enforced, where it would render the plaintiff subject to a criminal prosecution, or to a penalty, or forfeiture, or make him infamous.

It is held to be an evidence of malice, and an aggravation of the injury, to file a plea in justification, without being able to support it by adequate proof; *Clark* v. *Binney*, 2 Pickering, 113, 121; *Farley* v. *Ranck*, 3 Watts & Sergeant, 555; *Dewit* v. *Greenfield*, 5 Ohio, 225; *Doss* v. *Jones*, 5 Howard's Mississippi, 158: and the defendant, after spreading on the record a republication of the libel, and reading it to the jury, is, in most courts, not allowed to withdraw it; *Lea & Wife* v. *Robertson*, 1 Stewart, 138; *Rush* v. *Cavanaugh*, 2 Barr, 187, 190. According to the New York practice, he is not allowed to withdraw it, without filing an affidavit of its falsity, or at least, a statement of record, to that

effect; *Clinton* v. *Mitchell*, 3 Johnson, 144; *Lent* v. *Butler*, 3 Cowen, 370; *Root* v. *King*, 7 Id. 613, 633.

In Massachusetts, it had been decided in *Jackson* v. *Stetson et ux.*, 15 Massachusetts, 48, and *Alderman* v. *French*, 1 Pickering, 1, that if a plea of justification was pleaded with the general issue, it dispensed with proof, upon the latter plea, of speaking the words: but this extraordinary departure from established principles was followed nowhere else; see *Wheeler* v. *Robb*, 1 Blackford, 330; *Doss* v. *Jones*, 5 Howard's Mississippi, 158; and it was corrected in Massachusetts, by the statute of 1826, c. 107, Revised Statutes, 608; which provides that in such a case the plea in justification shall not be taken as evidence that the defendant spoke the words; see *Hix* v. *Drury*, 5 Pickering, 296, 302. As to the burden of proof, where the general issue and a justification are pleaded together, see *Sperry* v. *Wilcox*, 1 Metcalf, 267; *Hinchman* v. *Lawson*, 5 Leigh, 695.

2. *In regard to privileged communication.*

Malice is a necessary ingredient in slander and libel, and the declaration usually, though it is not necessary, charges the utterance or publication to have been *malicious;* but the word, as thus used, must be understood in its legal signification, for though in its common acceptation, *malice* means ill-will against a person, in its legal sense it means a wrongful act, done intentionally, without just cause or excuse; and, therefore, every utterance or publication, having the other qualities of slander or libel, if it be wilful and unauthorized, is, in law, malicious: *Bromage* v. *Prosser*, 4 Barnewall & Cresswell, 247, 255; *Cockayne* v. *Hodgkisson*, 5 Carrington & Payne, 543, 548; *Chalmers* v. *Payne*, 2 Crompton, Meeson & Roscoe, 156; *Brown* v. *Croome*, 2 Starkie, 297, 301; *Lewis* v. *Few*, 5 Johnson, 1, 35; *King* v. *Root*, 4 Wendell, 114, 136; *Washburne* v. *Cooke*, 3 Denio, 110, 112; *Dexter et ux.* v. *Spear*, 4 Mason, 115, 117; *Parke* v. *Blackiston*, 3 Harrington, 373, 378; *Layton* v. *Harris*, Id. 406; *Dunn* v. *Winters*, 2 Humphreys, 512; *Shelton* v. *Simmons*, 12 Alabama, 466; *Byrket* v. *Monohon*, 7 Blackford, 84; *Estes* v. *Antrobus*, 1 Missouri, 197: and see the distinction between legal malice as intended in the declaration, and actual malice under St. 3 and 4 Vict., c. 24, s. 2; *Foster* v. *Pointer*, 8 Meeson & Welsby, 395. Any defence, which shows a rightful occasion, and an authorized motive, removes the legal presumption of malice; and matters, thus protected, are called *privileged communications.* The operation of such evidence is this: the showing of a privileged occasion, *primâ facie*, removes the quality of malice, and puts upon the plaintiff a necessity of showing express or actual malice, and if this be proved, the defence entirely fails; see *Child* v. *Affleck*, 9 Barnewall & Cresswell, 403; *Wright* v. *Woodgate*, 2 Crompton, Meeson & Roscoe, 573; *Warr* v. *Jolly*, 6 Carrington & Payne, 497; *Adcock* v. *Marsh*, 8 Iredell, 360; and this express proof of malice appears to consist, in all cases, in showing *mala fides* in the defendant; that is, that the occasion was made use of, colourably, as a pretext for wantonly injuring the plaintiff; and this express malice, being matter of fact and motive, is, upon sufficient evidence, a question for the jury: *Smith* v. *Youmans*, Riley's Law, 88; S. C., 3 Hill's South Carolina, 85; *Hart* v. *Reed*, 1 B. Monroe, 166, 169; *Gray* v. *Pentland*, 4 Sergeant & Rawle, 420, 423; *Flitcraft* v. *Jenks*, 3 Wharton, 158. In some cases, the whole question of privileged communication has been left to the jury; *Blackburn* v. *Blackburn*, 4 Bingham, 395; S. C., 1 Moore & Payne, 33; 3 Carrington & Payne, 146; but there can be no doubt that properly the question, whether the occasion is such as to rebut the inference of malice, if the publication be *bonâ fide*, is one of law, for the court,

and whether *bona fides* existed is one of fact for the jury; per Cresswell and Coltman, Js., in *Coxhead* v. *Richards*, 2 Common Beneh, 569, 584, 600 : but as the proteetion always involves matter of intention and good faith, it is said in *Cooper* v. *Stone*, 24 Wendell, 434, 441, 442, that the question of privileged communication cannot be settled on demurrer to the declaration, but requires the intervention of the jury. Mala fides and actual maliee may be inferred by the jury; *Wright* v. *Woodgate*, 2 Crompton, Meeson & Roseoe, 573; *Hastings* v. *Lusk*, 22 Wendell, 410, 421; either from the faee of the publieation itself; *Wright* v. *Woodgate; Coward* v. *Wellington*, 7 Carrington & Payne, 531, 536; or from extrinsie evidence, which may be of various kinds. The fact that the matter was known to be false, would raise a presumption of maliee, not only primâ facie, but absolutely eonclusive; *Fountain* v. *Boodle*, 3 Queen's Beneh, 5, 11; *Smith* v. *Thomas*, 2 Bingham's New Cases, 372, 382; *Flitcraft* v. *Jenks*, 3 Wharton, 158, 162; *Hastings* v. *Lusk*, 22 Wendell, 410, 416. It is said in *Toogood* v. *Spyring*, 1 Crompton, Meeson & Roseoe, 181, 193, and *Padmore* v. *Lawrence*, 11 Adolphus & Ellis, 380, that the fact of a communication, privileged in its nature, being made in the presence of another, is not of itself sufficient to take away the eharaeter of a privileged eommuuication; but the seeking of sueh an occasion might be evidence of express maliee.

The privilege which protects a communication, it would seem, must result either from some right on the part of the defendant to say what is complained of; see *Hearne* v. *Stowell*, 12 Adolphus & Ellis, 719, 726; or some duty, publie or private, legal or moral, under which he is acting; *Toogood* v. *Spyring*, 1 Crompton, Meeson & Roscoe, 181, 194; *Cockayne* v. *Hodgkisson*, 5 Carrington & Payne, 543, 548; and see *Thorn* v. *Moser*, 1 Denio, 488, 493: and when an occasion of this kind is made out, the question for the jury will be, whether the defendant has acted *bonâ fide*, intending honestly to exereise a right or discharge a duty, or whether he has aeted maliciously with intention to injure the plaintiff: see *Pattison* v. *Jones*, 8 Barnewall & Cresswell, 578.

The eases of privileged communication may be conveniently arranged under three classes, in whieh it will be found that the elements of right and duty sometimes exist separately, and sometimes blended together.

1. Where a communication is required by the interest of the persons to whom it is made, and is reasonably called for, or warranted, by the relation in which the person making it stands to him; and still more, when the matter eoneerns the eommon interest of both; the matter is privileged. Of this nature, are the eases, where the creditor in a continuing guaranty, having been requested by the surety to inform him of any defaults, eommunicated to the surety, and even in very opprobrious terms, information of dishonest dealings in the principal debtor; *Dunman* v. *Bigg*, 1 Campbell, 269, *note;* and where a party addressed a prineipal in regard to his agent's improper management of his affairs, the party himself also having an interest in the affair referred to; *M'Dougall* v. *Claridge*, Id. 267; and where a communieation was made by an agent to his prineipal in regard to the eonduet of a third person eonnected with the business of the ageney, and not going beyond it; *Washburn* v. *Cooke*, 3 Denio, 110; and where a tenant of a nobleman wrote to inform him of his gamekeeper's negleet of duty; *Cockayne* v. *Hodgkisson*, 5 Carrington & Payne, 543, 548; see also *Cleaver* v. *Sarraude*, eited 1 Campbell, 268; and where a letter was written, sineerely and bonâ fide, by a person to his mother-in-law, who was about to marry again, warning her of the bad eharaeter of the man she was about to marry, from an honest wish to save her from

injury; *Todd* v. *Hawkins*, 8 Carrington & Payne, 88, 91; see, also, *Adcock* v. *Marsh*, 8 Iredell, 360; and where answers believed to be true are made to questions put by a person interested in the matter; *Kine* v. *Sewell*, 3 Meeson & Welsby, 297; and where a warning of the insolvency of another is given confidentially to a friend, or in answer to an inquiry; *Hewer* v. *Dawson*, Buller's Nisi Prius, 8; *Vanspike* v. *Cleyson*, Croke Elizabeth, 541; *Smith* v. *Thomas*, 2 Bingham's New Cases, 372, 381.

In this connexion, there has been some doubt as to the circumstances which will warrant a stranger in giving information injurious to the character of another. It seems to be settled, that every one is at liberty to state an opinion, *bonâ fide*, about the character of another when inquired of; *Storrey* v. *Challands*, 8 Carrington & Payne, 234, 236; but in the late cases of *Coxhead* v. *Richards* and *Bennett* v. *Deacon*, 2 Common Bench, 569, and 628, the Court of Common Pleas was equally divided upon the question, whether a stranger is justified in volunteering to give information, injurious to another, to one interested in the knowledge. In *Hart* v. *Reed*, 1 B. Monroe, 166, a letter written confidentially to an employer about the character of his clerk, was held to be privileged; though the writer does not seem to have stood in any special relation to the employer. There is no doubt that if communications injurious to the character of one with whom the person addressed has connexion in business, are made maliciously, they are not protected; *Ward* v. *Smith*, 4 Carrington & Payne, 302, S. C. 6 Bingham, 749; *Godson* v. *Horne*, 3 Moore, 223.

And to this head also may be referred the common case of a letter written, or a statement made, *bonâ fide*, and with belief of its truth, as to the character of a servant, by his former master, to one inquiring about it. "A character *bonâ fide* given of a servant of any description, is a privileged communication, and in giving it, *bona fides* is to be presumed; even though the statement should be untrue in fact, the master will be held justified by the occasion in making it, unless it can be shown to have proceeded from a malicious mind:" per Lord Denman, C. J. in *Fountain* v. *Boodle*, 3 Queen's Bench, 5, 11: *Weatherston* v. *Hawkins*, 1 Term, 110; *Edmondson* v. *Stephenson et ux.*, B. N. P. 8; *Patteson* v. *Jones*, 8 Barnewall & Cresswell, 578; *Child* v. *Affleck*, 9 Id. 403; per Parke, J., in *Cockayne* v. *Hodgkisson;* and per Bayley, J. in *Bromage* v. *Prosser*, 4 Barnewall & Cresswell, 247, 256, 257: and according to Bayley, J. in *Patterson* v. *Jones*, p. 584, the person, giving the character, need not wait until he is asked about it; but if he sees that another is about to take a servant who he believes ought not to be taken, he may put himself in motion, and do some act to induce the other to ask for information: but when a person, officiously, or from malignant motives, gives a bad character of one who has been his servant, and wilfully misstates or exaggerates his misdoings, this will be such express evidence of malice as to make him liable; *Rogers* v. *Clifton*, 3 Bosanquet & Puller, 587, 594. Perhaps, also, to a similar principle belongs the case of matter, not officiously volunteered, but spoken confidentially to a senator of the United States requesting information in relation to the plaintiff's fitness and qualification for an office to which he had been nominated by the President; *Law* v. *Scott*, 5 Harris & Johnson, 438, 458. And perhaps to the same head may be referred the case of something said or written by desire of the plaintiff, in answer to questions from him, which is held to be privileged; *Kerr* v. *Shedden*, 4 Carrington & Payne, 528; *Warr* v. *Jolly*, 6 Id. 497; but see *Thorn* v. *Moser*, 1 Denio, 488. Indeed if the plaintiff had procured the utterance or writing for the

purpose of suing the defendant, no action could be maintained; *Yeates* v. *Reed*, 4 Blackford, 463, 465; *Jones* v. *Chapman*, 5 Id. 88; *King* v. *Waring et ux.*, 5 Espinasse, 13: see, however, *Griffiths* v. *Lewis*, 7 Queen's Bench, 61.

2. Another class of cases, is where matter is spoken or written by one who has a duty to perform to the public, or to individuals, and the speaking or writing is in good faith, and in the belief that it comes within the discharge of that duty. Such is the case of *Bradley* v. *Heath*, 12 Pickering, 163, where one of the selectmen of the town, during an election, at which he was acting in his capacity of a public officer, cried out, as the plaintiff voted, that he had put in two votes: the court here held that evidence was admissible to show that the plaintiff's manner of voting was such as to excite suspicion and justify a belief that he had voted twice; and held the officer justified, on the ground of a duty on his part; and also on the ground that, being uttered before other voters, the words were spoken in good faith to those who had an interest in the communication, and a right to know and act upon the fact stated. And such is the case of the imputation of a crime to one, in the regular course of church discipline, under the rules of the church, with an honest intention and without ill will, which has been held not to be legally malicious; *Jarvis* v. *Hatheway*, 3 Johnson, 180. So also, where a felony has been committed, the expression of a suspicion grounded upon facts, made prudently and confidentially and in good faith, to discreet persons, in consultation, or to persons who are directly or reasonably concerned in duty or interest, to discover the wrongdoer, is privileged; *Grimes* v. *Coyle*, 6 B. Monroe, 301, 303; *Faris* v. *Starke*, 9 Dana, 128.

3. A third class is, where the communication is made in the honest pursuit of the person's own interests, or in necessary self-defence. Thus, a communication by an employer to his overseer having reference to the protection and care of the property committed to his charge, is confidential and privileged; *Easley* v. *Moss*, 9 Alabama, 266, 268. And any one, in a transaction of business or employment with another, has a right to use language, *bonâ fide*, which is relevant to that business or employment, and which a due regard for his own interest makes necessary; but this will not justify defamatory aspersions against character, or wanton and gratuitous charges; *Tuson* v. *Evans*, 12 Adolphus & Ellis, 733; *Toogood* v. *Spyring*, 1 Crompton, Meeson & Roscoe, 181, 193; *Robertson* v. *M'Dougall*, 4 Bingham, 670; and see *Blackham* v. *Pugh*, 2 Common Bench, 611, and *Kine* v. *Sewell*, 3 Meeson & Welsby, 297. A person, however, who has been robbed, has a right, upon reasonable suspicion, to tax the suspected person with the theft, and if not done maliciously, an action will not lie; *Fowler and wife* v. *Homer*, 3 Campbell, 294; and the fact, that this is in the presence of others, will not necessarily take away the protection; *Padmore* v. *Lawrence*, 11 Adolphus & Ellis, 380. It was said also in *Finden* v. *Westlake*, 1 Moody & Malkin, 461, that a publication of the loss of bills of exchange, supposed to be stolen, made in the belief that it was necessary either for purposes of justice, with a view to the discovery and conviction of the thief, or for the protection of the defendant himself against the liability he might be exposed to on the bills, and without malice, would be privileged, though it might tend to implicate certain persons: see also *Stockley* v. *Clement*, 4 Bingham, 162; and *Lay* v. *Lawson*, 4 Adolphus & Ellis, 795.

There is no doubt also that a man has a right to communicate to another any information he is possessed of, in a matter in which they have a common interest; *Shipley* v.

Todhunter, 7 Carrington & Payne, 680. Thus, a bank director would be, primâ facie, justified in communicating, at a meeting of the board, any information which he possessed relating to the solvency of a customer of the bank, and which would probably have an effect on the action of the board, but he would not be authorized to communicate such matters otherwise than in the performance of official service; *Sewell* v. *Catlin*, 3 Wendell, 291.

Many of these cases of the prosecution of one's interest relate to charges against public officers. A letter addressed to the secretary at war, by one having a just claim against an officer in the army, in order to obtain, through the secretary's interference, payment of his claim, has been held privileged, as being an application for redress to one whom the writer honestly thought was competent to afford it; *Fairman* v. *Ives*, 5 Barnewall & Adolphus, 642; and so has a letter to the postmaster-general, or the secretary of the general post-office, complaining of the conduct of a postmaster, written with a view to obtain redress for an injury which the writer believed that he had suffered; *Woodward* v. *Lander*, 6 Carrington & Payne, 548; *Blake* v. *Pilford*, 1 Moody & Robinson, 198. Charges made by a tax payer against a constable of the township at a meeting of tax payers called for the purpose of investigating the subject of an alleged misappropriation of funds by the officer; *Spencer* v. *Amerton*, 1 Moody & Robinson, 470; and remarks made, *bonâ fide*, among members of a congregation, or at a meeting of it, about the character of their minister; *Blackburn* v. *Blackburn*, 4 Bingham, 395; have been considered privileged.

Petitions, letters or addresses of any kind, sent to superior officers or bodies, civil or ecclesiastical, having the power of appointment or removal, in respect to some inferior office or to membership, where the parties, either as citizens or as members of the Society, have an interest in the matter, and containing charges of unfitness or unworthy conduct, in regard to the officer, member, or applicant, though they are in themselves the subjects of an action for libel, are privileged communications; that is, the occasion justifies them, unless the plaintiff prove bad motives and want of probable cause; but if the charges are known to be false, they are malicious, and the question of malice is for the jury: *Thorn* v. *Blanchard*, 5 Johnson, 508; *Vanderzee* v. *McGregor*, 12 Wendell, 545; *Howard* v. *Thompson*, 21 Id. 320; *O'Donaghue* v. *M'Govern*, 23 Id. 26; *Reid* v. *Delorne*, 2 Brevard, 76; *Gray* v. *Pentland*, 2 Sergeant & Rawle, 23; S. C. 4 Id. 420; *Chapman* v. *Calder*, 2 Harris, 365, 369; *Bodwell* v. *Osgood*, 3 Pickering, 379. But publications, by the editors of newspapers, with however good motives, in regard to public officers, or candidates for office, are not privileged; and the publishers can protect themselves only by proving the truth of what they have published; *Root* v. *King*, 7 Cowen, 613; S. C. on error, 4 Wendell, 114; *Usher* v. *Severance*, 20 Maine, 9; see *Harwood* v. *Astley*, 1 New Reports, 47; and a publication of a libel, as the act of a public meeting against a candidate for a public office, is not privileged; *Lewis* v. *Few*, 5 Johnson, 1, 36; nor is a libel on a Roman Catholic priest published in the course of a *bonâ fide* discussion at a public meeting respecting the propriety of supporting the Roman Catholic religion; *Hearne* v. *Stowell*, 12 Adolphus & Ellis, 719, 726. For other similar cases of publications not privileged, see *Getting* v. *Foss*, 3 Carrington & Payne, 160; *Martin* v. *Strong*, 5 Adolphus & Ellis, 535.

But besides the pursuit of one's interest, the defence of one's character or conduct furnishes occasion of privilege; if a man *bonâ fide* write a letter in his own defence or for the defence and protection of his interests and rights, and is not actuated by any

malice, the letter is privileged, although it may impute dishonesty to another; *Coward* v. *Wellington*, 7 Carrington & Payne, 531, 536; and when the plaintiff had charged the defendant, before the church, with having expressed a false or slanderous opinion of him, and the defendant to vindicate himself and show that he had not invented the slander, produced certificates of persons who stated that they had told him the facts which he repeated, it was held that such defence, *bonâ fide* made, was a privileged occasion; *Dunn* v. *Winters*, 2 Humphreys, 512.

If the communication complained of, is, in itself, the institution of a judicial proceeding, for some alleged offence, before a tribunal having jurisdiction, it is not the ground of an action of slander or libel at all, but only of an action of malicious prosecution or maliciously suing out a warrant, in which, bad motives and want of probable cause must be shown; *Howard* v. *Thompson*, 21 Wendell, 320, 325; *O'Donaghue* v. *M'Govern*, 23 Id. 26, 29; *Hartsoek* v. *Reddick*, 6 Blackford, 255; and the same rule has been thought applicable to regular proceedings, or a *bonâ fide* charge, by one member of a church against another member, before an ecclesiastical tribunal competent to try the offence; *Remington* v. *Congdon et al.*, 2 Pickering, 310, 314; *Whitaker* v. *Carter*, 4 Iredell, 461, 468; and see *Chapman* v. *Calder*, 2 Harris, 365, 369; but charges made before such a tribunal against one not a member, but a stranger, not amenable to the jurisdiction, are not privileged; *Coombs* v. *Rose*, 8 Blackford, 156; and charges made before a tribunal having no legal competency to investigate the matter, and with intent to defame, would be actionable as slanders or libels; *Milam* v. *Burnsides*, 1 Brevard, 295.

The distinction between these two kinds of action seems to be that an action for slander or libel will not lie wherever the other can be applied: accordingly, if a charge of felony has been made before a magistrate, and a warrant has not thereupon been issued by him, slander is the only appropriate remedy, and if the charge was not made in good faith, but merely as a pretence to promulgate slander, an action of slander may be maintained for imposing the crime of felony, that is for maliciously and without probable cause charging the plaintiff with felony before a magistrate; *Blizard* v. *Kelly*, 2 Barnewall & Cresswell, 283; *Hill* v. *Miles*, 9 New Hampshire, 12; but if the charge was made in good faith, upon reasonable grounds, and with sincere intention to prosecute the suit, it would no doubt be privileged; *Bunton* v. *Worley*, 4 Bibb, 38; but wherever a warrant has been issued, slander is no longer appropriate, but the action must be for malicious prosecution, or malicious arrest, or maliciously suing out a search warrant; *Vausse* v. *Lee*, 1 Hill's So. Car. 197; *Heyward* v. *Cuthbert*, 4 M'Cord, 354; *Sanders* v. *Rollinson*, 2 Strobhart, 447, 451; *Shock* v. *M'Chesney*, 4 Yeates, 507, (overruling S. C. 2 Id. 473;) see *Glass & another* v. *Stewart*, 10 Sergeant & Rawle, 223, 225.

But, though, where the institution of a suit is the matter complained of, the action must be for malicious prosecution, under some of its forms, yet for matters written or spoken in the course of a cause, an action for slander or libel is the appropriate remedy. But such matters, if pertinent or material, are privileged. The distinction upon the subject is this. Whatever is said or written in the course of a judicial proceeding, civil, military, or ecclesiastical, by a party or by his counsel, (for their privileges are the same,) pertinent and material to the subject in controversy, is privileged, and excludes the legal notion of malice: within that limit, the protection is complete, and the speaker or writer is not liable to an action, however much he may have been animated by ill-will: but if the matter is not pertinent, and

is not uttered bonâ fide, but for the purpose of defaming, the person is without protection, and may be made answerable for slander or libel; *Hodgson* v. *Scarlett*, 1 Barnewall & Alderson, 232; *Flint* v. *Pike*, 4 Barnewall & Cresswell, 473; *Astley* v. *Younge*, 2 Burrow, 807; *Trotman* v. *Dunn*, 4 Campbell, 211; *Ring* v. *Wheeler*, 7 Cowen, 725; *Burlingame* v. *Burlingame*, 8 Id. 141; *Hastings* v. *Lusk*, 22 Wendell, 410; *Lathrop* v. *Hyde*, 25 Id. 448; *Gilbert* v. *The People*, 1 Denio, 42; *Hoar* v. *Wood*, 3 Metcalf, 193; *Warner* v. *Paine*, 2 Sandford's S. Ct., 195; *Eccles* v. *Shannon*, 4 Harrington, 193, 194; *Davis* v. *McNees*, 8 Humphreys, 40; *Mower* v. *Watson*, 11 Vermont, 536, 542; *M'Millan* v. *Birch*, 1 Binney, 178, 186; *Kean* v. *M'Laughlin*, 2 Sergeant & Rawle, 469; *Vigours* v. *Palmer*, 1 Browne, 40; *Badgley* v. *Hedges*, Pennington, 233; *Hardin* v. *Comstock*, 2 Marshall's Kentucky, 480. And this privilege extends not only to parties, counsel, witnesses, jurors and judges, in a judicial proceeding, but also to proceedings in legislative bodies, and to all who, in the discharge of public duty, or the honest pursuit of private right, are compelled to take part in the administration of justice, or in legislation; *Torrey* v. *Field*, 10 Vermont, 353, 413; *Hastings* v. *Lusk*; *Wilson* v. *Collins*, 5 Carrington & Payne, 372; *Jekyll* v. *Moore*, 2 New, 341; see also *Home* v. *Bentinck*, 4 Moore, 563; 2 Broderip & Bingham, 130; as to legislative immunity, see *Coffin* v. *Coffin*, 4 Massachusetts, 1. In *Johnson* v. *Evans*, 2 Espinasse, 32, Lord Eldon held, that words of accusation of a crime, spoken when the person was about to give the defendant in custody to a constable, were privileged: but in *Dancaster* v. *Hewson*, 2 Manning & Ryland, 176, it was decided, that where one who has obtained a search-warrant for goods supposed to be stolen, tells the officer that such an one has robbed him, the remark is not privileged. But there does not seem to be any such distinction in principle between these cases and those of private and confidential communication, as the chancellor in *Hastings* v. *Lusk* supposed. In all cases of privilege, the protection is complete within the range of the privilege, whatever may be the person's motives. In private communications, the privilege is for speaking on a justifiable occasion, that which is really believed to be true: with whatever malignity and ill-will that be done, within the limit of the privilege, the protection is undoubtedly absolute.

It seems to be established, that a fair, candid, and accurate report in the newspapers, *bonâ fide*, of the proceedings in a public court of justice, is not a libel; *Curry* v. *Walter*, 1 Espinasse, 456; 1 Bosanquet & Puller, 525; per Lawrence, J., in *The King* v. *J. Wright*, 8 Term, 293, 298; *Stockdale* v. *Tarte*, 4 Adolphus & Ellis, 1016; *O'Donaghue* v. *M'Govern*, 23 Wendell, 26, 29: but the soundness of this principle has, in some cases, been doubted; see per Abbott, C. J., in *Duncan* v. *Thwaites*, 3 Barnewall & Cresswell, 556, 583; and it is certainly to be applied with caution and strictness; see *M'Gregor* v. *Thwaites*, Id. 24, and *The King* v. *Carlile*, 3 Barnewall & Alderson, 167, and *The King* v. *Creevey*, 1 Maule & Selwyn, 273; and it is not applicable to a proceeding before a justice, by way of preliminary inquiry; *Duncan* v. *Thwaites*. A report of legal proceedings, to be justifiable, must be fair, candid, and true; a garbled or discoloured account, or one mixed up with comments or insinuations, which in effect render the publication a vehicle for slander, is not justifiable; *Stiles* v. *Nokes*, 7 East, 493, 506; *Lewis* v. *Clement*, 3 Barnewall & Alderson, 702; *Delegal* v. *Highley*, 3 Bingham's N. C. 950; *Thomas* v. *Crosswell*, 7 Johnson, 264, 272; and it must be full and impartial; for an ex parte account, as of the statement made by counsel of a party's conduct, is not privileged; *Saunders*

v. *Mills*, 6 Bingham, 213; and a plea of this privilege, which alleges that the matter is 'in substance' a true account, is bad on demurrer, for the report should be true and accurate in all respects; *Flint* v. *Pike*, 4 Barnewall & Cresswell, 473. And, certainly, an editor is not at liberty to publish everything that is said in the course of a trial in a court of justice: he may publish a history of the trial, but is not at liberty to publish observations made by counsel injurious to the character of individuals; for though such observations, as made by counsel in court, would be privileged, the publication of them in the papers would not be; per Bayley, J., in *Flint* v. *Pike*, 4 Barnewall and Cresswell, 473, 480, and in *Lewis* v. *Walter*, 4 Barnewall & Alderson, 605, 613, and in *The King* v. *Creevey*, 1 Maule & Selwyn, 273, 281; *Roberts* v. *Brown*, 10 Bingham, 519; and see *M' Gregor* v. *Thwaites*, 3 Barnewall & Cresswell, 24, 31: much less are remarks of bystanders, or persons whose duty does not call upon them to make them, justifiably published; *Delegal* v. *Highley*, 3 Bingham's N. C. 950, 961: and if blasphemous or indecent matter be brought out on a trial, the publication of it in the newspapers would be indictable; *The King* v. *Carlile*; *The King* v. *Creevey*. It is well settled, that though a defamatory speech made in parliament may be privileged, the publication of the speech in the newspapers will not be; *Rex* v. *Lord Abingdon*, 1 Espinasse, 226; *The King* v. *Creevey*, 1 Maule & Selwyn, 273. As to privilege of parliament, see *Stockdale* v. *Hansard*, 9 Adolphus & Ellis, 1.

Literary criticism is also privileged from the character of libel. Every man who publishes a book commits himself to the judgment of the public, and any one may comment on his performance. Criticisms, however ridiculing, upon books, or upon authors in respect to their books, are not libels: but attacks upon the moral character of the writer, or upon his character unconnected with his authorship, under the pretext of literary criticism, are not protected; *Carr* v. *Hood*, 1 Campbell, 355, *note*; *Tabart* v. *Tipper*, Id. 350; *Macleod* v. *Wakley*, 3 Carrington & Payne, 311, 313; *Frazer* v. *Berkeley*, 7 Id. 621, 625; *Cooper* v. *Stone*, 24 Wendell, 434, 441, 442; see also *Heriot* v. *Stuart*, 1 Espinasse, 437; *Stuart* v. *Lovell*, 2 Starkie, 93. And where a book, or other writing, on a professional subject, is published, though fair, reasonable, and temperate criticisms, even expressed through the medium of ridicule, are allowable, remarks intended, unfairly and maliguantly, to injure the writer in his profession, by imputing ignorance of its principles, would be actionable; *Soane* v. *Knight*, 7 Carrington & Payne, 74; *Dunne* v. *Anderson*, 3 Bingham, 88. So, a fair and temperate criticism on a picture publicly exhibited, which is not intended as a vehicle of personal malignity towards the plaintiff, is not actionable: the question is, whether it is an *honest* criticism and no more, or whether the limits of fair and honest criticism have been exceeded; *Thompson* v. *Shackell*, 1 Moody & Malkin, 187, 188. As to the right of comment upon sermons preached, see *Gathercole* v. *Miall*, 15 Meeson & Welsby, 319.

In *Dibdin* v. *Swan & Bostock*, 1 Espinasse, 28, Lord Kenyon said, that the editor of a public newspaper may fairly and candidly comment on any place or species of public entertainment; but it must be done fairly, and without malice or view to injure or prejudice the proprietor in the eyes of the public: if so done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved, that the comment is unjust, is malevolent, or exceeding the bounds of fair opinion, it is a libel. And if it attack the personal character of the exhibitor, it is libellous; *Green* v. *Chapman*, 4 Bingham, N. C. 92.

In an indictment for a libel, the malice, or malicious intent, required,

is legal malice; *Commonwealth* v. *Blanding*, 3 Pickering, 304, 311; *Commonwealth* v. *Snelling*, 15 Id. 337, 340; which does not consist in personal hatred and ill-will, but is *the wilful doing of an unlawful act; Commonwealth* v. *Bonner*, 9 Metcalf, 410. In an indictment for a libel, the truth, of itself, is not a defence, and cannot be given in evidence; *The State* v. *Lehre*, Constitutional Reports, 1st ser. 809. But "although the truth of the words," said Parsons, C. J., in *Commonwealth* v. *Clap*, 4 Massachusetts, 163, 169, "is no justification in a criminal prosecution for a libel, yet the defendant may repel the charge, by proving that the publication was for a justifiable purpose, and not malicious, nor with the intent to defame any man. And there may be cases, where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, when such evidence will tend to negative the malice and intent to defame. Upon this principle, a man may apply, by complaint, to the legislature to remove an unworthy officer; and if the complaint be true, and made with the honest intention of giving useful information, and not maliciously, or with intent to defame, the complaint will not be a libel. And when any man shall consent to be a candidate for a public office, conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office. And publications of the truth on this subject, with the honest intention of informing the people, are not a libel. For it would be unreasonable to conclude, that the publication of truths, which it is the interest of the people to know, should be an offence against their laws. And every man holding a public elective office may be considered as within this principle; for as a re-election is the only way his constituents can manifest their approbation of his conduct, it is to be presumed that he is consenting to a re-election if he does not disclaim it." And it was said in *Commonwealth* v. *Blanding*, 3 Pickering, 304, 312, that undoubtedly there are other cases besides those thus mentioned by Chief Justice Parsons, as illustrations of the general doctrine, depending on the same principle. In a late case, where this subject was much considered, it is laid down, that if the end of the publication be justifiable, as, if the object is the removal of an incompetent officer, or to prevent the election of an unsuitable person to office, or, generally, to give useful information to the community, or to those who have a right to know, and who ought to know, in order that they may act on the information, the occasion is lawful, and then the party may justify the publication, by showing that it was true, or may excuse it by showing probable cause and good motives; *The State* v. *Burnham*, 9 New Hampshire, 35, 43. See, also, *Commonwealth* v. *Sanderson*, 3 Pennsylvania Law Journal, 269.

In New York, Massachusetts, and several other states, by statute or constitutional provision, the truth may be given in evidence, and is a defence, if published with good motives, and for justifiable ends; see *Commonwealth* v. *Bonner*, 9 Metcalf, 410. In Pennsylvania, by the 7th article of the Declaration of Rights, in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence, and if published from good motives, and justifiable ends, will be a defence; see *Respublica* v. *Dennie*, 4 Yeates, 267; *Commonwealth* v. *Duane*, 1 Binney, 601, and the act of the 16th of March, 1809, there cited.

Of evidence in mitigation and in aggravation of Damages, in Slander and Libel.

GILMAN versus LOWELL.

In the Supreme Court of the State of New York.

ALBANY, JANUARY, 1832.

[REPORTED 8 WENDELL, 573–583.]

In actions of Slander and Libel, mitigating circumstances which have a tendency to prove the truth of the charge, cannot be given in evidence under the general issue, in diminution of damages: but any circumstances of mitigation which disprove malice, but do not tend to prove the truth of the charge, are admissible.

THIS was an action of *slander*, tried at the Clinton circuit in January, 1830, before the Hon. ESEK COWEN, one of the circuit judges.

A witness for the plaintiff testified that in December, 1828, the defendant accused the plaintiff with having *sworn falsely* in regard to some of their business, and said something about *complaining to the grand jury* or attending to the grand jury. In May, 1829, the plaintiff, attended by a friend, called on the defendant and demanded an explanation—the defendant ordered him out of his store; the plaintiff persisted in his demand, when the defendant told him that he had *sworn* before Lynde that a deed was on record, and that he had searched for it, and the clerk had searched for it, and could not find it, and that he would attend to the *grand jury* respecting it. The plaintiff rested, and the defendant moved for a *nonsuit*, insisting that the words spoken were not actionable, without proof of a *colloquium* in regard to some legal proceeding in which *perjury* could be committed. The motion for a nonsuit was overruled. The counsel for the defendant, in opening his defence to the jury, stated that it would be proved that Lowell, the defendant, had recovered a judgment against Gilman, the plaintiff, and one Wood, before Justice Lynde, for a sum exceeding $25; that Lowell asked for an execution to issue forthwith, and made the requisite oath; that Gilman complained that such application was unnecessary, and to show it to be so, made oath voluntarily before the justice that he was a

freeholder and had a deed of land, and that the same was recorded in the clerk's office of the county of Clinton; that Lowell thereupon withdrew his application for an execution, took a transcript of the judgment, filed it in the clerk's office, and requested the clerk to search for the record of the deed to Gilman, so that he might know the premises upon which his judgment would be a lien. That the clerk searched the records and informed Lowell that no such deed was on record; that Lowell requested the clerk to search with great care, stating to him the reason of his particularity; that the clerk made a second search, and again told him there was no such deed on record; that Lowell subsequently caused another search to be made, which was equally unsuccessful. That in fact, however, *the deed was recorded*, but a mistake had occurred in *indexing* the records, and the error was discovered only by the production of the deed to the clerk, from an endorsement on the back of which the time of its record was learnt. Previous, however, to the discovery of the error, Lowell had taken out execution on his judgment, and supposing he had no security on real estate, pressed the collection of it from other property, of which Gilman complained, and the conversations which had been testified to were the consequence, which took place before Lowell had any knowledge of the deed being in fact recorded. To the plea of the general issue put in by the defendant, he had subjoined a *notice*, that on the trial of the cause he would prove, that although the statements made by Gilman in respect to his deed were true, that he held such deed, and that the same was in fact recorded, *yet*, that after such statements by Gilman, and before the speaking of the words, he, Lowell, caused diligent search to be made at the clerk's office for the deed, and that owing to a mistake in the indexing of the records, the record of the deed in question could not be found, and that he, Lowell, was informed by the clerk that it could not be found, and that at the time of the speaking of the words charged in the declaration, he had reason to believe, and did believe, that no such deed was in fact recorded. The evidence thus offered to be given was objected to by the plaintiff, and overruled by the presiding judge. The plaintiff had a verdict for $250, which the defendant now moved to set aside.

S. Stevens, for the defendant. The words in themselves are not actionable, notwithstanding the addition to the charge that the defendant *would complain to the grand jury*. Actionable words are those that convey the charge of perjury in a clear unequivocal manner, and which admit of no uncertainty. Hopkins v. Beedle, 1 Caines, 349. See also 3 Wils. 186. 6 T. R. 194. 1 Rolle's Abr. 70. Cro. Jac. 190. 1 Johns. R. 505. 2 id. 10. Although the party intended to impute a

crime, if the words in legal acceptation do not import the charge of a crime, the speaker is not liable. Cro. Eliz. 416. This principle is fully illustrated in Dexter v. Taber, 12 Johns. R. 239, where the defendant manifestly intended to charge the plaintiff with *felony*, yet because he stated the crime to consist in stealing hoop-poles and saw-logs from off the land of third persons, and the terms being held to be applicable equally to standing as to felled timber, the jury were instructed that they might consider the words as applicable to the former, and if they should so find, that the defendant was not liable; and the instruction thus given to the jury was sanctioned by the court in term. See also Cro. Jac. 446. The law presumes that the bystanders understand the words spoken as the law regards them. The words being spoken in reference to a particular transaction, and so stated at the time, it was incumbent on the plaintiff to have shown that in the transaction alluded to, the crime of perjury might have been committed, that is, that the swearing was of that kind, that if a party swore false, he might by law be punished for perjury. 13 Johns. R. 81. 20 id. 388. 9 Cowen, 30. 1 Wendell, 475. 4 id. 531. At all events, the evidence offered by the defendant should have been received in mitigation of damages.

B. F. Butler, for the plaintiff. The rule laid down in Hopkins v. Beedle, 1 Caines, 329, prevails no more, either here or in England. Slanderous words, it is now conceded, are to be understood according to their natural import, and as ordinary hearers would understand them. 6 Cowen, 87. See also 5 id. 503. 2 Wendell, 536. 4 id. 325. 3 Cowen, 331. By adding to the charge of false swearing, that he would complain to the grand jury, the bystanders were given to understand that the defendant imputed to the plaintiff an indictable offence. Such was the construction given by the court in Fox v. Vanderbeck, 5 Cowen, 513, to the words there spoken; the defendant interrupted the plaintiff while testifying, and told him it was not so, and requested the justice to keep the minutes of his testimony, as he wanted them to prosecute for perjury. If the words were actionable, it was not necessary to prove that they were spoken in reference to a transaction in which the crime imputed might be committed; the cases cited in support of the defendant's position were cases of words not actionable.

Was the evidence offered in mitigation admissible? The injury to the plaintiff is as great where the defendant believes the charge to be true which he makes, as where he knows it to be false. See the cases stated by Chancellor Walworth, in King v. Root, 4 Wendell, 137, and his comments upon them. The belief of the defendant in the truth of the charge is no bar, nor can it be given in evidence in mitigation, unless where the plaintiff has given evidence in aggravation. For

privileged communications, as in giving the character of a servant, no action lies, unless *express malice* is shown; and where evidence in such cases is given to show malice, the defendant may rebut it by proof, to show that he had reason to believe what he asserted. In ordinary cases of slander, the false speaking of the words shows malice; the law implies malice, and the defendant cannot rebut the conclusion. If the evidence of the belief of the defendant is at all admissible, it can be received only under a special plea admitting the falsehood of the charge. 1 Pickering, 19.

By the court, SAVAGE, Ch. J. There are two questions presented in this case: 1. Whether the words proved are actionable in themselves; 2. Whether the evidence offered in mitigation should have been received.

Whether the words are actionable or not, depends on the question whether they convey to the hearer the charge of perjury. "Actionable words are those that convey the charge of perjury in a clear unequivocal manner, and which admit of no uncertainty." To say, "You have sworn to a lie," is not actionable, for it may mean extra-judicial swearing. 1 Caines, 347, 9. To say of another that "he has sworn falsely; he has taken a false oath against me in Squire Jamison's court," is not actionable, there being no colloquium about that court, or any cause pending there, and no averment that Jamison had authority to hold a court in which an oath might be judicially administered. But where it appears that a lawful oath was administered in a court of law, and the witness is contradicted when testifying to a material point, and it is so averred in the declaration, an action lies. 6 Johns. R. 82. Where the charge is *perjury*, it will be intended that it was in some court of justice, or before some officer where perjury might be committed; "but for a charge of false swearing, no action lies, unless the declaration shows that the speaking of the words had a reference to a judicial court or proceeding." 2 Johns. R. 10, 12. 1 Id. 505. 1 Bin. 573. 2 Id. 60. It is well settled that words are to be understood according to their natural import, and as ordinary hearers would understand them. 6 Cowen, 87. And in Fox v. Vanderbeck, 5 Cowen, 513, words like those charged in this declaration and proved, were held to convey the charge of perjury. In that case, while the plaintiff was testifying before a justice, the defendant interrupted him, and told him it was not so. The defendant also requested the justice to keep minutes, saying he wanted them to prosecute for perjury; or he wanted them to go to some lawyer, to prosecute the plaintiff. Sutherland, justice, in giving the opinion of the court, says, "The words are actionable, they are calculated to convey to the mind of an ordinary hearer the

imputation of the crime of perjury." In this case there was a distinct charge of false swearing, followed by a threat that the defendant would complain to the grand jury, or attend to the grand jury respecting it. Why complain to the grand jury, but to procure an indictment? And why indict for false swearing, unless perjury has been committed? A person is not punishable for false swearing, unless he has committed perjury. An intimation, therefore, that the plaintiff was indictable for swearing false, necessarily contains an assertion that he has committed the crime of perjury. On the first point, therefore, I think the circuit judge was correct in deciding that the words taken all together, contained a charge of perjury, and are actionable.(*a*)

The next inquiry is, whether the judge was right in rejecting the evidence offered in mitigation. What facts and circumstances shall be given in evidence under the general issue in mitigation of damages, is a question not free from difficulty. The subject was considered by this court in the case of Root v. King, 7 Cowen, 613. The action is founded in supposed damage to the plaintiff, arising from the malice of the defendant. Where words are actionable in themselves, neither the damage nor the malice are required to be proved; the speaking of the slanderous words is all the proof necessary; the damage on the one hand, and the malice on the other, are both necessary consequences, and the action is therefore sustained; but in estimating the damages which the one has received, and the other should pay, various circumstances are legitimate subjects of consideration. If the plaintiff is a person of tarnished reputation, he cannot have received much damage; and the defendant should be punished according to the degree of malice by which he was actuated; the general character of the plaintiff is therefore a proper subject of investigation, in ascertaining the amount which the plaintiff is entitled to recover; and generally speaking, the defendant should pay in proportion to the quantum of malice by which he has been actuated. These remarks are not applicable to a plea of justification, because, if the defendant can prove the truth of the words spoken, no action lies, however malicious his motives may have been.

Before the case of Underwood v. Parks, Str. 1200, under the plea of the general issue, the defendant might avail himself of any defence. It was then decided that if the defendant intended to justify, he must plead his justification, that the plaintiff might know what defence he

(*a*) Where the words were, "Thou art a forsworn man; I will teach thee the price of an oath, and will set thee on the pillory," they were held actionable, because the defendant showed that he meant to impute a perjury, for which the plaintiff ought to stand in the pillory. 1 Viner's Abr. 407, pl. 71. So, to say of another, "You swore to a lie, for which you now stand indicted," was held to be actionable. Pelton v. Ward, 3 Caines, 73.

was to meet. According to some recent nisi prius cases in England, it seems that the defendant, under the general issue, may prove anything short of a justification—suspicious circumstances and slanderous reports of the same character with the words spoken, though the judges who admit this testimony concede that they cannot reconcile it with correct principles; nor is it thought to be consistent with the rule established in Underwood v. Parks. Those late decisions are not authority in this country, and courts in different states have established rules for themselves, where the legislatures have not done it. From the current of decisions in this state it is settled that the defendant may justify, if he chooses, but if he does so, he admits the malice on his part, and of course can resort to no defence which is based upon the absence of malice. It results from this principle, I think, that where a defendant is prosecuted for words, he has two courses before him in shaping his defence: the one to justify; if he succeeds in his justification, he is of course exonerated from all liability; if he fails, the attempt to justify enhances damages. The other course is to show his innocence, either by a total denial, or by showing circumstances which prove his motives to have been innocent. If he takes the latter course, and undertakes to show his innocence, he ought not to inculpate the plaintiff; by declining to justify, he virtually admits that he cannot do so, and of course the truth of the charges is abandoned; he ought not then to be permitted to do indirectly what he dare not do directly. Under the influence of these considerations, we intimated in Root v. King, 7 Cowen, 633, that the true rule was that the defendant may, under the general issue alone, show anything which repels the presumption of malice, and does not imply the truth of the charge, or tend to prove it true. That reports of a similar character were prevalent in the neighbourhood, might show a less degree of malice in the defendant, but they have a tendency to prove the truth, and are, therefore, inadmissible; not that reports are testimony to convict of a crime, but they destroy reputation, and have in part, the same effect as proof. It often happens that reports, prejudicial to the plaintiff, have prevailed extensively, before he commences a suit; and the fact that his character is suffering from those reports unmerited opprobrium, drives him to a prosecution. If, then, he is to be met by those reports, and only allowed a nominal verdict, which is about equal to a verdict against him, "he had better," in the language of Chief Justice Parsons, 6 Mass. R. 518, which I have before quoted in Matson v. Bush, 5 Cowen, 500, "sink privately under the weight of unmerited calumny, lest by attempting his justification, he should give notoriety to slanders which had before been circulated in whispers." Whether the plaintiff's rank and condition in life may be shown either to enhance or diminish the damages, it is unnecessary

now to decide; but I may be permitted to say that it is so held in Massachusetts, Larned v. Buffinton, 3 Mass. R. 552; and it is not perceived that this principle has any necessary connexion with the question of malice; it is proper, under the head of inquiry into general character. Persons in different stations would be differently damnified by the same slanders.

In Larned v. Buffinton, the case last cited, Chief Justice Parsons says, "Where, through the fault of the plaintiff, the defendant, as well at the time of speaking the words, as when he pleaded his justification, had good cause to believe they were true, it appears reasonable that the jury should take into consideration this misconduct of the plaintiff, to mitigate the damages." In Alderman v. French, 1 Pick. 19, this dictum is denied, unless the defendant admits he was mistaken, and thus afford all the relief he can against the calumny which he has published. In Bodwell v. Levan, 3 Pick. 377, evidence was rejected which had a tendency to prove the truth of the words; and in Warmouth v. Cramer, 3 Wendell, 396, it was held, that particular facts which might form links in the chain of circumstantial evidence against the plaintiff, cannot be received under the general issue, in mitigation of damages. In that case there was a charge of theft, and the defendant offered to prove, that after a prosecution against another person, the plaintiff sent home the stolen property; the possession of the property would be a link in the chain of circumstances to convict the plaintiff, and therefore it was rejected. In South Carolina, it seems, that facts and circumstances showing a ground of suspicion may be shown in mitigation, though not amounting to actual proof. Buford v. M'Luny, 1 Nott & M'Cord, 268. In Virginia such circumstances are not permitted in mitigation. In Cheatwood v. Mayo, the defendant had called the plaintiff a "hog-thief." The defendant offered to prove by a witness, that he, the witness, had lost a hog, and charged plaintiff's slave, and applied to the plaintiff on the subject; when plaintiff acknowledged that such a hog had been killed at his house, and agreed it was W.'s hog; but it was rejected in the supreme court of Amherst, and affirmed in the supreme court of appeals. 5 Munford, 16. The same principle is found in McAlexander v. Harris, 6 Mun. 465. In Connecticut, Chief Justice Hosmer, in Hyde v. Bailey, 3 Conn. R. 466, says, that "the defendant on the general issue, may prove, in mitigation of damages, such facts and circumstances as show a ground of suspicion not amounting to actual proof of the guilt of the plaintiff," and relies on Knobell v. Fuller, and —— v. Moor, 1 Maule & Sel. 285. In Treat v. Browning, 4 Conn. R. 414, the same learned judge enters more at large into the subject, and considers several cases; on the question of admitting reports, he limits their admission only as proof of *character*, and says,

"if the evidence went beyond the proof of reputation, it should have been rejected, as there had been no notice of an intended justification." He adds, that they are hearsay only, and evincive of character; and that "on a critical examination it is apparent that the cases which have sanctioned the admission of general reports have not gone beyond these bounds," and cites 2 Campb. 251, and —— v. Moor, 1 Maule & Sel. 285. If those cases go no further, they are not objectionable; but they have been considered here as sanctioning the giving in evidence of the specific reports, without answering to the question of the plaintiff's general character. Chief Justice Hosmer cites with approbation the language of Smith, justice, in Kennedy v. Gregory, 1 Bin. 85, where he says, "I challenge ingenuity to point out one evil which would result from such evidence being given, as matter of justification without notice, which would not follow to almost the same degree were it allowed in mitigation of damages;" and adds, "and I am incapable of resisting the same conclusion; when I consider the case on principle, I am strongly impelled to the opinion that the offered testimony was rightly rejected. The argument for its admission proceeds on the ground that the evidence would diminish the presumption of malice, and of consequence, lessen the damages. It is an indisputable truth that evidence which falls short of a justification may be competent to mitigate damages; and that to this end such facts and circumstances as show a ground of suspicion, not amounting to actual proof of guilt, are admissible in evidence;" citing Knobell v. Fuller, Peake's Evidence.

It will be found that in all the American courts, where facts and circumstances of suspicion are permitted in mitigation, they are admitted on the strength of the English nisi prius cases above referred to, in one of which Chief Justice Mansfield frankly admits that he could not answer the arguments against it. Chief Justice Hosmer virtually says it is inadmissible upon principle, but upon authority it is. Mr. Starkie, in his Treatise on Slander, 408, 9, 10, in commenting on these cases, thinks the rule that any matters short of actual proof are admissible in mitigation, is inconsistent with the rule in Underwood v. Parks, that the truth should not be given in evidence without a special plea. General evidence as to the plaintiff's *suspicious character*, he thinks proper; but not facts tending to show *actual guilt*. These cases show that learned jurists in this country and in England, who have admitted evidence of reports and of suspicious circumstances, have done so upon what they considered authority, and not because they are admissible upon principle. The more I have considered this subject, the more I am convinced that the supreme court of Massachusetts and this court have proceeded upon the only correct rule, in excluding, under the general issue, all mitigating circumstances which have a tendency to prove, what

cannot be proved under such a plea, the truth of the words; but that any circumstances of mitigation which *disprove malice*, but do not tend to prove the truth of the charge, are admissible. This was the point in Mapes v. Weeks, 4 Wendell, 662.

These remarks are rather a discussion of the general question of mitigation (into which I have been led by the ingenious arguments of counsel) than of the precise question in this case; that question, in my apprehension is, whether the facts offered to be shown would disprove malice, and would not tend to prove the truth of the charge of false swearing. The words were that the plantiff had sworn falsely, that he had sworn before Lynde to that which defendant could not find on record, and that he would attend to the grand jury respecting it. The defendant in his notice disclaims all intention to prove the truth, and admits that what the plaintiff swore was true, but to show that what he said was not spoken through wantonness and malice, he offers to prove that he made search in the clerk's office, and no such deed could be found, owing to a mistake of the clerk in indexing the records; what was offered to be shown certainly could not tend to prove the truth, when the defendant admits in his notice, that the words were untrue; and it seems to me they go far to diminish the *quantum* of malice; perhaps they show as far as can be done, the absence of malice. The plaintiff, however, must recover, for the speaking actionable words is sufficient evidence of malice to sustain the action; but the facts offered to be proved show that the defendant really believed that he had been deceived by the plaintiff, and was in danger of losing his debt, and that he did not make the charge until more than one search had been made at the clerk's office; and when this is taken in connexion with the proof in the cause, that on one occasion the language was drawn from the defendant by the provocation of the plaintiff, who went to defendant's store with a witness with intent to draw from him words upon which he might prosecute, I think the evidence peculiarly proper. I am of opinion that a new trial be granted, costs to abide the event.

When the cause of action in slander or libel has been established, the parties may proceed to give evidence in aggravation or mitigation of damages. Such evidence generally has relation either to the character and condition of the parties, or the *degree* of malice which entered into the slander; for though actionable words, of themselves, imply in law malice, sufficient to maintain the suit and entitle the plaintiff to a verdict, yet there are degrees of malice, and upon them the amount of damages depends: see *Rigden* v. *Wolcott*, 6 Gill & Johnson, 413, 417.

As the injury done to the plaintiff's character is the legal measure of damages, the defendant, in diminution of

damages, may always give evidence under the general issue, of the *general* bad character of the plaintiff, before and at the time of the publication of the slander or libel, but not afterwards; and the jury will estimate the damages in relation to the actual value of the plaintiff's character; *Paddock* v. *Salisbury*, 2 Cowen, 811; *Douglass* v. *Tousey*, 2 Wendell, 352; per the Chancellor, in *King* v. *Root*, 4 Id. 114, 139; *Gilman* v. *Lowell*, 8 Id. 573, 578; *Hamer* v. *McFarlin*, 4 Denio, 509, 510; *Lamos* v. *Snell*, 6 New Hampshire, 414; *Flint* v. *Clark*, 13 Connecticut, 362, 368; *Wolcott* v. *Hall*, 6 Massachusetts, 514, 518; *Bodwell* v. *Swan et ux.*, 3 Pickering, 376, 378; *Bowen* v. *Hall*, 20 Vermont, 232; *Lincoln* v. *Chrisman*, 10 Leigh, 338; *Waters* v. *Jones*, 3 Porter, 442, 450; *Bradley* v. *Gibson*, 9 Alabama, 406, 408; *Eastman* v. *Caldwell*, 2 Bibb, 21, 24; *McGee* v. *Sodusky*, 5 J. J. Marshall, 185, 186; *Goodbread* v. *Ledbetter*, 1 Devereux & Battle, 12; *Woods* v. *Anderson*, 5 Blackford, 598; *Burke* v. *Miller*, 6 Id. 155, 157; *Buford* v. *McLuny*, 1 Nott & M'Cord, 268; (and see *Freeman* v. *Price*, 2 Bailey, 115; *Williams* v. *Haig*, 3 Richardson, 362;) *Henry* v. *Norwood*, 4 Watts, 347, 350; (but see, per Kennedy, in *Smith* v. *Buckecker & wife*, 4 Rawle, 295, 296:) and there seems to be no doubt that this may be done where a justification has been pleaded with the general issue; *Stone* v. *Varney*, 7 Metcalf, 86; *Steinman* v. *McWilliams*, 6 Barr, 170, 174; *Dewit* v. *Greenfield*, 5 Ohio, 225; *Young* v. *Bennett*, 4 Scammon, 43, 47, 48; *Hamer* v. *McFarlin*, 4 Denio, 509; per the Chancellor in *King* v. *Root*, 4 Wendell, 114, 140; *Vick* v. *Whitfield*, 2 Haywood, 222; *Bowen* v. *Hall*, 20 Vermont, 232. But evidence of particular facts in discredit of character, whether of the same nature with the matter charged, or of a distinct kind, or of bad character in other respects than in the matter charged, cannot be given; *Lamos* v. *Snell*; *Sawyer* v. *Eifert*, 2 Nott & M'Cord, 511; *Randall* v. *Holsenbake*, 3 Hill's So. Car. 175, 177; (and see *Freeman* v. *Price*;) *Fisher* v. *Patterson*, 14 Ohio, 418, 425; *Ridley* v. *Perry*, 16 Maine, 21; *Smith* v. *Buckecker & wife*, 4 Rawle, 295; *Long* v. *Brougher*, 5 Watts, 439; *Bowen* v. *Hall*, 20 Vermont, 232. In some of the states, evidence of the plaintiff's bad character in relation to the particular fault charged, is held admissible; *M'Nutt* v. *Young*, 8 Leigh, 542; *Anthony* v. *Stephens*, 1 Missouri, 253; *M'Cabe* v. *Platter*, 6 Blackford, 405; *Buford* v. *M'Luny*, 1 Nott & M'Cord, 268, 271; and see *Regnier* v. *Cabot*, 2 Gilman, 34, 40; but in *Jones* v. *Stevens*, 11 Price, 235, which was an action by an attorney for slander of his professional character, the court of exchequer decided that evidence of the plaintiff's bad character and repute in his profession was inadmissible; and this case was approved of in *Parke* v. *Blackiston*, 3 Harrington, 373, 375; and in Pennsylvania it is decided that it is only character in its most general sense, that can be given in evidence; *Steinman* v. *M'Williams*, 6 Barr, 170; see *Saunders* v. *Mills*, 7 Bingham, 213, 223.

In regard to the admissibility of evidence to diminish damages by showing the absence of malice, it has been made a consequence of the rule requiring the truth to be specially pleaded, that the truth cannot be given in evidence under the general issue in mitigation of damages; *Van Ankin* v. *Westfall*, 14 Johnson, 233, 234; *Shepard* v. *Miller*, 13 Id. 475, 477; *Hyde* v. *Bailey*, 3 Connecticut, 463, 466; *Taylor* v. *Robinson*, 29 Maine, 323, 327; *Smith* v. *Smith*, 8 Iredell, 29, 34; *Koy* v. *Frediyal*, 5 Barr, 221, 223; *Arrington* v. *Jones*, 9 Porter, 139; *Henson* v. *Veatch*, 1 Blackford, 369, 371; (but see *Moseley* v. *Moss*, 6 Grattan, 534,) nor any facts which tend to prove the truth and to criminate the plaintiff, or which form a link in a chain of evidence to prove a justi-

fication; the rule excluding everything that would be competent evidence under a plea of justification; *Dennis* v. *Pawling*, 12 Viner's Abr. 159, pl. 16; *Root* v. *King*, 7 Cowen, 613, 634; *Wormouth* v. *Cramer*, 3 Wendell, 395; *Henry* v. *Norwood*, 4 Watts, 347, 349; *Petrie* v. *Rose*, 5 Watts & Sergeant, 364, 366; *Waggstaff* v. *Ashton*, 1 Harrington, 503, 506; *Parke* v. *Blackiston*, 3 Id. 373, 379; *Eagan* v. *Gantt*, 1 McMullan, 468; *Burke* v. *Miller*, 6 Blackford, 155; *Hart* v. *Reed*, 1 B. Monroe, 166, 171; *Thompson* v. *Bowers*, 1 Douglass, 322, 325; *Scott* v. *McKinnish & wife*, 15 Alabama, 662, 666; nor of any fact which would be evidence to prove a justification of any part of the libel, because the defendant ought to justify as to that part; *Vessey* v. *Pike*, 3 Carrington & Payne. And the New York cases lay down the general principle, that evidence going only to the damages, must be such as fully admits the charge to be false; *Cooper* v. *Barber*, 24 Wendell, 105, 108. There are *dicta* however, laying down the general rule, that circumstances which disprove malice, and do not tend to prove the truth, are admissible in mitigation of damages; dicta in *Gilman* v. *Lowell*, 8 Wendell, 573; *Reynier* v. *Cabot*, 2 Gilman, 34, 39; *Bailey* v. *Hyde*, 3 Connecticut, 463, 466; *Calloway* v. *Meddleton*, 2 Marshall, 372; (see, however, *M'Gee* v. *Sodusky*, 5 J. J. Marshall, 185, 186, and *Hart* v. *Reed*, 1 B. Monroe, 166, 172;) *Sims* v. *Kinder*, 1 Carrington & Payne, 279; and in some other cases, the rule has been expressed to be that the defendant "may prove under the general issue, by way of excuse, anything short of a justification, which does not necessarily imply the truth of the charge or tend to prove it true, but which rebuts the presumption of malice;" *Root* v. *King*, 7 Cowen 613, 633; *Wormouth* v. *Cramer*, 3 Wendell, 395, 397; *Arrington* v. *Jones*, 9 Porter, 139, 142; *Beehler* v. *Steever*, 2 Wharton, 314, 326. But it would be very unsafe to rely upon this as a general rule: it has, indeed, only a very limited and special application: "facts which tend to diminish the presumption of *malice*, are *sometimes* competent proof;" says Hosmer, C. J., in *Treat* v. *Browning*, 4 Connecticut, 409, 416, 417; "but it cannot be a correct principle, that evidence which diminishes the presumption of malice, is *always* admissible." The case in which, chiefly, the principle has been supposed applicable, relates to the admission of circumstances showing a reasonable ground of belief or suspicion. Circumstances disclosing a ground of suspicion, were admitted in mitigation of damages, by Eyre, C. J., in *Knobell* v. *Fuller*, Peake's Additional Cases, 139, under the principle that "the defendant might, in mitigation of damages, give any evidence short of such as would be a complete defence to the action, had a justification been pleaded." And the practice in some of the states, at least in Connecticut, Maryland and Ohio, has gone to the same extent; that is to say, if the defendant at the trial admits that he was mistaken, and disclaims all intention to rely on the truth, facts and circumstances showing a reasonable ground of belief at the time of the speaking, but not amounting to proof of the truth, may be given in evidence to repel the presumption of malice, and mitigate damages: the circumstances of their *tending* to prove the truth, not being sufficient to exclude them, if they fall short of proving it; *Williams* v. *Miner*, 18 Connecticut, 464; *Rigden* v. *Wolcott*, 6 Gill & Johnson, 413; *Wilson* v. *Apple*, 3 Ohio, 270; *Wilson* v. *Runyon*, Wright, 651, 653: but in some other states, for example, New York, Delaware and Pennsylvania, the principle is strictly qualified by the limitation, that the evidence must be such as does not tend to prove the truth of the charge: and it is held, that facts and circumstances which induced the defendant to suppose the charge true at the time it was made, cannot be

given in evidence in mitigation of damages, when not accompanied with the disclosure of new circumstances, explaining the others, and removing the presumption which they had created; because facts which were sufficient to induce the defendant to suppose the charges true, would be circumstantial evidence of their truth to the jury, and would tend to a justification; and this is enforced where the defendant expressly admits, even by a disclaimer filed of record, that the charge was wholly false and groundless; *Purple* v. *Horton*, 13 Wendell, 10, 25; *Cooper* v. *Barber*, 24 Id. 105, 108; *Waggstaff* v. *Ashton*, 1 Harrington, 503; *Petrie* v. *Rose*, 5 Watts & Sergeant, 364, 366; (which of course controls *Williams* v. *Mayer*, 1 Binney, 92, *note*, and *Beehler* v. *Stoever*, 2 Wharton, 314, 326;) *Kay* v. *Fredigal*, 3 Barr, 221, 223; *Minesinger* v. *Kerr*, 9 Id. 312; *Updegrove* v. *Zimmerman*, 1 Harris, 619; *Chapman* v. *Calder*, 2 Id. 365, 367; but if the evidence itself shows that the charge was a mistake, circumstances establishing the integrity of this mistaken belief, are held admissible; thus, on a charge of perjury, for swearing that a deed was on record, evidence that though the deed was in fact on record, the defendant after the plaintiff's oath, and before his own words were uttered, had caused diligent search to be made for the deed at the clerk's office, and that owing to a mistake in the indexing of the records, it could not be found, and the defendant was informed by the clerk that it could not be found, was decided to be proper in mitigation; *Gilman* v. *Lowell*, 8 Wendell, 573. In Kentucky, however, it has been laid down that the rule authorizing the admission of facts and circumstances in mitigation, must be circumscribed to such evidence as may tend to diminish the injury which would result by implication of law from the slander, without any such mitigating testimony; and that consequently it does not allow proof of facts which may tend to show, merely that the defendant had reasonable grounds for believing the charge when he uttered it, but only of such facts as may show the nature and extent of the injury which the plaintiff suffered; *McGee* v. *Sodusky*, 5 J. J. Marshall, 185, 186; *Hart* v. *Reed*, 1 B. Monroe, 166, 172; and see also, *Grimes* v. *Coyle*, 6 Id. 301, 303: and in Virginia it appears to be decided that circumstances showing probable ground of suspicion are not admissible in evidence; *Cheatwood* v. *Mayo*, 5 Munford, 16; *M'Alexander* v. *Harris*, 6 Id. 465. In South Carolina, the admissibility of such evidence, though frequently taken for granted, does not appear ever to have been decided: in *Buford* v. *McLuny*, 1 Nott & M'Cord, 268, where the point decided was that bad character, not only generally, but in respect to the particular matter charged, was admissible in evidence, there was a *dictum* quoted from English cases, that facts and circumstances showing ground of suspicion, not amounting to evidence of guilt, are admissible: and though this has been repeated in the later cases, as a dictum, it has been treated with so much disfavour, that it can hardly be said that the principle is established in South Carolina; see *Randall* v. *Holsenbake*, 3 Hill's S. C., 175; *Freeman* v. *Price*, 2 Bailey, 115; *Poppenheim* v. *Wilkes*, 1 Strobhart, 275.

Whether previous reports of the plaintiff's having been guilty of the offence charged, are admissible, either as affecting his character, or as rebutting the presumption of malice, has been greatly disputed. In *Leicester* v. *Walter*, 2 Campbell, 251, and —— v. *Moor*, 1 Maule & Selwyn, 285, general reports of the plaintiff having been guilty of the matter charged, were reluctantly admitted; but these cases were doubted or disapproved by Lord Tenterden, in *Waithman* v. *Weaver*, 11 Price, 257, *note*, and such evidence is said to have been rejected by Lord Abinger, in *Wolmer* v. *Latimer*,

1 Jurist, 119; see also *Saunders* v. *Mills*, 6 Bingham, 213, 224. The two former cases went entirely upon the ground that the reports formed a part of the general character, in regard to the particular matters charged; (and such is the view taken of these cases in *Alderman* v. *French*, 1 Pickering, 1, 18; *Paddock* v. *Salisbury*, 2 Cowen, 811; *Gilman* v. *Lowell*, 8 Wendell, 573, 581; and *Ridley* v. *Perry*, 16 Maine, 21;) and in like manner, in Alabama, the courts have been inclined to think that, after the plaintiff's general character has been shown to be bad, reports in general circulation as to his guilt, may be admissible, to show how far his character has been damaged; *Bradley* v. *Gibson*, 9 Alabama, 406; *Shelton* v. *Simmons*, 13 Id. 467, 468; and in Kentucky, the rule seems to be the same, that general suspicion is admissible in mitigation of damages, on the ground of its affecting character, and showing that the plaintiff has not been so much damnified; *McGee* v. *Sodusky*, 5 J. J. Marshall, 185, and *Hart* v. *Reed*, 1 B. Monroe, 166, 172, apparently limiting *Calloway* v. *Middleton*, 2 Marshall, 372; and see also to a similar effect, *Treat* v. *Browning*, 4 Connecticut, 409, 414, *Case* v. *Marks*, 20 Id. 248, 251; *Torrey* v. *Field*, 10 Vermont, 353, 412, and *Dewit* v. *Greenfield*, 5 Ohio, 225. In like manner in Pennsylvania, in *Long* v. *Brougher*, 5 Watts, 439, 440, it is declared by Gibson, C. J., that "If the existence of suspicions be admissible in any case, and it seems to be so by the force of authority, it must be to show the previous plight of the defendant's character, in order to estimate the injury to it; for it is agreed, that as an inducement to a belief of actual guilt, it is not competent to detract from the malignity of the defendant's purpose;" and this is followed by an able and unanswerable argument against such admissibility for any purpose; and probably the remark in *Smith* v. *Stewart*, 5 Barr, 372, 377, that reports are admissible, is to be understood as referring to their effect on character: in *Henry* v. *Norwood*, 4 Watts, 347, 350, also, it is said that evidence of reports ought to be received very limitedly. In some of the courts in this country, evidence of reports has been deemed admissible in mitigation of damages, as showing that the defendant did not malignantly invent the slander; *Cook* v. *Barkley*, Pennington, 170; *Nelson* v. *Evans*, 1 Devereux, 9; *Morris* v. *Barker*, 4 Harrington, 520; and in some it has been held that evidence of the defendant having merely repeated what he had been told by another, is admissible in mitigation of damages; *Evans* v. *Smith*, 5 Dana, 363, 364; *Kennedy* v. *Gregory*, 1 Binney, 85; *Easterwood* v. *Quin*, 2 Brevard, 64 (but see *Poppenheim* v. *Wilkes*, 1 Strobhart, 275); *Duncombe* v. *Daniell*, 2 Jurist 32, Q. B.; see *Parker* v. *McQueen*, 8 B. Monroe, 16, 19. See also as to the copying of libels, *Mullett* v. *Hulton*, 4 Espinasse, 248; *Saunders* v. *Mills*, 6 Bingham, 213; *Creevy* v. *Carr*, 7 Carrington & Payne, 64, and *Morris* v. *Duane*, 1 Binney, 90, *note*. But the weight of authority is clearly and powerfully against the admissibility of general reports of the plaintiff's guilt for any purpose whatsoever; except of course as rebutting evidence on the subject of actual malice; *Wolcott* v. *Hall*, 6 Massachusetts, 514; *Alderman* v. *French*, 1 Pickering, 1, 18; *Bodwell* v. *Swan et ux.* 3 Id. 376; *Matson* v. *Buck*, 5 Cowen, 499; *Root* v. *King*, 7 Id. 659, 662; *Gilman* v. *Lowell*, 8 Wendell, 573; *Kennedy* v. *Gifford*, 19 Id. 296, 300; *Ridley* v. *Perry*, 16 Maine, 21; *Lewis* v. *Niles*, 1 Root, 346; *Young* v. *Bennett*, 4 Scammon, 43, 46; *Anthony* v. *Stephens*, 1 Missouri, 254, 255; see also, *Scott* v. *McKinnish & wife*, 15 Alabama, 662, 664; and of evidence that previously to the defendant's speaking of the words, another person had told him the story as he repeated it: *Inman* v. *Foster*, 8 Wendell, 602; *Clark* v. *Munsell*, 6 Metcalf, 374, 390; *Treat* v.

Browning, 4 Connecticut, 409, 415; *Anthony* v. *Stephens*, 1 Missouri, 254, 255; *Moberly* v. *Preston & wife*, 8 Id. 463, 466; *Thompson* v. *Bowers*, 1 Douglass, 321, 327; *Mills & wife* v. *Spencer & wife*, 1 Holt, 533. Evidence of probable ground of suspicion or belief, or of general reports, or of a communication of the matter from another, and, in general, evidence that the defendant believed what he uttered, seems to be adapted only to repel the presumption of actual and wanton malignity, and therefore to be appropriate only after the plaintiff has introduced into his case evidence of aggravated malice, in which case it seems properly admissible; *Hart* v. *Read*, 1 B. Monroe, 166, 171. Such evidence cannot take away *legal malice*, nor that ordinary malice that is reasonably to be implied from every slander, unless the defendant goes on to show a justifiable occasion or motive for uttering the injurious charge; that is to say, unless he makes out a case of privileged communication. Except, therefore, as rebutting evidence, of actual malice, and except in that definite class of cases known as privileged communications, legal principles seem to require that evidence that the defendant honestly and reasonably believed what he said, and uttered it without ill will, should not be received: see the remark of the Chancellor in *King* v. *Root*, 4 Wendell, 114, 139; and see *Usher* v. *Severance*, 20 Maine, 9.

In the Earl of Northampton's case, 12 Coke, 132, 134, it was resolved, that if one publish that he heard another, naming him, say that the plaintiff was a traitor or a thief, in an action on the case, if the truth be such, he may justify. Later decisions, in admitting the authority of this resolution, have always construed it very strictly, by holding that such a plea, to be good, must show that the defendant, at the time, disclosed a certain cause of action against another, by naming him at the time of speaking, and by stating the precise words used by him; and that such person was amenable to the plaintiff's action; *Davis* v. *Lewis*, 7 Term, 17; *Woolnoth* v. *Meadows*, 5 East, 463; *Maitland* v. *Goldney*, 2 Id. 426, 437; *Saunders* v. *Mills*, 6 Bingham, 213; *McGregor* v. *Thwaites*, 3 Barnewall & Cresswell, 24; *Torrey* v. *Field*, 10 Vermont, 353, 412; *Tatlow* v. *Jacquett*, 1 Harrington, 333; *Church* v. *Bridgman & Wife*, 6 Missouri, 190, 193; *Moberly* v. *Preston & Wife*, 8 Id., 463, 464; *Hersh* v. *Ringwalt*, 3 Yeates, 508, 520; *Scott* v. *Peebles*, 2 Smedes & Marshall, 546, 559; and it was further held in several cases, that such a defence is not to be considered as amounting to a justification, but only as raising a presumption, prima facie, that the defendant did not circulate the slander maliciously, which presumption may be rebutted by testimony showing positive malice; and if the repetition is found to have been malicious, the defence altogether fails; *Crane* v. *Douglass*, 3 Blackford, 195; *Miller* v. *Ken*, 2 McCord, 286; *McBrayer* v. *Hill*, 4 Iredell's Law, 136; and see *Dole* v. *Lyon*, 10 Johnson, 447, 449; *Hersh* v. *Ringwalt*, 3 Yeates, 508, 510; see also *McGregor* v. *Thwaites*, 3 Barnewall & Cresswell, 24. But the late English cases go yet further, and decide that the plea must show that the defendant believed the matter to be true, and that he repeated it on a justifiable occasion; which, in effect, completely overrules the resolution in Northampton's case; *McPherson* v. *Daniels*, 10 Barnewall & Cresswell, 263; *Ward* v. *Weeks*, 7 Bingham, 211, 216; and these decisions have been generally recognised and approved in this country; *Moberly* v. *Preston & Wife*, 8 Missouri, 463, 465; *Stevens* v. *Hartwell*, 11 Metcalf, 542, 549; *Skinner* v. *Grant*, 12 Vermont, 456, 462; *Jones* v. *Chapman*, 5 Blackford, 88; *Clarkson* v. *McCarty*, Id. 574; *Smith* v. *Stewart*, 5 Barr, 372; *Inman* v. *Foster*, 8 Wendell, 602; but not in Maine, where the older English practice is adhered to;

Haynes v. *Leland*, 29 Maine, 233. According to *Bennett* v. *Bennett*, 6 Carrington & Payne, 588, however, the defendant's giving at the time, the name of the person from whom he received the statement, would be evidence in mitigation of damages. It should be observed, also, that the doctrine of Northampton's case, never was extended to libels, and that it is no justification, there, that the defendant had the matter from another whose name he disclosed in the publication; *De Crespigny* v. *Wellesley*, 5 Bingham, 392; *Delegal* v. *Highley*, 3 Bingham, N. C., 950, 961; *Clarkson* v. *McCarty; Dole* v. *Lyon*, 10 Johnson, 447; but in *Runkle* v. *Myer et al.*, 3 Yeates, 518, it is said to be admissible in mitigation of damages; see *Binns* v. *McCorkle*, 2 Browne, 79, 89.

Under the general issue, in mitigation of damages, the defendant may prove that the words were spoken through heat or passion, or under intoxication, and not with intention to make a serious charge against the plaintiff; for evidence, that the speaking was impulsive and involuntary, undoubtedly diminishes malice, as understood by the law; therefore, immediate provocation by the plaintiff, under the excitement of which the words were spoken, may be given in evidence; *Larned* v. *Buffington*, 3 Massachusetts, 546, 553; *Atkinson* v. *Hartley*, 1 McCord, 203; *McKee* v. *Ingalls*, 4 Scammon, 30; *Craig* v. *Catlet*, 5 Dana, 323; *Howell* v. *Howell*, 10 Iredell, 84; *Iseley* v. *Lovejoy*, 8 Blackford, 462; and see *Swearingen* v. *Birch*, 4 Yeates, 322, 326; and so in an action for libel, previous verbal slanders, of which it is a resentment, may be given in evidence; *Davis* v. *Griffith*, 4 Gill & Johnson, 342. Perhaps it is a general principle that all the immediate circumstances under which the words were uttered are proper to be shown to the jury, as they define the true character of the speaking which is alleged to be slanderous; see *Kennedy* v. *Dear*, 6 Porter, 139, 142; *Arrington* v. *Jones*, 9 Id. 142; *Grant* v. *Hoover*, 6 Munford, 13; *Craig* v. *Catlet*, 5 Dana, 323; *Easterwood* v. *Quin*, 2 Brevard, 64; *Bechler* v. *Stoever*, 2 Wharton, 314, 326; *Haynes* v. *Haynes*, 29 Maine, 247; but evidence that the plaintiff has been in the habit of slandering or libelling the defendant, is not admissible for any purpose; *Wakly* v. *Johnson*, Ryan & Moody, 422; *McAlexander* v. *Harris*, 6 Munford, 465; *Goodbred* v. *Ledbetter*, 1 Devereux & Battle, 121; nor is evidence of the parties being enemies or having had a quarrel; *Andrews* v. *Bartholomew*, 2 Metcalf, 509; *Craig* v. *Catlet*, 5 Dana, 323; *Swann* v. *Rary*, 3 Blackford, 298. And with regard to the admissibility of previous libels by the plaintiff on the defendant, the rule is that a previous libel which was the immediate provocation of the libel sued on, and raises a fair presumption that the latter was written in the heat of blood, and in consequence of the provocation, may be admitted in mitigation of damages; *Child* v. *Homer*, 3 Pickering, 513; *Watts* v. *Fraser*, 7 Carrington & Payne, 369; S. C. 7 Adolphus & Ellis, 223; *Fraser* v. *Barkeley*, 7 Carrington & Payne, 621, 624; *Tarpley* v. *Blaby*, 7 Carrington & Payne, 395: S. C. 2 Bingham's New Cases, 437; and where the libel sued upon has relation to another previous publication of the plaintiff, to or upon which it is a reply or comment, and which is necessary to the understanding of the libel in suit, or of the occasion of its publication, such writing may be given in evidence for purposes of explanation; *Hotchkiss* v. *Lothrop*, 1 Johnson, 286; *Southwick* v. *Stevens*, 10 Id. 443; *Thompson* v. *Boyd*, 1 Mill's Constitutional, 80: but distinct and independent libels, or libels remote in time, published by the plaintiff against the defendant, are not admissible for any purpose; *May* v. *Brown*, 3 Barnewall & Cresswell, 113; *Tarpley* v. *Blabey*, 2 Bingham's New Cases, 437; *Watts* v. *Frazer*, 7 Carrington & Payne, 369; *Beardsley* v. *Maynard*, 4 Wendell, 337; S. C.

affirmed on error, 7 Id. 560; *Gould* v. *Weed*, 12 Id. 13.

Under the general issue, the insanity of the defendant at the time of speaking the words may be given in evidence in excuse or mitigation of damages; *Dickinson* v. *Barber*, 9 Massachusetts, 225; and probably it is a complete defence; *Bryant* v. *Jackson*, 6 Humphreys, 199; partial insanity also, on the subject to which the words relate, may perhaps be admissible; but the insanity must be proved by proper evidence and not by the opinions of the neighbourhood; *Yeates* v. *Reed*, 4 Blackford, 463, 465; but evidence that the defendant was in the habit of talking much about persons and things, and that what he said was not regarded by the community as worthy of notice, and seldom occasioned remark, has been decided to be inadmissible in mitigation of damages; *Howe* v. *Perry*, 15 Pickering, 506.

It is laid down in several cases, that the filing of a plea in justification, which the defendant is not able to support by proof, is such conclusive evidence of malice, that the defendant will not afterwards be allowed to give evidence of mistake or absence of malice, in mitigation of damages; *Alderman* v. *French*, 1 Pickering, 1, 18; *King* v. *Root*, 4 Wendell, 114, 140; *Gilman* v. *Howell*, 8 Id. 573, 579; *Purple* v. *Horton*, 13 Id. 10, 26; *Bradley* v. *Gibson*, 9 Alabama, 406; *Shelton* v. *Simmons*, 12 Id. 466, 468. But though such a plea, if not sustained, may be considered in aggravation of damages, it is going unreasonably far to forbid the defendant to give any evidence in mitigation. The true rule seems to be, that a plea in justification only precludes the defendant from relying under the general issue on any ground that is in its nature inconsistent with the filing of such a plea; he cannot show that the words were spoken through heat or passion, for such deliberate reaffirmance of the assertion as true, is necessarily repugnant to the position that the words were spoken inadvertently and unintentionally; but beyond such actual inconsistency there seems to be good reason why, when the defendant has failed in establishing the truth, he should not be allowed still to give any legal evidence in mitigation of damages under the general issue; and the better opinions are in favour of such practice; see *Larned* v. *Buffington*, 3 Massachusetts, 546, 553; *Sawyer* v. *Hopkins*, 22 Maine, 269, 279; *Parke* v. *Blackiston*, 3 Harrington, 373, 378, 379; *Morehead* v. *Jones*, 2 B. Monroe, 210; *King* v. *Root*, 4 Wendell, 114, 163; *McNutt* v. *Young*, 8 Leigh, 542, 553. In *Chubb* v. *Flannagan*, 6 Carrington & Payne, 431, 435, it was left to the jury to say whether a justification put on the record, and not substantiated by evidence, was not an aggravation of the original offence; and this practice was approved in *Updegrove* v. *Zimmerman*, 1 Harris, 619, 622. And see *Simpson* v. *Robinson*, 12 Q. B. 511. It seems to be certain that such a plea does not prevent the defendant's recurring to the defence of absence of legal malice, that is, that the matter was a privileged communication; *Howard* v. *Thompson*, 21 Wendell, 320, 333, 334; *Jarvis* v. *Hathaway*, 3 Johnson, 180; *Wright* v. *Woodgate*, 2 Crompton, Meeson & Roscoe, 573. An invalid and insufficient plea of justification would be entitled to no weight in aggravation of damages; *Brader & wife* v. *Walker*, 8 Humphreys, 34.

To aggravate the damages, the plaintiff may give evidence of actual malice and vindictive motives on the part of the defendant; see *per* Lord Abinger in *Chalmers* v. *Payne*, 2 Crompton, Meeson & Roscoe, 156; *per* the Chancellor in *King* v. *Root*, 4 Wendell, 114, 139; *per* Harrington, J. in *Kinney* v. *Hosea*, 3 Harrington, 397, 400; *per* Henderson, C. J. in *Brittain* v. *Allen*, 3 Devereux, 167, 171; and if the defendant plead a justification, without the general issue, the plaintiff may still give evidence of actual malice to aggravate the damages; *Sawyer* v. *Hopkins*,

22 Maine, 269, 277; *Parke* v. *Blackiston*, 3 Harrington, 373, 379. For this purpose, there is no doubt, that evidence of all the circumstances, under which the words were spoken, and of the acts and manner of the defendant at the time, may be given; *Kinney* v. *Hosea*, 3 Harrington, 401; *Sawyer* v. *Hopkins*; *Craig* v. *Catlet*, 5 Dana, 323; but in regard to the admissibility, in actions of slander and libel, of other words or writings, of the same purport, uttered or published at a different time, and before or after the suit has been commenced, there has been much confusion in the cases. There seems to be no real distinction established between repetitions before and after suit, nor between slander and libel. In England, formerly, the practice was to admit, as evidence of malice, only such other similar words as were not themselves actionable; *Cook* v. *Field*, 3 Espinasse, 138; *Mead* v. *Daubigny*, Peake, 125, 126; and this distinction between actionable and non-actionable words or writings, which was overthrown in *Lee* v. *Huson*, Peake, 107, and in *Rustell* v. *Macquister*, 1 Campbell, 49, *note*, seems to have been reestablished in *Defries* v. *Davis*, 7 Carrington & Payne, 112. And some of the cases had held, that subsequent matter was admissible to show the intention of the defendant, and only where the matter sued on was equivocal; *Pearce* v. *Ormsby*, 1 Moody & Robinson, 455; *Symmons* v. *Blake*, Id. 477; *Stuart* v. *Lovell*, 2 Starkie, 93, 95; but by the recent decision of *Pearson* v. *Lemaitre*, 5 Manning & Granger, 700, 719; S. C. 6 Scott's New, 607, where all the cases are reviewed, the distinctions between the admissibility of actionable and non-actionable matter, and between the cases of equivocal and unequivocal meaning, are exploded, and the court, per Tindal, C. J. declare it to be a general rule, "that either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that, if the evidence given for that purpose, establishes another cause of action, the jury should be cautioned against giving any damages in respect of it. And if such evidence is offered merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected. It may be difficult," he added, "to reconcile all the Nisi Prius cases upon this subject; and the point does not appear to have been decided by any of the courts in Westminster Hall. But, upon the principle, we think that the *spirit* and *intention* of the party publishing a libel, are fit to be considered by a jury, in estimating the injury done to the plaintiff; and that evidence tending to prove it, cannot be excluded, simply because it may disclose another and different cause of action." And see to a similar effect, *Stearns* v. *Cox*, 17 Ohio, 590. In this country, although it has lately been established in New York, that in actions of libel, only other non-libellous matter is admissible, and in action of slander, only such words as are not slanderous, or are barred by the statute of limitations, and that these are never to be considered for the purpose of enhancing damages; *Root* v. *Lowndes*, 6 Hill, 518; *Keenholts* v. *Beeker*, 3 Denio, 347; *Rundell* v. *Butler*, 7 Barbour's S. Ct. 260, 261; and there are *dicta* to the same effect in some other courts; *Randall* v. *Holsenbake*, 3 Hill's So. Car. 175; *Wilson* v. *Apple*, 3 Ohio, 270; yet it may be taken to be the law of the American states generally, that the utterance of other slanderous words of the same import, and so connected with them as to amount to a continuation of the same slander, may be admitted as evidence of malice; but not distinct calumnies; *Williams* v. *Miner*, 18 Connecticut, 464, 472; *Watson & wife* v. *Moore*, 2 Cushing, 134, 137; *Thompson* v. *Bowers*, 1 Douglass, 322, 329; *Brittain* v. *Allen*, 3 Devereux, 167, 171; *Hatch* v. *Potter et ux.*, 2 Gilman, 725, 730; *Duvall* v. *Griffith*, 2 Harris & Gill, 30; *Scott* v. *Mort-*

singer, 3 Blackford, 454; *Shock* v. *M'Chesney*, 2 Yeates, 473; see, however, remarks of Duncan, J. in *Eckart* v. *Wilson*, 8 Sergeant & Rawle, 44, 53, and *M'Almont* v. *M'Clelland*, 14 Id. 359, 361: and this extends to a repetition of the slander, or the utterance of similar slanderous matter, after the suit is commenced; *Wallis* v. *Mease*, 3 Binney, 546, 550; *Kean* v. *M'Laughlin*, 2 Sergeant & Rawle, 469; *Bodwell* v. *Swan et ux.*, 3 Pickering, 376, 378; *Kennedy* v. *Gifford*, 19 Wendell, 296, 300; *Teague* v. *Williams*, 7 Alabama, 842, 850; *Smith* v. *Wyman*, 16 Maine, 13; *Taylor* v. *Kneeland*, 1 Douglass, 68; *Miller* v. *Kerr*, 2 M'Cord, 286, 288; *Randall* v. *Holsenbake*, 3 Hill's So. Car. 175; *Morgan* v. *Livingston*, 2 Richardson, 574, 585; *M'Intyre* v. *Young*, 6 Blackford, 496, 498; though, of course, the speaking or publishing of the matter sued upon must be proved to have been before the suit was commenced; *Taylor* v. *Sturyinggen*, 2 Reports, Const. Ct. 2d ser. 367; *Scovell* v. *Kingsley*, 7 Connecticut, 284; *Keenholts* v. *Beeker*. According to some of the cases, such repetition after suit, is proper evidence to aggravate the damages; *Williamson* v. *Harrison*, 3 Missouri, 411, 412; according to others, it is appropriate only for the purpose of showing the intent of the defendant in speaking the words sued on, but for no other purpose, and if the court instruct the jury that they may take it into consideration in assessing damages, it is error; *M'Glemery* v. *Keller*, 3 Blackford, 488, 489; *Schoonover* v. *Rowe*, 7 Id. 202; *Forbes* v. *Myers*, 8 Id. 74; *Lanter* v. *M'Ewen*, Id. 495; *Scott* v. *M'Kinnish & wife*, 15 Id. 662, 666; *Teague* v. *Williams*: but in Pennsylvania, the distinction is, that damages cannot be given for such subsequent words; *Wallis* v. *Mease*; yet the subsequent words are proper to increase the damages to be given for the words on which suit is brought; *Keon* v. *M'Laughlin*; though in *Eckart* v. *Wilson*, 8 Sergeant & Rawle, 44, 45, Duncan, J. supposed, that they were not admissible to increase the damages. It has been decided in several cases, that words of similar import uttered so long before those sued upon, as to be barred by the statute of limitations, are admissible to prove malice in the defendant, but are not to be considered by the jury in aggravation of damages; *Inman* v. *Foster*, 8 Wendell, 602; *Throgmorton* v. *Davis*, 4 Blackford, 175, 176; *Teague* v. *Williams*, 7 Alabama, 844; *Lincoln* v. *Christman*, 10 Leigh, 338; *Randall* v. *Holsenbake*, 3 Hill's So. Car. 175; *Morgan* v. *Livingston*, 2 Richardson, 574, 588. It has been decided, also, in several cases, that whenever the plaintiff, to show malice, gives in evidence other slanders, or other parts of a libel than those declared on, the defendant may, under the general issue, prove them to be true; *Warne* v. *Chadwell*, 2 Starkie, 171; *Eccles* v. *Shackleford*, 1 Littell, 35, 38; *Henry* v. *Norwood*, 4 Watts, 347; but as the truth of words does not diminish their maliciousness, the justness of that rule seems to be questionable. Where the words offered as evidence of malice, consisted of a repetition of those declared on, the truth cannot be shown under the general issue; *Teagle* v. *Deboy*, 8 Blackford, 134, 136.

Notwithstanding the great accumulation of authority in favour of it, this whole practice of giving in evidence words, or writings, published at other times, actionable or not actionable, and before or after suit, is utterly inconsistent with legal principle, and tends to gross injustice. If such evidence is admitted for the purpose of affording ground to infer *legal malice* from the matter charged in the declaration, then, if legal malice was inferrible before, they are unnecessary, and if it was not, they give a cause of action where before there was none: but if the object of such evidence is to introduce *actual malice* into the case, it can have no other operation than to increase the damages. If the jury are not to give higher damages on account

of it, it is useless; and if they do, this result follows, that the words, if not slanderous or libellous in themselves, are yet so made use of as to bring damages, though not connected with the principal words as part of the res gesta, and are made to sustain a verdict where they would not sustain an action, and if they are slanderous or libellous, they may become the ground of another suit, and a double compensation. The distinction apparently taken in *Pearson* v. *Lemaitre*, the Pennsylvania cases above cited, and *Brittain* v. *Allen*, 3 Devereux, 167, 171, that though damages are not to be given for the injury done by the subsequent words, yet these words may be used to inflame the damages given for the words in the declaration, might be applicable in cases of special damage, but as applied to words actionable in themselves, it is futile and nugatory. Moreover, the fact that the defendant, months, or years before or after the occasion stated in the declaration, uttered similar charges, with malice, does not reasonably prove that he was actuated by malice on the particular occasion sued upon: and this is especially to be considered, in regard to words or publications after suit brought. A man may have spoken or published something injurious to another, but without the least actual malice: he is sued for slander or libel, and then in resentment for such treatment, he reiterates his charges with real malignity. The reasons suggested in some of the cases; see *Delegall* v. *Highley*, 8 Carrington & Payne, 414, 450, and *Plunkett* v. *Cobbett*, 5 Espinasse, 36; that such evidence shows that the publication, or utterance, was not by mistake or inadvertance, would not justify the admission, before the defendant has given evidence that it is not intentional, for the law implies intention. The suggestion in *Pearce* v. *Ormsby*, and *Symmons* v. *Blake*, of admissibility to explain the meaning, seems still more groundless, for it does not follow that the person means the same thing in every writing or speech on the same subject. The admission of such evidence seems in every view, irrational and dangerous, and it is to be hoped that the court will retrace their steps in regard to it. It is well settled that the bringing of one action for slanderous words, does not bar the plaintiff from having another action for other words, whether spoken before or after the commencement of the suit; *Henson* v. *Veatch*, 1 Blackford, 370. It should be observed, however, that there is no doubt that the plaintiff may give evidence of the utterance of the same words at different times, so long as he does not go beyond the words laid in the declaration; and he may recover damages for the injuries on each occasion; *Charlton* v. *Barret*, Peake, 32; *Root* v. *Lowndes*, 6 Hill, 518.

The question whether the plaintiff may give evidence of his *good* character has been variously held. In some of the cases, evidence of the plaintiff's good character has been considered admissible, under the general issue, on the ground that by the nature of the action, his character is put in issue, even when it has not been attacked by the defendant's pleas or evidence; *King* v. *Waring*, 5 Espinasse, 13; *Bennett* v. *Hyde*, 6 Connecticut, 24; *Williams* v. *Haig*, 3 Richardson, 362; and in Massachusetts such evidence was admitted where a plea in justification had been filed, but it was doubted whether it would be admissible under the general issue; *Harding* v. *Brooks*, 5 Pickering, 244; and this is followed in *Scott* v. *Peebles*, 2 Smedes & Marshall, 546, 560; and see *Dewit* v. *Greenfield*, 5 Ohio, 225; and so in Alabama, it is said that the plaintiff's character is not in issue until it has been attacked by plea on record, or by evidence on the trial; and, therefore, until then, evidence of good character cannot be given; *Rhodes* v. *James*, 7 Alabama, 575; but there can be little doubt that the true principle is, that, except to rebut evidence

of general bad character given by the defendant, such evidence is wholly inadmissible, whether the truth has been pleaded in justification, or not; and this is held in *Matthews* v. *Huntley*, 9 New Hampshire, 146; *Cornwall* v. *Richardson*, Ryan and Moody, 305; *M'Cabe* v. *Platter*, 6 Blackford, 405; see also *Wheeler* v. *Shields*, 2 Scammon, 348, 350; *Stow* v. *Converse*, 3 Connecticut, 326; *Stone* v. *Varney*, 7 Metcalf, 86, 91, 92; *Houghtaling* v. *Kilderhouse*, 2 Barbour's S. Ct., 149; 1 Comstock, 530; see also, *Flitcraft* v. *Jenks*, 3 Wharton, 158. There seems to be no question that such evidence is admissible after the plaintiff's character has been attacked by testimony; *Inman* v. *Foster*, 8 Wendell, 602; *Holley* v. *Burgess*, 9 Alabama, 728. In Delaware, however, neither evidence of good, nor of bad character of the plaintiff, is admissible; *Parke* v. *Blackiston*, 3 Harrington, 373, 375.

In slander or libel, evidence of the plaintiff's, or of the defendant's circumstances, rank, condition, and of the state of his family, is admissible, when offered by the opposite party, to increase or diminish the damages; *Larned* v. *Buffington*, 3 Massachusetts, 546, 553; *Bennett* v. *Hyde*, 6 Connecticut, 24, 27; *Beehler* v. *Steever*, 2 Wharton, 314, 325; *M'Almont* v. *M'Clelland*, 14 Sergeant & Rawle, 359, 362; *Parke* v. *Blackiston*; and see *Stone* v. *Varney*, and *Gilman* v. *Lowell*, 8 Wendell, 573. But in *Case* v. *Marks*, 20 Connecticut, 248, 250, it was held that a defendant could not give evidence of his own poverty at the time of uttering a slander in order to diminish the damages. Evidence of the falsity of the charges, where there is no justification pleaded, cannot be given; *Stuart* v. *Lovell*, 2 Starkie, 93, 94; at least, not without letting in evidence of the truth on the other side; *Brown* v. *Croome*, Id. 297, 298. In assessing damages, the jury may take into consideration, prospective damage likely to be occasioned; *Gregory* v. *Williams*, 1 Carrington & Kirwan, 568; *Nigram* v. *Lawson*, 8 Scott, 477.

Action for Malicious Prosecution.

MUNNS v. DUPONT ET AL.

In the Circuit Court of the United States, for the District of Pennsylvania.

PHILADELPHIA, APRIL TERM, 1811.

[REPORTED, 3 WASHINGTON'S CIRCUIT COURT, 31–41.]

Of the malice of a charge which is the ground of a prosecution for a crime, the jury are exclusively the judges. Probable cause for such a prosecution, is a mixed question of law and fact. What circumstances are sufficient to prove a probable cause, must be decided by the Court; but to the jury it must be left to decide, whether these circumstances are proved by credible testimony.

Probable cause, is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious man in believing that the accused was guilty.

THIS was an action for a malicious prosecution: 1. In charging the plaintiff before Alderman Keppele, in Philadelphia, with having stolen a brass pounder, and three draughts of machinery; and causing the plaintiff to be imprisoned. 2. In bringing a civil action, and demanding excessive bail. 3. Causing the plaintiff to be indicted in the state of Delaware, as the receiver of five pieces of parchment sieves, knowing them to have been stolen. All charged to have been done maliciously, and without probable cause.

The circumstances of the case which are at all important, will appear in the charge.

WASHINGTON, Justice. The plaintiff, having some skill in the mystery of making gunpowder, engaged with Brown, Page & Co., of Virginia, in November or December 1808, to superintend a manufactory of that article, which they were about to establish near to Richmond; and with a view to obtain more complete information of the art than he then possessed, or to procure workmen, or certain parts of machinery, he came to the northward early in December. On the 9th, he put up at an inn called the Buck, within half a mile, or thereabouts, of the powder manufactory of the defendants, on the Brandywine. The powder

of this manufactory had obtained great celebrity, and commanded the market, in consequence of the skill employed in making it, and probably from the use of certain parts of the machinery employed, particularly the parchment sieves. The plaintiff, immediately after his arrival at the Buck, opened a correspondence with some of the defendants' workmen, and had frequent interviews with them at the tavern; at which times he made them considerable offers to induce them to leave the service of the defendants, and to go to the manufactory at Richmond. He also made them pecuniary offers, to procure for him patterns or models of the different parts of the machinery used by the defendants, and particularly to procure for him a sight of one of the brass pounders, or a pattern of it.

The defendants, hearing of the plaintiff's conduct, called upon him at the tavern; and after offering considerable violence to his person, ordered him to quit the neighbourhood, which he did on the 14th. It is proper to remark, that pains were taken by the defendants to preserve the secrets of their art, and that strangers were not, without leave, admitted into the factory. Shortly after the plaintiff had left the neighbourhood, two of the defendants' workmen secretly went off, and at the same time, one of the brass pounders was missing. The plaintiff came to Philadelphia, and a few days afterwards, the defendants arrived here. On the 22d, they applied to Alderman Keppele, for the warrant stated in the first count of the declaration, and, on their oath, valued the property charged to have been stolen, at $10,000. The officer to whom the warrant was delivered, met with the plaintiff the next day, and inquired of him, if his name was not Munns? The plaintiff denied it, and assumed a fictitious name. The officer, however, being satisfied that he answered the description, carried him to the house of the high constable, where he acknowledged himself; and after he was informed of the nature of the charge against him, he put to the officer this question:—"If I was in the company of one who had stolen certain articles, am I guilty?" The officer declined giving an answer, and conducted his prisoner to the office of Mr. Keppele. There he was examined, and by order of the alderman, his person was searched; when certain letters were found in his pocket book, from him to Brown, Page & Co., and from them to him; by which it appeared, that the plaintiff, previous to his arrest, knew that the defendants were in Philadelphia, and suspected that they were following his steps—that he had obtained all the information he wanted, to enable the Richmond to equal the Brandywine powder manufactory; and that some of the hands, belonging to the defendants, had left them and gone to Richmond.

The alderman committed the plaintiff to the jail of Philadelphia, having required bail to the amount of $15,000, which the plaintiff could

not give. On the 27th, the plaintiff was carried before Judge Rush, on a *habeas corpus*, who reduced the bail to $1000; but this he could not get, and he was again committed. On the 29th, the defendants sued out the writ mentioned in the second count, for seducing the defendants' workmen and servants, and demanded bail in $6000, which, on citation before Judge Rush, was reduced to $600.

The defendants, having obtained from the Governor of Delaware, a requisition to the Governor of Pennsylvania, for the removal of the plaintiff to the former state, as a fugitive from justice, he was, upon the warrant of the Governor of Pennsylvania, removed on the 6th of January, to the jail at New Castle. The defendants discontinued their civil suit in Pennsylvania, and renewed it in Delaware, laying their damages at $4000. On the 4th of February, the plaintiff, upon a *habeas corpus*, obtained from the Chief Justice of Delaware, was discharged from confinement under the criminal charge, upon the ground that he ought to have been committed under a warrant from some magistrate of that state, and not under the warrant of the Governor of Pennsylvania, which only authorized his removal. But he was remanded, to answer to the civil action. Thinking now to correct this error, the defendants obtained a second warrant against the plaintiff, from a justice of the peace of Delaware; charging him with a suspicion of having stolen a brass stamper, and sundry other articles, of the value of forty dollars, or having caused the same to be stolen. It is admitted that the stamper is the same instrument with the pounder, mentioned in the warrant issued by Mr. Keppele. On the 11th of March, the plaintiff was again discharged upon a *habeas corpus*, on the ground, that by the law of Delaware no person can be committed by a judge or justice, who has once been discharged upon a *habeas corpus* from confinement, on account of the same offence. In May, a bill was sent to the grand jury, charging the plaintiff as the receiver of five pieces of parchment sieves, the property of the defendants, knowing them to be stolen. The jury found the bill, and the trial being postponed, upon the motion of the plaintiff, until December, (during all which time he remained in confinement,) upon a trial before the petit jury, the defendant was found not guilty. The Attorney-General then moved the Court to certify probable cause, in order to compel the plaintiff, Munns, to pay the costs of that prosecution, under the Constitution of the state. But the counsel for Munns agreed that his client should pay the costs, if the Court would not grant the certificate; in consequence of which, the certificate was not granted.

The balance of the evidence, except such parts of it as will be more particularly noticed hereafter, relates to the plaintiff's sufferings, which it must be acknowledged, were very great. But as to these, it is to be observed, that except where they were produced by the immediate

agency or interposition of the defendants, no inference of malice can be drawn from them, to charge the defendants, although they may be considered in estimating the damages, if the plaintiff has made out such a case as to entitle him to a verdict for anything. For the assault and battery at the Buck, the defendants have been indicted and punished, by a fine of fifteen dollars each, so that that transaction is no otherwise to have influence on your minds, than as it may become an item in the account of malice charged upon the defendants. So, too, the high value affixed to the articles charged to have been stolen, in the Philadelphia warrant, and the low value fixed to the same articles, in the Delaware warrant, and the amount of damages claimed in the civil suit, brought in Pennsylvania, are only to be considered in relation to the question of malice.

The question, then, is, are the defendants liable for damages, on account of the warrant issued by Mr. Keppele, and the consequent confinement of the plaintiff under it? and 2d, are they liable in consequence of the indictment in Delaware, and the injuries to which it exposed the plaintiff?

The question upon which this cause must be decided, is not whether the plaintiff has suffered from the charge of which the defendants were the authors, and which was not founded in truth, but whether the charge was made maliciously, and without probable cause. In trials of actions of this nature, it is of infinite consequence to mark with precision, the line to which the law will justify the defendant in going, and will punish him if he goes beyond it. On the one hand, public justice and public security require that offenders against the law should be brought to trial, and to punishment, if their guilt be established. Courts and juries, and the law officers, whose duty it is to conduct the prosecutions of public offenders, must in most instances, if not in all, proceed upon the information of individuals; and if these actions are too much encouraged,—if the informer acts upon his own responsibility, and is bound to make good his charge at all events, under the penalty of responding in damages to the accused, few will be found bold enough, at so great a risk, to endeavour to promote the public good. The informer can seldom have a full view of the whole ground, and must expect to be frequently disappointed, by evidence which the accused only can furnish. Even if he be possessed of the whole evidence, he may err in judgment; and in many instances a jury may acquit, where to his mind the proofs of guilt were complete. It is not always the fate of those to command success, who deserve it.

On the other hand, the rights of individuals are not to be lightly sported with; and he who invades them, ought to take care that he acts from pure motives, and with reasonable caution. For the inte-

grity of his own conduct, he must be responsible; and his sincerity must be judged of by others, from the circumstances under which he acted. If, without probable cause, he has inculpated another, and subjected him to injury, in his person, character, or estate, it is fair to suspect the purity of his motives, and the jury are warranted in presuming malice. But though malice should be proved, yet, if the accusation appear to have been founded upon probable ground of suspicion, he is excused by the law. Both must be established against him; viz., malice, and the want of probable cause. Of the former, the jury are exclusively the judges—the latter is a mixed question of fact and law. What circumstances are sufficient to prove a probable cause, must be judged of, and decided by the Court. But to the jury it must be referred, whether the circumstances which amount to probable cause are proved by credible testimony or not.

What, then, is the meaning of the term "probable cause?" We answer, a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the person accused is guilty of the offence with which he is charged. What, then, were the grounds of suspicion, upon which the defendants acted in relation to the warrant of Alderman Keppele, under which the plaintiff was apprehended and committed? The plaintiff was a stranger, and his character totally unknown to the defendants. He took up his abode at an obscure tavern, in the neighbourhood of the defendants' manufactory, where he contrived to procure frequent interviews with the workmen employed there, for the purpose of seducing them from their engagements with the defendants, and of obtaining from them a knowledge of the machinery and process, used in the manufacture of gunpowder, which the defendants had carefully endeavoured to keep secret. He offers one of them in particular, Bowman, a reward for bringing to him a brass pounder, or a pattern of it. The pounder was brought, was afterwards concealed, and about the same time, Bowman secretly absconded. The plaintiff came to Philadelphia, and although he soon afterwards knew that the defendants were also in this city, and suspected that they were following his footsteps, as he expresses it in a letter to his employers, yet, when arrested by the constable, he denied his name, and put that officer a question, by no means calculated to allay the suspicions which existed against him. The letters taken from him by the alderman, developed fully the objects which had carried him to the neighbourhood of the defendants, and contain allusions to the article of machinery which the defendants had missed.

Called upon to declare an opinion, whether these circumstances, if proved to your satisfaction, afforded a probable cause for the prosecution in relation to the brass pounder, the Court feels no hesitation in

saying, that they did; and still further, that the plaintiff has no person but himself to blame for that prosecution, and the sufferings it has produced. A man may undesignedly and innocently become the object of suspicion, and of unmerited, though justifiable prosecution. In such a case, he may with great propriety call upon his accuser to acquit himself, by strong evidence, from the charge of rashness and malevolence, before he can claim to be excused from the consequences of his conduct. But, if he has intentionally acted in such a manner as to connect himself with the supposed guilt, and has in fact, participated in it, shall he be permitted afterwards to complain that he had become an object of suspicion, and to claim the assistance of the law, to compensate him for the losses to which he had thus exposed himself? In this case, the *brass pounder* was taken and carried away, at the instigation of the plaintiff; was in his possession, as he afterwards acknowledged; and was then concealed by the person who took it, and who afterwards ran off:—and does it now lie in the plaintiff's mouth to say, that the defendants had not probable cause for suspecting him as the felon? But, it is said, that still there is no proof, that a larceny was committed by any person; and the proof of this is essential to the defence. Without determining conclusively upon the soundness of the doctrine contended for, we must be permitted to express the hesitation of the Court, in approving it. It would seem to demolish the whole ground of defence, allowed to the defendant in this action; if, notwithstanding the strongest circumstances of guilt, the *motives* of the action should, upon a full examination of the evidence to be furnished by the person suspected, turn out differently from what they appeared;—if probable cause shall excuse, in relation to the person suspected, and yet afford no protection as to the offence supposed to have been committed. But, it is by no means to be admitted that a larceny was not committed, in relation to the brass pounder. Baron Eyre defines larceny to be "the wrongful taking of goods, with intent to spoil the owner *causa lucri;*" and what are the facts of this case? Bowman secretly took, and carried away this instrument, for a reward promised him by the plaintiff, as is proved in the cause; and he concealed, or otherwise disposed of it, so that it was lost to the owner. Whether his intention was to spoil the owner, or to convert the article to his own use, would be a proper subject of inquiry with a jury, upon all the circumstances of the case.

But, it is proved by two witnesses, that the plaintiff afterwards acknowledged that Bowman had *stolen* the pounder; and whether, in technical language, he had done so or not, the plaintiff cannot, in this action, make it an objection, that in point of strict law, a larceny was not committed.

As to the three draughts of machinery, charged to have been stolen

by the plaintiff, it must be admitted, that the defendants proceeded not only without probable cause, but without any cause at all. It does not appear by the evidence, that the defendants ever possessed such draughts, and consequently, they could not have been deprived of them. This charge (which is certainly unfounded), being connected in the same warrant with another which was founded, may or may not have produced injury to the plaintiff; and if in your opinion it did so, and was maliciously made a ground of prosecution, the plaintiff is entitled to a verdict on that account, for such damages as you may think right.

We shall notice the warrant taken out by the defendants in Delaware, merely for the purpose of observing, that it is not made a distinct ground of charge against the defendants, and is only relied upon as a circumstance to prove malice. Of course, no damages could be given on account of that prosecution, even if it had been made without probable cause; and if the defendants had probable cause for obtaining the first warrant, the grounds of suspicion had received additional strength, before the second was granted; the plaintiff having previously acknowledged that the pounder, or stamper (which means the same thing), had been stolen by Bowman, brought to him, and afterwards concealed.

2. The second ground of complaint is, the indictment against the plaintiff in Delaware, for having received five pieces of parchment, four of them perforated with holes, knowing them to have been stolen. How stands the evidence, in relation to these articles? It is in full proof, if the witnesses are believed, that Peebles, one of the workmen in the defendants' manufactory, by the plaintiff's procurement, cut from the parchment sieves belonging to the defendants, without their knowledge or consent, a number of pieces of different sizes, which the plaintiff afterwards had in his possession, and which were produced at his trial. And if this evidence required any support, the finding of the bill of indictment, and the agreement of the plaintiff's counsel to pay the costs of that prosecution, which the law excused him from doing, unless a certificate of probable cause was granted, are strong indeed upon the point of probable cause.

Upon the whole, if the jury think that the facts above stated are proved, the plaintiff is not entitled to a verdict, as to the two charges which respect the pounder and sieves; because, though he should have proved malice to your satisfaction, the defendants have justified themselves by proving probable cause for those prosecutions. And as to the three draughts of machinery, you are to decide, whether that charge was maliciously made, and was productive of injury to the plaintiff.

The plaintiff suffered a nonsuit.

The most prominent of the early decisions in the English reports, upon the action for malicious prosecution, is *Savil* v. *Roberts*, 1 Salkeld, 13, which is said in *Potts* v. *Imlay*, 1 Southard, 330, 333, to be "a leading case on this subject." The principle established in that case is summed up as follows, in *Jones* v. *Gwynn*, 10 Modern, 214, 217: "The damage a person may sustain by an indictment, may relate either to his person, his reputation, or his property; and each of these is resolved, in the case of *Savil* v. *Roberts*, to be a just ground of this action." There are some distinctions, however, in regard to the different grounds of this action, which are very accurately traced in *Frierson* v. *Hewitt*, 2 Hill's So. Car. 499, 500. "To sustain the action of malicious prosecution, technically so called," says O'Neall, J., in that case, "the indictment must charge a *crime;* and then the action is sustainable *per se*, on showing a want of probable cause. There is another class of cases, which are popularly called actions for malicious prosecution, but they are misnamed; they are actions on the case, in which both a *scienter* and a *per quod* must be laid and proved. I allude now, first, to actions for false and malicious prosecutions for a mere misdemeanour, involving no moral turpitude: secondly, to an abuse of judicial process, by procuring a man to be indicted, as for a crime, when it is a mere trespass: third, malicious search warrants. In all these cases, it will be perceived, that they cannot be governed by the ordinary rules applicable to actions for malicious prosecutions. It is said by most of our law writers, that, in such cases, you must not only prove want of probable cause, but also express malice and actual injury or loss, as deprivation of liberty, and money paid in defence. The express malice necessary to sustain such actions, ought to be laid and proved, and this is what I understand by the *scienter*. As in an action for a false and malicious prosecution for a misdemeanour, it must be laid and proved, that the party knowing the defendant's innocence, still of his mere malice, preferred the charge; so, in the second class of cases, it will not do to say, that you indicted me, as for a crime, for a trespass, without any probable cause, for in such a case no injury is done to the plaintiff, and no fault is established against the defendant, for which he can be punished. But when to this statement we superadd the facts, that the defendant, knowing that the trespass complained of, was no crime, yet procured the plaintiff to be indicted, as for a crime, malice is clearly made out; and, if the plaintiff has sustained any injury, the action will lie. There can be no necessary and consequential injury in such cases; it may, or may not arise. In other words, there is no implied injury; for there can be no slander, inasmuch as no crime is imputed. Actual injury must be stated and proved; and this constitutes the *per quod*. Deprivation of liberty, or expense of defence, will constitute sufficient ground to sustain this part of the action." See, also, *Byne* v. *Moore*, 5 Taunton, 187. It is, certainly, only in the case of a *crime*, or, at least, an indictable offence involving moral turpitude, the verbal imputation of which would be slander, that the mere preferring of an indictment, or issuing of a warrant, or other instituting of a criminal proceeding, without arrest or special damage, is actionable. Indeed, it was said by Patteson, J., in *Gregory* v. *Derby*, 8 Carrington and Payne, 749, in the case of a charge of stealing, on which a warrant was issued, that if the party was never apprehended, no action would lie, and by the court in *O'Driscoll* v. *M'Burney*, 2 Nott & M'Cord, 54, 55, that "there can be no prosecution without an arrest:" but probably these remarks should be confined to cases, where the charge is not slanderous, or, at least, where arrest is specially made the gravamen in the decla-

ration: for, if a slanderous charge be made before a magistrate and a warrant demanded, and a warrant thereupon issue, it is believed, that this form of action is the appropriate remedy; but if no warrant issue, the remedy is slander, in the form of "imposing the crime of felony:" see *Fuller* v. *Cook*, 3 Leonard, 100; *Heyward* v. *Cuthbert*, 4 M'Cord, 354; and *supra*. If some, only, of the charges in an indictment for felony are without probable cause, an action for preferring an indictment, without probable cause, may be maintained; *Reed* v. *Taylor*, 4 Taunton, 616; *Candler* v. *Petit*, 2 Hall, 315, 344. If a person state facts to a magistrate truly, which do not amount to felony, or constitute a different felony, and the magistrate, of his own motion, erroneously issue a warrant for felony, or for another felony from that stated, the person is not liable to an action for malicious prosecution; *Leigh* v. *Webb*, 3 Espinasse, 165; *Heyward* v. *Cuthbert*, 4 M'Cord, 354; *M'Neely* v. *Driskill*, 2 Blackford, 259; *Bennett* v. *Black*, 1 Stewart, 495: and if one swear, before the grand jury, to facts not amounting to a felony, and the jury find a felony, he is not responsible for the indictment; *Leidig* v. *Rawson*, 1 Scammon, 273, 274. An action may also be maintained, for charging a man before a magistrate, with any matter by which he may be imprisoned, and in consequence of which, he is imprisoned; *Randall* v. *Henry*, 5 Stewart & Porter, 367. And an action lies for maliciously, and without probable cause, procuring a search warrant to be issued, to search the plaintiff's premises for stolen property, and arrest his person, upon which his premises are searched and his person arrested; *Elsee* v. *Smith*, 1 Dowling & Ryland, 97; *Miller* v. *Brown*, 3 Missouri, 127, 131.

It has been decided in several cases, that an action for malicious prosecution may be maintained, though the warrant or indictment were legally defective, and the person could never have been convicted; for the disgrace, injury, trouble and expense are the same under a bad indictment as under a good one; *Jones* v. *Gwynn*, 10 Modern, 214, 220; *Chambers* v. *Robinson*, 2 Strange, 691; *Wicks* v. *Fentham*, 4 Term, 247; *Pippet* v. *Hearn*, 5 Barnewall & Alderson, 634; *Anderson* v. *Buchanon*, Wright, 725. Where, however, a warrant was void, it was held that for an arrest under it, the remedy must be trespass, because a defendant cannot be liable in malicious prosecution, when the prosecution never legally existed; *Braveboy* v. *Cockfield*, 2 M'Mullan, 270, 273. It has been held, also, in some cases, that if the prosecution be before a court having no jurisdiction, the party may, at his election, bring either trespass or case; *Morris* v. *Scott*, 21 Wendell, 281; *Hays* v. *Younglove*, 7 B. Monroe, 545: but the better opinion is, that if the proceeding be extra-judicial, or before a tribunal having no jurisdiction, case for malicious prosecution cannot be maintained; but that an action for slander is the remedy, if the charge were of that character, and trespass, if there were an arrest; see *Turpin* v. *Remy*, 3 Blackford, 211, 216; *Bodwell* v. *Osgood*, 3 Pickering, 379, 383. The true distinction is, between void and valid process; if valid, the remedy is case for malicious prosecution; if void, for irregularity, or want of jurisdiction, it is trespass; *Allen* v. *Greenlee*, 2 Devereux, 370. Where the action is against a person for procuring a regular and legal warrant to be issued by a justice, it must be case; but if against a justice who, without probable cause, issues a warrant and commits, it is trespass; *Morgan* v. *Hughes*, 2 Term, 225. Each person who participates in causing a groundless prosecution, is severally liable; *Cotton* v. *Huidekoper*, 1 Pennsylvania, 148, 153.

An action on the case lies, also, *in certain cases*, for special damage occasioned to the person or property

of another by maliciously, and without probable cause, instituting a civil suit. See note 4 to Co. Litt. 161, a. "There are no cases in the old books," says Lord Camden in *Goslin* v. *Wilcock*, 2 Wilson, 302, 305, "of actions for suing where the plaintiff had no cause of action; but of late years, when a man is *maliciously* held to bail, where nothing is owing, or when he is maliciously arrested for a great deal more than is due, this action has been held to lie, because the costs in the cause are not a sufficient satisfaction for imprisoning a man unjustly, and putting him to the difficulty of getting bail for a larger sum than is due." The first instance in the reports, of this action being brought for an arrest by civil process, is said to be the case of *Daw* v. *Swaine*, Siderfin, 424, in 21 Car. 2. It is now well settled that arresting, and imprisoning, or holding to bail, where nothing is due, or for more than is due, if done maliciously and without probable cause, is actionable; *Ray* v. *Law*, 1 Peters' C. C. 207, 210; *Brush* v. *Burt*, 2 Pennington, 979; *Wickliffe* v. *Payne*, 1 Bibb, 413. If the party has given bail, without there having been any actual arrest, the action must not be for malicious arrest; *Berry* v. *Adamson*, 6 Barnewall & Cresswell, 528; but should be for maliciously holding to bail, under a writ, upon a declaration framed according to the facts; S. C., 2 Carrington & Payne, 503; *Small* v. *Gray*, Id. 605. As to what is an arrest in law, see *Collins* v. *Fowler*, 10 Alabama, 859. An action lies also for maliciously holding to bail, or maliciously attaching property, under the process of a court which has no jurisdiction; *Goslin* v. *Wilcock*, 2 Wilson, 302; *Boon* v. *Maul*, 2 Pennington, 862. And it lies for maliciously suing out an attachment, and attaching the plaintiff's property, where nothing is due, or for more than is due; *Lindsay* v. *Larned*, 17 Massachusetts, 190; *Savage* v. *Brewer*, 6 Pickering, 453, 456; *Whipple* v. *Fuller*, 11 Connecticut, 582; *Bump* v. *Betts*, 19 Wendell, 421; *Young* v. *Gregorie*, 3 Call, 446; *Shaver* v. *White & Dougherty*, 6 Munford, 110; and see *Donnell* v. *Jones et al.*, 13 Alabama, 491. It lies also for maliciously suing out a domestic attachment, where, either there is nothing due, or the party has not rendered himself legally liable to such process; *Williams* v. *Hunter*, 3 Hawks, 545; *Tomlinson & Sperry* v. *Warner*, 9 Ohio, 103; and for maliciously suing out a replevin and detaining a ship; *Wells* v. *Noyes*, 12 Pickering, 324. But it will not lie for the mere institution of a civil suit, in a court of competent jurisdiction, where the person is not arrested, or held to bail, or his property attached, or other grievance occasioned, because the costs are considered a sufficient compensation; *dicta* in *Ray* v. *Law*, 1 Peters' C. C. 207, 210; *Potts* v. *Imlay*, 1 Southard, 331; *Algor* v. *Stillwell*, 1 Halsted, 166. And though in some instances the general principle has been asserted, that case will lie for any civil suit maliciously and groundlessly instituted; see *Whipple* v. *Fuller*, 11 Connecticut, 582; *Pangburn* v. *Bull*, 1 Wendell, 354; yet, excepting where the person or property has been specifically injured, as by arrest, holding to bail, or attachment, all the cases seem to be, not for malicious institution of a suit, but for malicious abuse of the process of law, which is a different action, and will be spoken of at the end of this note. *Whipple* v. *Fuller* was the case of an attachment; and *Pangburn* v. *Bull* was for malicious abuse of process in suing a man twice for purposes of vexation. There is no doubt, however, of the general principle, that the malicious and groundless institution of legal proceedings of any kind, under circumstances of special damage, or circumstances that raise a legal presumption of damage, is actionable. And it matters not before what tribunal the proceeding has been, if it was cause-

less and malicious, and injured the plaintiff in person, property, or reputation. It will lie, therefore, for a suit in equity under such circumstances; *Davis* v. *Gully*, 2 Devereux & Battle, 360, 363. An action, also, will lie for, maliciously and without probable cause, suing out a commission of bankrupt against the plaintiff; *Chapman* v. *Pickersgill*, 2 Wilson, 145; *Brown* v. *Chapman*, 1 Blackstone, 427; S. C., 3 Burrow, 1418; *Cotton* v. *James*, 1 Barnewall & Adolphus, 128; *Whiteworth* v. *Hall*, 2 Id. 695. And in *Chapman* v. *Pickersgill*, when the objection was made that the action was new, Lord Camden said, "I wish never to hear this objection again. This action is for a *tort:* torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief, and this suing out of a commission of bankruptcy *falsely and maliciously*, is of the most injurious consequence in a trading country." An action will lie also for maliciously advising and procuring one to sue or prosecute without probable cause; *Grove* v. *Brandenburg*, 7 Blackford, 234; *Mowry* v. *Miller*, 3 Leigh, 561; *Perdu* v. *Connerly*, Rice, 49; it is doubted, however, in *Firaz* v. *Nicholls*, 2 Common Bench, 501, whether it will lie for procuring one to bring a civil action. Neither case nor trespass will lie for executing a capias upon a person privileged from arrest as the suitor of a court, the privilege being that of the court; *Cameron* v. *Lightfoot*, 2 Blackstone, 1190; *Magnay* v. *Burt*, 5 Queen's Bench, 381. In case of malicious arrest, or taking in execution, the plaintiff in the suit is generally liable for the acts done by his attorney; at least, unless there is clear evidence of the attorney's acting without, or against the party's consent; *Jones* v. *Nicholls*, 3 Moore & Payne, 12: and the attorney is not liable, unless he was not authorized, or unless he knew that the suit was groundless, and wilfully and maliciously took part in a scheme of bringing a vexatious action; *Stockley* v. *Hornidge*, 8 Carrington & Payne, 11, 18; *Bicknell* v. *Dorion*, 16 Pickering, 478, 490; *Wood* v. *Weir & Sayre*, 5 B. Monroe, 544, 547.

In regard to the principles upon which these actions rest, and the rules applicable to them, some of the cases have said that there are essential distinctions between actions for criminal prosecutions, and for civil suits: see *Savil* v. *Roberts*; *Wengert* v. *Beashore*, 1 Pennsylvania, 232; *Herman* v. *Brookerhoof*, 8 Watts, 240. But at the present day, both classes of actions seem to stand on the same legal footing.

The principles upon which the action for malicious prosecution, or suit, rests, were first clearly stated in *Farmer* v. *Sir Robert Darling*, 4 Burrow, 1971, 1974; where all the judges agreed as to the ground of this sort of action, "That malice, (either express or implied,) and the want of probable cause, must both concur." A few years later, occurred the celebrated case of *Sutton* v. *Johnstone*, 1 Term, 493, which was an action on the case for a malicious prosecution before a court-martial, and in which the judgment of the Court of Exchequer was reversed on error in the Exchequer Chamber; *Johnstone* v. *Sutton*, Id. 510; and the reversal confirmed in the House of Lords; see 1 Brown's P. C. 76. The reasons given by Lords Mansfield and Loughborough, for the reversal in the Exchequer Chamber, have always been admired, as presenting a comprehensive and accurate view of the ground and nature of this action. (See a strong approbation of these views in *Willans* v. *Taylor*, 6 Bingham, 183, 188, and in S. C. in error, *Taylor* v. *Willans*, 2 Barnewall & Adolphus, 857, 858, 859; in *Mitchell* v. *Jenkins*, 5 Id. 594; and in *Musgrove* v. *Newell*, 1 Meeson & Welsby, 585, 587, where Alderson, B., remarked, that "all the principles applicable to the case are beautifully laid down in *Johnstone* v. *Sutton*," and Lord Abinger, C. B., said

"that the principles of law by which such cases are governed, cannot be better laid down than in the case of *Johnstone* v. *Sutton*.")

These principles, as there explained, are as follows:

"The essential ground of this action is, that a legal prosecution was carried on *without a probable cause*. We say this is emphatically the essential ground; because every other allegation may be implied from this; but this must be substantively and expressly proved, and cannot be implied.

"From the want of probable cause, malice may be, and most commonly is, implied. The knowledge of the defendant is also implied.

"From the most express malice, the want of probable cause cannot be implied.

"A man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action.

"After a verdict, the presumption is, that such parts of the declaration, without proof of which the plaintiff ought not to have had a verdict, were proved to the satisfaction of the jury. In this case, to support the verdict, there was nothing necessary to be proved, but that there was no probable cause, from whence the jury might imply malice, and might imply that the defendant knew there was no probable cause.

"The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable, are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law."

The principle, that malice alone, even the most express, if there were either real or probable ground of proceeding, will not be sufficient to sustain the action, but that both malice and want of probable cause must be established, has been constantly affirmed in the later cases; per Buller, J., in *Morgan* v. *Hughes*, 2 Term, 225, 231; *Willans* v. *Taylor*, 6 Bingham, 183, 186; per Holroyd, J., in *Nicholson* v. *Coghill*, 4 Barnewall & Cresswell, 21, 23; *Musgrove* v. *Newell*, 1 Meeson & Welsby, 582, 587; *Munns* v. *Dupont et al.*; *Wilmarth* v. *Mountfort et al.*, 4 Washington, 80, 82; *Murray* v. *Long*, 1 Wendell, 140; *Foshay* v. *Ferguson*, 2 Denio, 617; *Wills* v. *Noyes*, 12 Pickering, 324, 326; *Wilder* v. *Holden*, 24 Id. 8, 11; *Stone* v. *Crocker*, Id. 81, 83; *Ulmer* v. *Leland*, 1 Greenleaf, 135, 137; *Plummer* v. *Noble*, 6 Id. 285, 288; *Lyon* v. *Fox*, 2 Browne, 67, 69; *Winebiddle* v. *Porterfield*, 9 Barr, 137; *Turner* v. *Walker*, 3 Gill & Johnson, 378; *Adams* v. *Lesher*, 3 Blackford, 241, 244; *Scott* v. *Mortsinger*, 2 Id. 454, 455; *Yocum* v. *Polly*, 1 B. Monroe, 358; *Wood* v. *Weir & Sayre*, 5 Id. 504; *Chandler* v. *McPherson et al.*, 11 Alabama, 916, 919; *Williams* v. *Vanmeter*, 8 Missouri, 339, 342; *Leidig* v. *Rawson*, 1 Scammon, 273; *Johnston* v. *Martin*, 3 Murphy, 248; *Johnson* v. *Chambers*, 10 Iredell, 287, 292; *Murray* v. *McLane*, 5 Hall's Law J. 514. It is necessary that *malice* should be expressly alleged in the declaration; *Saxon* v. *Castle*, 6 Adolphus & Ellis, 652; see, also, *Page* v. *Wiple*, 3 East, 314, and *Vanduzor* v. *Linderman*, 10 Johnson, 106. And, though want of probable cause is necessary to support the action, yet those very words need not be alleged in the declaration, the words, falsely and maliciously, necessarily including a conscious want of probable cause; *Jones* v. *Gwynn*, 10 Modern, 214. See, also, *Sterling* v. *Adams*, 3 Day, 411, 432; the omission at least is cured by verdict; *Weinbeger* v. *Shelby*, 6 Watts & Sergeant, 336, 342. See, also, *Griffith* v. *Ogle*, 1 Binney, 172, 174. Some American cases, however, conflict with those authorities. In *Gibson* v. *Waterhouse*, 4 Greenleaf, 226, the omission of an allegation of want of probable cause was decided to

be bad after verdict; but here the word "maliciously" also was omitted. In *Ellis* v. *Thilman*, 3 Call, 3, "without any just cause," was decided to be insufficient on error, though "of his mere malice," was alleged; and in *Young* v. *Gregorie*, Id. 446, "without any legal or justifiable cause," was adjudged insufficient; and in both of these cases it was said that "want of probable cause," being the gist of the action, must be alleged in the declaration. In *Davis* v. *Clough*, 8 New Hampshire, 157, the omission to state that there was no probable cause beyond a certain amount, where there had been an arrest for more, was held bad on special demurrer. It is said also to have been decided in *Maddox* v. *McGinnis*, 7 Monroe, 371, that it is not enough to say in the declaration, "falsely and maliciously," without some of the words indicating want of probable cause.

The definition of probable cause, in a case of criminal prosecution, given by Judge Washington in the principal case, viz.—"a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the person accused is guilty of the offence with which he is charged;" is one of the best ever given, and has been frequently applied. See *Wilmarth* v. *Mountfort et al.*, 4 Washington, 82; *Foshay* v. *Fergusson*, 2 Denio, 617, 619; *Hall* v. *Suydam*, 6 Barbour's S. Ct., 84, 86; *Cabiness* v. *Martin*, 3 Devereux, 454. "There must be a reasonable cause," said Tindal, C. J., in *Broad* v. *Ham*, 5 Bingham's N. C. 722, 725,—"such as would operate on the mind of a discreet man; there must also be a probable cause—such as would operate on the mind of a reasonable man; at all events, such as would operate on the mind of the party making the charge: otherwise there is no probable cause for him." In another quarter, it is said that "anything which will create in the mind of a reasonable man the belief that a felony existed, and that the party charged was in any way concerned in it, is probable cause;" *Braveboy* v. *Cockfield*, 2 M'Mullan, 270, 274. See, also, *Sims* v. *M'Lendon*, 3 Strobhart, 557, 560. "Probable cause, in general," it was said, in another court, "may be understood to be such conduct on the part of the accused, as may induce the court to infer that the prosecution was undertaken from public motives;" *Ulmer* v. *Leland*, 1 Greenleaf, 135; *Thompson* v. *Mussey*, 3 Id. 305, 311. The question of probable cause does not turn upon the actual innocence or guilt of the accused, but upon the prosecutor's belief of it at the time, upon reasonable grounds; *Burlingame* v. *Burlingame*, 8 Cowen, 141; *French* v. *Small et al.*, 4 Vermont, 363: "however innocent the plaintiff may have been, it is enough for the defendant to show that he had reasonable grounds for believing him guilty at the time the charge was made;" *Foshay* v. *Ferguson*, 2 Denio, 617, 619: and the question of probable cause rests only on those facts and circumstances which were known to the prosecutor *at the time* the prosecution was begun, and not upon any which afterwards came to his knowledge; *Swaim* v. *Stafford*, 3 Iredell's Law, 289; 4 Id. 392. In one of the cases, justifiable probable cause is said to be "a deceptive appearance of guilt, arising from facts and circumstances misapprehended or misunderstood so far as to produce belief," and to depend not on facts, but on the belief of them; *Seibert* v. *Price*, 5 Watts & Sergeant, 438; but still, the belief must be upon reasonable grounds: and mere belief occasioned by the prosecutor's own negligence or want of proper investigation or reflection, would not be a justification; *Merriam* v. *Mitchell*, 13 Maine, 439; and, therefore, probable cause is justly defined in *Travis* v. *Smith*, 1 Barr, 234, 237, as "reasonable ground for belief." On this subject, different courts have fallen into error on the right hand and on

the left. Some of them have held that probable cause depends on the fact, whether there was or was not reasonable ground for prosecuting, and not upon the prosecutor's knowledge or belief of the fact; *Mowry* v. *Miller*, 3 Leigh, 561; *Hickman* v. *Griffin*, 6 Missouri, 37, 42; *Adams* v. *Lesher*, 3 Blackford, 241, 245: yet it is certain, that if probable cause really existed, but the prosecutor did not believe the party was guilty, or knew that he was not guilty, there was no probable cause as to him; *Bell* v. *Pearcy*, 5 Iredell's Law, 83; *Delegal* v. *Highley*, 3 Bingham's N. C., 950, 959; *Haddrick* v. *Hislop*, 12 Q. B., 267, 274; and the true question therefore is, "Whether he had probable cause upon the existing facts known to him;" *Wills* v. *Noyes*, 12 Pickering, 324, 326. Others have fallen into the antagonist error of holding that it depended merely on belief, and not on the causes or ground of belief; as in *Chandler* v. *M'Pherson et al.*, 11 Alabama, 916; but this would reduce probable cause to a mere question of the *fact* of belief, and break up the rule that it is a question of law for the court. There is no doubt that actual belief or suspicion, and reasonable ground for it, must both enter into a justification of the defendant; the latter is that part of the question which belongs exclusively to the court, and the former is the consideration of bona fides in acting upon it, or of the connexion between the probable cause and the party's conduct, which must be decided by the jury. The principle seems to be accurately stated in *Faris* v. *Starke*, 3 B. Monroe, 4, 6: "The law protects the prosecutor if he have reasonable or probable cause for the prosecution, that is, if he have such ground as would induce a man of ordinary prudence and discretion, to believe in the guilt, and to expect the conviction of the person suspected, and if he acts in good faith on such belief and expectation. The question is not whether the plaintiff was actually guilty, but whether the defendant had reasonable ground, from the facts known to him, and the communications made to him, to believe, and did actually believe, that the plaintiff was guilty." "Probable cause," says the court, in *Hall* v. *Hawkins*, 5 Humphreys, 357, 359, "is the existence of such facts and circumstances as would excite in a reasonable mind the belief that the person charged was guilty of the crime for which he was prosecuted; that is, acting upon the facts within the knowledge of the prosecutor, if a reasonable man would believe the party guilty of the crime charged, there would exist probable cause for the prosecution. It is not sufficient that the party really believed that a crime had been committed; when, in truth, the facts within his knowledge constituted no crime." "Good faith merely," said the court, in *Hall* v. *Suydam*, 6 Barbour's S. Ct., 84, 89, "is not sufficient to protect the defendant from liability. There must be a reasonable ground of suspicion, &c. Good faith merely may be based on mere conjecture, on unfounded suspicion — supported by no circumstances."

"*The mere belief* of the prosecutor," said the court in *Winebiddle* v. *Porterfield*, 9 Barr, 137, "is no evidence of probable cause. How are you to test the sincerity of a professed belief, or know that it is not the secret work of a heart to cover malice? There must be some circumstances which would authorize a reasonable man to entertain a belief. It need not be legal evidence that would be sufficient to convict; and hence it is not to be put to the jury as a question of guilt or innocence, but as a question whether the prosecutor had reasonable and probable cause to believe the defendant guilty. And if it can be fairly inferred from the circumstances of the case, that the prosecutor was actuated by an honest and fair intent to bring a suspected culprit to justice, on grounds sufficient to authorize the belief of a cautious man, it will remove all grounds

for a just inference of malice, and thus protect the defendant; but his mere professed belief will not."

The burden of showing want of probable cause is, in the first instance, on the plaintiff; and there must be some evidence of the absence of probable cause, before the defendant can be called on to justify his conduct; but as this is a negative, slight evidence will generally be sufficient; *Incledon* v. *Berry*, 1 Campbell, 202, *n.*; *Willans* v. *Taylor*, 6 Bingham, 183, 187; S. C. on error, 2 Barnewall & Adolphus, 857; *Cotton* v. *James*, 1 Id. 128, 133; *M'Cormick* v. *Sisson*, 7 Cowen, 715; *Gorton* v. *De Angelis*, 6 Wendell, 418, 420; *Stone* v. *Crocker*, 24 Pickering, 81, 84. If a party lays all the facts of the case fairly before counsel, before beginning proceedings, and acts bonâ fide upon the opinion given by that counsel, however erroneous that opinion may be, he is not liable to this action; but if he misrepresents the case, or if he does not act bonâ fide under the advice he has received, and does not himself believe that there is a cause of prosecution or action, he is not protected, and the bona fides of his conduct is a question of fact for the jury; *Snow* v. *Allen*, 1 Starkie, 502; *Ravenga* v. *Mackintosh*, 2 Barnewall & Cresswell, 693; *Hewlett* v. *Cruchley*, 5 Taunton, 277; *Hall* v. *Suydam*, 6 Barbour's S. Ct., 84, 88; *Blunt* v. *Little*, 3 Mason, 102, 105; *Wills* v. *Noyes*, 12 Pickering, 324; *Wilder* v. *Holden*, 24 Id. 8, 11; *Stone* v. *Swift*, 4 Id. 389; *Stevens* v. *Fassett*, 27 Maine, 267, 283; *Turner* v. *Walker*, 3 Gill & Johnson, 378; *Hall* v. *Hawkins*, 5 Humphreys, 357, 359; *Sommer* v. *Wilt*, 4 Sergeant & Rawle, 19; *Wood* v. *Weir & Sayre*, 5 B. Monroe, 544, 551; *Chandler* v. *M'Pherson*, 11 Alabama, 916, 919; *Hill* v. *Ward*, 13 Id. 311, 313; *Leaird* v. *Davis*, 17 Id. 27: see, however, to the contrary, *Collard* v. *Gay*, 1 Texas, 494. A defendant cannot excuse himself by showing that he consulted with an unprofessional person, and followed his advice, *Beal* v. *Robeson*, 8 Iredell, 276. In an action for a criminal prosecution, the fact that the plaintiff's character was suspicious, would not of itself be a sufficient justification; *Newsam* v. *Carr*, 2 Starkie, 69; and see *Gregory* v. *Thomas*, 2 Bibb, 286; but if other circumstances of suspicion are shown, the bad character of the plaintiff may be given in evidence, because with them it may cause a sufficient cause for the proceeding; *Rodriguez* v. *Tadmire*, 2 Espinasse, 720; *Miller* v. *Brown*, 3 Missouri, 127, 132; *Bostick* v. *Rutherford*, 4 Hawks, 83, 88. In the case of a criminal prosecution, a discharge by the examining magistrate, or a rejection of the bill by the grand jury, is prima facie evidence of probable cause, and it is for the defendant to rebut this inference by contrary proof; per Holroyd, J., in *Nicholson* v. *Coghill*, 6 Dowling & Ryland, 12, 14; S. C., 4 Barnewall & Cresswell, 21, 24; *Johnston* v. *Martin*, 3 Murphey, 248; *Plummer* v. *Gheen*, 3 Hawks, 66, 68; *Johnson* v. *Chambers*, 10 Iredell, 287, 292; *Bostick* v. *Rutherford*, 4 Id. 83, 87, (but see *M'Rae* v. *O'Neal*, 2 Devereux, 166, 169;) *Williams* v. *Norwood*, 2 Yerger, 329, 336; but a mere acquittal on trial would not be; *Adams* v. *Lisher*, 3 Blackford, 445; *Garrard* v. *Willet*, 4 J. J. Marshall, 628, 630; *Williams* v. *Vanmeter*, 8 Missouri, 339, 342; *Stone* v. *Crocker*, 24 Pickering, 81, 88. An entry of nolle pros. by the prosecuting attorney is not sufficient of itself to make out a prima facie case for the plaintiff; *Yocum* v. *Polly*, 1 B. Monroe, 358, 359; nor is the mere fact of the plaintiff's discharge for want of prosecution; *Purcell* v. *Macnamara*, 9 East, 361; S. C., 1 Campbell, 199, 201; *Wallis* v. *Alpine*, Id. 204, note; *Braveboy* v. *Cockfield*, 2 McMullan, 270; see also *Fulmer* v. *Harmon*, 3 Strobhart, 576; but where the defendant had presented two bills to the grand jury, yet did not himself appear before them, and the bills were ignored, and he then presented a third which

on his own oath was found, and this was kept pending three years, and upon its being brought to trial by the plaintiff, the defendant declined appearing as a witness, though he was in court and called on, and the plaintiff was acquitted; this was decided to be sufficient evidence of want of probable cause; *Willans* v. *Taylor*, 6 Bingham, 183; affirmed on error in 2 Barnewall & Adolphus, 857. The defendant has a right to show, as ground of probable cause, what evidence was given on the prosecution, even though it was given by himself; *M'Mahan* v. *Armstrong*, 2 Stewart & Porter, 151; but in some Missouri cases, this permission of the defendant to prove what he swore to is limited to the instances in which there was no other witness of the fact sworn to than himself; *Hays* v. *Waller*, 2 Missouri, 222; *Hickman* v. *Griffin*, 6 Id. 37, 41; *Riney* v. *Vanlandingham*, 9 Id. 816; see also, *McRae* v. *O'Neal*, 2 Devereux, 166, 171. On the other hand, the committing of the plaintiff after hearing by the examining magistrate, or the finding of the bill by the grand jury, even though the person be afterwards acquitted or discharged, is prima facie evidence of probable cause, but may be rebutted hy evidence; *Graham* v. *Noble*, 13 Sergeant & Rawle, 233, 235; *Brown* v. *Griffin*, Cheves's Law, 32; *Braveboy* v. *Cockfield*, 2 M'Mullan, 270; *Garrard* v. *Willet*, 4 J. J. Marshall, 628, 631; *Maddox* v. *Jackson*, 4 Munford, 462; *Frowman* v. *Smith and wife*, Littell's Sel. Ca. 7; *Collard* v. *Gay*, 1 Texas, 494; and it would not be sufficient if such finding was on the evidence of the defendant; *Kerr* v. *Workman*, Addison, 270. A conviction in the court where the indictment was tried, has been said to be conclusive evidence against the plaintiff; *Griffis* v. *Sellers*, 2 Devereux & Battle, 492; S. C. 4 Id. 176; and see *Mellor* v. *Baddely*, S. C. & M. 675; and this, even, where on appeal to a higher court, he was acquitted; *Reynolds* v. *Kennedy*, 1 Wilson, 232; *Whitney* v. *Peckham*, 15 Massachusetts, 243: but this seems to be pushed too far: the true principle appears to be, that a verdict of guilty is strong *primâ facie* evidence, but capable of being rebutted by showing that it was obtained exclusively, or mainly, by the false swearing of the defendant, or by other corrupt or undue means; *Witham* v. *Gowan*, 14 Maine, 362; *Payson* v. *Caswell*, 22 Id. 212, 216: the North Carolina courts, however, go so far as to deny any remedy by action for corruptly and maliciously prosecuting a party, and procuring a conviction; *Williams* v. *Woodhouse*, 3 Devereux, 257; which would be a reproach to the law, and certainly is wholly uncalled for by the doctrine of estoppel. In *Smith* v. *Macdonald*, 3 Espinasse, 7, Lord Kenyon said, that if the evidence on the indictment was such as to make the jury pause, he would hold it probable cause; but this, of course, must be understood of their doubting on the evidence, where it is legal, and has no reference to the cases where the evidence is afterwards shown to be corrupt; see *Tompson* v. *Massey*, 3 Greenleaf, 305.

In like manner, in case of a malicious civil suit, the voluntary discontinuance of the former suit is sufficient *primâ facie* evidence of want of probable cause and of malice; *Nicholson* v. *Coghill*, 6 Dowling & Ryland, 12, 14; S. C., 4 Barnewall & Cresswell, 21, 23; *Webb* v. *Hall*, 3 Carrington & Payne, 488; *Burhans* v. *Sanford*, 19 Wendell, 417; but is not conclusive; *Bristow* v. *Heywood*, 1 Starkie, 48: the mere suffering judgment of *non pros.* has been held not to be sufficient evidence to sustain the action; *Sinclair* v. *Eldred*, 4 Taunton, 8; *Purton* v. *Honnor*, 1 Bosanquet & Puller, 205; *Gorton* v. *De Angelis*, 6 Wendell, 418, 420; but it may be aided by other evidence; *Norrish* v. *Richards*, 3 Adolphus & Ellis, 733, 737: a verdict and judgment against the plaintiff unreversed and not set aside, have, in two cases, been decided to be conclusive evidence of probable cause; *Her-*

man v. *Brookerhoff*, 8 Watts, 240; *Jones* v. *Kirksey*, 10 Alabama, 839; but it seems, they would not be, if obtained by undue means; *Burt* v. *Place*, 4 Wendell, 491; *Gorton* v. *De Angelis*, 6 Id. 418; or, if obtained without notice to the defendant, as in case of an attachment of his property in his absence; *Bump* v. *Betts*, 19 Wendell, 421.

Although, as presently to be stated, want of probable cause is sufficient evidence of malice, the most express malice is not a sufficient ground to infer want of probable cause; *Musgrove* v. *Newell*, 1 Meeson & Welsby, 582, 584, 587; *Pangburn* v. *Bull*, 1 Wendell, 345; *Murray* v. *Long*, Id. 140; *Masten* v. *Deyo*, 2 Id. 424, 427; *Ulmer* v. *Leland*, 1 Greenleaf, 135, 137; *Marshall* v. *Maddock*, Littell's Sel. Ca. 107; *Williams* v. *Vanmeter*, 8 Missouri, 339, 342; *Chandler* v. *M'Pherson*, 11 Alabama, 916, 919; *Plummer* v. *Gheen*, 3 Hawks, 66, 68; *Horn* v. *Boon*, 3 Strobhart, 307. In accordance with the principle laid down in *Johnstone* v. *Sutton*, it is universally agreed, that the question of probable cause is a mixed one of fact and law, involving two distinct considerations, to be adjudicated by two different tribunals at the same time, the sufficiency of the circumstances to constitute probable cause being a mere question of law for the court, and the evidence of the circumstances being for the consideration of the jury; *Broad* v. *Ham*, 5 Bingham's N. C. 722, 725; *Munns* v. *Dupont et al.*; *Wilmarth* v. *Mountford et al.*; *Murray* v. *M'Lane*, 5 Hall's Law Jour. 514; *M'Cormick* v. *Sutton*, 7 Cowen, 715, 717; *Pangburn* v. *Bull*, 1 Wendell, 345; *Wilder* v. *Holden*, 24 Pickering, 8, 11; *Wengert* v. *Beashore*, 1 Pennsylvania, 232; *Miller* v. *Brown*, 3 Missouri, 127, 132; *Thomas* v. *Rouse*, 2 Brevard, 75; *Nash* v. *Orr*, 3 Id. 94. If there is any fact or motive in dispute, the proper course is for the judge to leave the question of probable cause to the jury, with instructions upon the law as applied to the several phases which the facts may assume, that is to say, with directions, that if they find in one way, there was no probable cause, and their verdict must be for the plaintiff, but if they find in another, there was probable cause, and the verdict must be the other way; *James* v. *Phelps*, 3 Perry & Davison, 231; *M'Donald* v. *Rooke*, 2 Bingham's N. C. 217; *Willans* v. *Taylor*, 6 Bingham, 183, 186; S. C. in error, 2 Barnewall & Adolphus, 845, 858; *Panton* v. *Williams*, 2 Queen's Bench, 169, 192; *Masten* v. *Deyo*, 2 Wendell, 424, 430; *Baldwin* v. *Weed*, 17 Id. 224, 227; *Hall* v. *Suydam*, 6 Barbour's S. Ct. 84, 89; *Weinberger* v. *Shelly*, 6 Watts & Sergeant, 336, 342; *French* v. *Smith et al.*, 4 Vermont, 363; *White* v. *Fox*, 1 Bibb, 369, 371; *Williams* v. *Norwood*, 2 Yerger, 329; *Paris* v. *Waddell*, 1 M'Mullan, 358, 363; *Leggett* v. *Blount*, 2 Taylor, 123; and it is error if the court leave it to the jury to say, on the evidence, whether there was, or was not probable cause; *Travis* v. *Barr*, 1 Barr, 234, 237; *Ulmer* v. *Leland*, 1 Greenleaf, 135, 139; *Plummer* v. *Gheen*, 3 Hawks, 66, 70. The court cannot assume the decision of the question of probable cause, unless the facts are undisputed; *Crabtree* v. *Horton*, 4 Munford, 59: but if there is no fact in dispute, or if the evidence consists of the direct testimony of an unimpeached witness, such that if the jury found against it, the court would order a new trial, or if, admitting all the facts in evidence on one side or the other, there still is, or is not probable cause, it is proper for the court to decide the question of probable cause; *Blackford* v. *Dod*, 2 Barnewall & Adolphus, 179; *Davis* v. *Hardy*, 6 Barnewall & Cresswell, 225; *Stone* v. *Crocker*, 24 Pickering, 81, 85; *Masten* v. *Deyo*, 2 Wendell, 424, 428; *Gorton* v. *De Angelis*, 6 Id. 418, 421; *Weaver* v. *Townsend*, 14 Id. 192; *Baldwin* v. *Weed*, 17 Id. 224, 227; *Varrell* v. *Holmes*, 4 Greenleaf, 168; *Williams* v. *Norwood*, 2 Yerger, 329, 332; *Lip-*

ford v. *M' Collum*, 1 Hill's So. Car. 82; *Horn* v. *Boon*, 3 Strobhart, 307, 310; *Swaim* v. *Stafford*, 3 Iredell's Law, 289. If want of probable cause be made out, it raises a natural presumption of knowledge of that want, on the part of the defendant, as is intimated in *Johnstone* v. *Sutton*; *Michell* v. *Williams*, 11 Meeson & Welsby, 205, 211; *Plummer* v. *Gheen*, 3 Hawks, 66, 68; but if such facts as would form probable cause exist, it may be doubtful, upon the evidence, whether the knowledge of those facts existed in the person's mind at the time, and was really the motive and inducement to the prosecution, or, if known, whether they were really believed and acted upon *bonâ fide*, and this will draw the whole question to the jury under proper instructions as to the law; *Venafra* v. *Johnson*, 10 Bingham, 301; *Delegal* v. *Highley*, 3 Bingham's N. C. 950, 959; *Broad* v. *Ham*, 5 Id. 722, 725; *Stone* v. *Swift*, 4 Pickering, 389; *Turner* v. *Walker*, 3 Gill & Johnson, 378.

Probable cause is a complete bar to this action; *Whitehurst* v. *Ward*; and it may either be shown under the general issue, or may be specially pleaded; and if pleaded, the facts in which it consists, must be distinctly set forth; *Legrand* v. *Page*, 7 Monroe, 401; *Garrard* v. *Willets*, 4 J. J. Marshall, 628; *Brown* v. *Connelly*, 5 Blackford, 391; *Horton* v. *Smelser*, Id. 429. The truth of the facts may, also, be pleaded, and will constitute a justification; *Morris* v. *Corson*, 7 Cowen, 281; *Adams* v. *Lesher*, 3 Blackford, 241, 245; *Bell* v. *Pearcy*, 5 Iredell's Law, 83, 86.

Malice, implied or express, must, also, be established; but the word is to be understood in its legal sense, in which it appears generally to be used as the opposite of *bona fides*. "It is not necessary to prove malice in the ordinary sense of the word,—any improper or sinister motive will be sufficient;" *per* Tindal, C. J., in *Stockley* v. *Hornidge*, 8 Carrington & Payne, 11, 18. "Malice may be inferred; malice, in law, means an act done wrongfully, and without reasonable and probable cause, and not, as in common parlance, an act dictated by angry feeling, or vindictive motives;" *per* Best, C. J., in *Jones* v. *Nicholls*, 3 Moore & Payne, 12. "Malice has a technical meaning," says Addison, P., in *Kerr* v. *Williamson*, Addison, 270, "and is not to be considered, as in the common conversation, or classical sense. Any prosecution carried on knowingly, wilfully and wantonly, or obstinately, for no purpose or end of justice or redress, but merely to the vexation of the person prosecuted, I conceive to be malicious." Malice is, in all cases, a question of fact for the jury; but want of probable cause is sufficient to authorize them to presume malice, without express evidence; *Parrot* v. *Fishwick*, 9 East, 362, *note*; *Musgrove* v. *Newell*, 1 Meeson & Welsby, 582, 587; *Munns* v. *Dupont et al.*, 3 Washington, 32, 37; *Wilmarth* v. *Mountford et al.*, 4 Id. 80, 82; *Sommer* v. *Wilt*, 4 Sergeant & Rawle, 19, 23; *Lyon* v. *Fox*, 2 Brown, App. 67, 69; *Pangburn* v. *Bull*, 1 Wendell, 345; *Murray* v. *Long*, Id. 140; *Masten* v. *Deyo*, 2 Id. 424, 425, 427; *Burhans* v. *Sanford*, 19 Id. 417; *Savage* v. *Brewer*, 16 Pickering, 453, 456; *Stone* v. *Crocker*, 24 Id. 81, 87; *Ulmer* v. *Leland*, 1 Greenleaf, 135, 137; *Merriam* v. *Mitchell*, 13 Maine, 439, 458; *Turner* v. *Walker*, 3 Gill & Johnson, 378; *Marshall* v. *Maddock*, Littell's Sel. Ca. 107; *Carries* v. *Meldrum*, 1 Marshall's Kentucky, 224; *Garrard* v. *Willet*, 4 J. J. Marshall, 628, 629; *Holburn* v. *Neal*, 4 Dana, 120; *Williams* v. *Vanmeter*, 8 Missouri, 339, 342; *Chandler* v. *M' Pherson*, 11 Alabama, 916, 919; *Plummer* v. *Gheen*, 3 Hawks, 66; still, the inference must be drawn by the jury, and cannot be drawn by the court; *Mitchell* v. *Jenkins*, 5 Barnewall & Adolphus, 588; *Newell* v. *Downs*, 8 Blackford, 523, 524; *Johnson* v. *Chambers*, 10 Iredell, 287, 292. Accordingly, in an action

for arrest under civil process, if no debt was due, but the defendant honestly believed that there was, and acted in good faith, under reasonable mistake, as, if the debt had been paid without his knowledge to his agent in another place, he could not be made liable in this action: the presumption of malice arising from a groundless suit, may, therefore, be rebutted by circumstances showing a fair and legitimate purpose, and the honest pursuit of a claim believed to be just; see *Scheibel* v. *Fairbairn*, 1 Bosanquet & Puller, 388; *Gibson* v. *Chaters*, 2 Id. 129; *Page* v. *Wiple*, 3 East, 314; *George* v. *Radford*, 3 Carrington & Payne, 464, 466; *Jackson* v. *Burleigh*, 3 Espinasse, 34; *Silversides* v. *Bowlby*, 1 Moore, 92, 94; *Spencer* v. *Jacob & another*, Moody & Malkin, 180; *Wood* v. *Weir & Sayre*, 5 B. Monroe, 504; *Bell* v. *Graham*, 1 Nott & M'Cord, 278, 283; *Ray* v. *Law*, Peters's C. C. 207, 210: and so in regard to a criminal proceeding, if the facts fall short of the legal measure of probable cause, but the prosecutor can show the honesty of his error, and it is apparent from the friendly relations of the parties and the prosecutor's reluctance to take any steps, that he acted without any malice, and only from a sense of supposed duty, he would not be answerable in this action; *Bell* v. *Pearcy*, 5 Iredell's Law, 83, 85; *Hall* v. *Hawkins*, 5 Humphreys, 357, 359. "What shall amount to such a combination of malice and want of probable cause," said Tindal, C. J., "is so much a matter of fact in each individual case, as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable man, that the accuser had no ground for proceeding, but his desire to injure the accused:" *Willans* v. *Taylor*, 6 Bingham, 183, 186.

In an action for maliciously holding to bail, the plaintiff may recover the extra costs beyond the taxed costs, that is to say, the costs between client and attorney, and a reasonable compensation for trouble; *Sandback* v. *Thomas*, 2 Starkie, 306; *Haddam* v. *Mills*, 4 Carrington & Payne, 486, 490; *Gould* v. *Barratt*, 2 Moody & Robinson, 171. There is no doubt of the power of courts to grant a new trial for excessive damages, in all these actions of tort; but it is rarely done, unless the jury appear to have mistaken the legal measure of damage, or to have been influenced by corruption, partiality, or prejudice; *Hewlett* v. *Cruchley*, 5 Taunton, 277; *Tompson* v. *Massey*, 3 Greenleaf, 305; *Blunt* v. *Little*, 3 Mason, 102, 106.

In all actions for malicious prosecution or suit, whether by indictment, arrest, attachment, or suing out a commission of bankruptcy, it must be alleged in the declaration, and proved, that the proceedings are legally at an end; *Fisher* v. *Bristow & others*, 1 Douglas, 215; *Morgan* v. *Hughes*, 2 Term, 225, 231, 232; *Whitworth* v. *Hall*, 2 Barnewall & Adolphus, 695; *Norrish* v. *Richards*, 3 Adolphus & Ellis, 733; *Heywood* v. *Collinge*, 9 Id. 268, 273; *Watkins* v. *Lee*, 5 Meeson & Welsby, 270; *Mellor* v. *Baddeley*, 2 Crompton & Meeson, 675; *Bacon* v. *Townsend*, 6 Barbour's S. Ct. 426; *Davis* v. *Clough*, 8 New Hampshire, 157; *Benjamin* v. *Garee*, Wright, 450; *Heyward* v. *Cuthbert*, 4 M'Cord, 354; *Hardin* v. *Borders et al.*, 1 Iredell's Law, 143; *Howell* v. *Edwards*, 8 Id. 516; and it must be shown *how* they were ended, and an omission to show *how* they were ended, would be specially demurrable; *Parker* v. *Langley*, 10 Modern, 145, 209; *Webb* v. *Hill*, 3 Carrington & Payne, 485, 487; *Wilkinson* v. *Howel*, 1 Moody & Malkin, 495; *per* Gaselee, J., in *Brook* v. *Carpenter*, 3 Bingham, 297, 302; *Thomas* v. *De Graffenreid*, 2 Nott & M'Cord, 144, 146; *Cole* v. *Hanks*, 3 Monroe, 208; *Teague* v. *Williams*, 3 M'Cord, 461; though the omission to allege either the mode or the fact of termination, would be cured by verdict; *Skinner* v. *Gunton*, 1 Saunders, 228; *Weinberger* v. *Shelby*, 6 Watts

& Sergeant, 336, 342; *Young* v. *Gregorie*, 3 Call, 446, 452; *Cotton* v. *Wilson*, Minor, 203: and it must be proved, that they were terminated precisely in the way alleged in the declaration, or it will be ground of nonsuit; *Combe* v. *Capron*, 1 Moody & Robinson, 398; *Good* v. *Bennett*, 5 Price, 540; *Feazle* v. *Simpson et al.*, 1 Scammon, 30; therefore, if it be alleged, that the party was "discharged," the averment would not be sustained by proof of an acquittal upon trial; *Law* v. *Franks*, Cheves's Law, 9; or, if it be alleged that the party was "acquitted," without stating in what manner, no other mode of discharge than by verdict of "not guilty" can be given in evidence; *Morgan* v. *Hughes*, 2 Term, 225, 232; *Thomas* v. *De Graffenreid*, 2 Nott & M'Cord, 144, 146; *Hester* v. *Hagood*, 2 Hill's So. Car. 195; *Teague* v. *Williams*, 3 M'Cord, 461. In fact, the whole judicial proceedings in the prosecution or suit should be set out in the declaration; *Sitton* v. *Farr*, Rice, 304; *Good* v. *Bennett:* and must be proved as laid; *Hughes* v. *Ross*, 1 Stewart & Porter, 258; and the proof must be by the record, or a copy of it; *Sayles* v. *Briggs*, 4 Metcalf, 421; *Cole* v. *Hanks*, 3 Monroe, 208; or by the papers themselves, which constitute the proceeding, in a court not of record; *Cooper* v. *Turrentine & Freeman*, 17 Alabama, 13: as to the plaintiff's right to have a copy of the indictment, see *Burton* v. *Hawkins*, 2 Hill's So. Car. 674. An action of conspiracy cannot be maintained, unless there has been an *acquittal* by verdict upon a trial; and the reason given is, that the writ of conspiracy is a formed writ, which cannot be departed from, and in the register it contains that allegation; but an action on the case is not tied down to any form, and any legal mode of discharge will be sufficient; *Smith* v. *Cranshaw*, W. Jones, 93; *Jones* v. *Gwynn*, 10 Modern, 214, 219; *Commonwealth* v. *Wheeler*, 2 Massachusetts, 172.

In case of a criminal prosecution, in some way or other, the proceeding must be legally at an end, that is, must be in such a condition that it cannot be revived, but the prosecutor must be put to a new proceeding; *Clark* v. *Cleveland*, 6 Hill, 345. A discharge by the justice before whom the charge was prosecuted; *Long* v. *Rogers*, 16 Alabama, 540, 546; or at the sessions, no indictment having been preferred; *Shock* v. *M'Chesney*, 4 Yeates, 507, 510; and an entry of *nolle pros.* on which the court render a judgment of discharge; *Chapman* v. *Woods*, 6 Blackford, 504; or a verdict of 'not guilty,' without any judgment of discharge; *Mills* v. *M'Coy*, 4 Cowen, 406; is a sufficient termination to maintain this action: but a mere entry of *nolle pros.* on the indictment, by the prosecuting attorney, or the mere non-acting on the bill by the grand jury, or even their rejection of it, will not be sufficient, unless followed by a judgment or order of discharge; *Smith* v. *Shackford*, 1 Nott & M'Cord, 36; *Heyward* v. *Cuthbert*, 4 M'Cord, 354; *O'Driscoll* v. *M'Burney*, 2 Nott & M'Cord, 54; *Thomas* v. *De Graffenreid*, Id. 144, 146; in short, whenever the termination is not by verdict, but by rejection of the bill, or by *nolle pros.*, or by arrest of judgment, a discharge by the court must be alleged, otherwise it does not appear, that the party may not still be proceeded against; *Teague* v. *Williams*, 3 M'Cord, 461. In an action for a malicious arrest, it is enough if the case is out of court by any other means than consent of parties: a rule to discontinue on payment of costs, and the actual payment of them; *Bristow* v. *Haywood*, 4 Campbell, 213, 214; *Brandt* v. *Peacock*, 1 Barnewall & Cresswell, 649; a neglect to declare for a year; *Pierce* v. *Street*, 3 Barnewall & Adolphus, 397; *Norrish* v. *Richards*, 3 Adolphus & Ellis, 733; is a sufficient termination. It appears, however, that any termination by consent will prevent an action being brought; *Wilkinson* v. *Howel*, 1 Moody & Malkin, 495; *M'Cormick* v. *Sisson*,

7 Cowen, 715: and in *Habershon* v. *Troby*, Peake's Additional, 181; S. C. 3 Espinasse, 33, it was held, that a termination by award upon a submission by consent to arbitrators, is a bar; but the reverse was decided in *Pierce* v. *Thompson*, 6 Pickering, 193, 196. It is said by Mr. Chitty to be a general rule, that the termination must have been in favour of the plaintiff; and this *dictum* is repeated in *Gorton* v. *De Angelis*, 6 Wendell, 418, 419; *Feagle* v. *Simpson et al.*, 1 Scammon, 30: but there is no express authority in the English cases for such a position, and its accuracy, as an inflexible rule, is doubtful. At all events, it would be satisfied by a termination in the plaintiff's favour, on appeal; *Burt* v. *Place*, 4 Wendell, 591; and it would not apply where the plaintiff had had no notice of the previous proceeding, as where it was an attachment sued out against his property in his absence; *Bump* v. *Betts*, 19 Wendell, 421.

The gist of the action above considered, is the putting of legal process in force, regularly, for the mere purpose of vexation, annoyance, or injury; and the inconvenience or harm resulting, naturally or directly, from the suit or prosecution, is the legal damage upon which it is founded. There is another action, quite distinguishable from this; it is the action for malicious abuse of civil process. It lies where capias is sued out for some collateral object of oppression, as, to extort property illegally from the defendant; *Grainger* v. *Hill*, 4 Bingham's N. C. 212; or, where a second capias is sued out from motives merely vexatious, for the same cause of action, pending a former writ; *Heywood* v. *Collinge*, 9 Adolphus & Ellis, 268; see also *Pangburn* v. *Bull*, 1 Wendell, 345; or, where a *ca. sa.* is sued out irregularly, a *fi. fa.* being still out; *Turner* v. *Walker*, 3 Gill & Johnson, 378; or, where, under a *fi. fa.* on a judgment on a bond with penalty, the plaintiff directs goods to be levied on and sold to the amount of the penalty, or in double the amount of the debt due on it; *Sommer* v. *Wilt*, 4 Sergeant & Rawle, 19. See, also, *Baldwin* v. *Weed*, 17 Wendell, 224, 227; *Plummer* v. *Dennett*, 6 Greenleaf, 421. In this action, it is not necessary to show, that the suit is terminated, nor to show want of probable cause of suit; but malice must be proved; *Lewis* v. *Morris*, 2 Crompton & Meeson, 712, 721. But want of probable cause would be evidence of malice. See *Prough* v. *Entriken*, 1 Jones, 82.

An action on the case will lie, also, for prosecuting an attachment suit without authority, in the name of a third person; and neither actual malice, nor want of probable cause, need be proved; though want of authority must; *Bond* v. *Chapin*, 8 Metcalf, 31.

Of the legal capacity of Infants, and their liability ex contractu and ex delicto.

TUCKER ET AL. *v.* MORELAND.

In the Supreme Court of the United States.

JANUARY TERM, 1836.

[REPORTED, 10 PETERS, 59–79.]

Of the acts of an Infant which are voidable, and of those which are void; and of the means by which his voidable acts may be avoided.

MR. JUSTICE STORY (*a*) delivered the opinion of the court.

This is a writ of error to the circuit court for the county of Washington, and District of Columbia.

The original action was an ejectment brought by the plaintiff in error against the defendant in error; and both parties claimed title under Richard N. Barry. At the trial of the cause upon the general issue, it was admitted, that Richard N. Barry, being seized in fee of the premises sued for, on the first day of December, 1831, executed a deed thereof to Richard Wallach. The deed, after reciting that Barry and one Bing were indebted to Tucker and Thompson in the sum of three thousand two hundred and thirty-eight dollars, for which they had given their promissory note, payable in six months after date, to secure which the conveyance was to be made, conveyed the premises to Wallach, in trust to sell the same in case the debt should remain unpaid ten days after the first day of December then next. The same were accordingly sold by Wallach, for default of payment of the note, on the 23d of February, 1833, and were bought at the sale by Tucker and Thompson, who received a deed of the same, on the 7th of March of the same year. It was admitted, that after the execution of the deed of Barry to Wallach, the former continued in possession of the premises until the 8th of February, 1833, when he executed a deed, including the same and other parcels of land, to his mother, Eliza G. Moreland, the defendant, in consideration (as recited in the deed) of the sum of one thousand one hundred and thirty-eight dollars and sixty-one cents, which he owed his mother; for the recovery of which she had instituted a suit against him, and of other sums advanced him, a particular account of which had not been kept, and of the

(*a*) The case being very fully stated in the opinion of the court, the reporter's statement has been omitted.

further sum of five dollars. At the time of the sale of Wallach, the defendant gave public notice of her title to the premises, and she publicly claimed the same as her absolute right. The defendant further gave evidence at the trial, to prove that at the time of the execution of the deed by Barry to Wallach, he, Barry, was an infant under twenty-one years of age; and at the time of the execution of the deed to the defendant, he was of the full age of twenty-one years.

Upon this state of the evidence, the counsel for the defendant prayed the court to instruct the jury, that if upon the whole evidence given as aforesaid to the jury, they should believe the facts to be as stated aforesaid, then the deed from the said Wallach to the plaintiffs, did not convey to the plaintiffs any title, which would enable them to sustain the action. This instruction the court gave; and this constitutes the exception now relied on by the plaintiff in error in his first bill of exceptions.

Some criticism has been made upon the language, in which this instruction is couched. But, in substance, it raises the question, which has been so fully argued at the bar, as to the validity of the plaintiff's title to recover; if Barry was an infant at the time of the execution of his deed to Wallach. If that deed was originally void, by reason of Barry's infancy, then the plaintiff, who must recover upon the strength of his own title, fails in that title. If, on the other hand, that deed was voidable only, and not void, and yet it has been avoided by the subsequent conveyance to the defendant by Barry; then the same conclusion follows. And these, accordingly, are the considerations, which are presented under the present instruction.

In regard to the point, whether the deed of lands by an infant is void or voidable at common law, no inconsiderable diversity of opinion is to be found in the authorities. That some deeds or instruments under seal of an infant are void, and others voidable, and others valid and absolutely obligatory, is not doubted. Thus, a single bill under seal given by an infant for necessaries, is absolutely binding upon him; a bond with a penalty for necessaries is void, as apparently to his prejudice; and a lease reserving rent is voidable only.(*a*) The difficulty is in ascertaining the true principle, upon which these distinctions depend. Lord Mansfield, in Zouch v. Parsons (3 Burr. 1804), said, that it was not settled, what is the true ground upon which an infant's deed is voidable only; whether the solemnity of the instrument is sufficient, or it depends upon the semblance of benefit from the matter of the deed upon the face of it. Lord Mansfield, upon a full examination of the

(*a*) See Russell v. Lee, 1 Lev. 86; Fisher v. Mowbray, 8 East, R. 330; Baylis v. Dineley, 3 M. & Selw. 470; Co. Litt. 172.

authorities on this occasion, came to the conclusion (in which the other judges of the court of King's Bench concurred) that it was the solemnity of the instrument, and delivery by the infant himself, and not the semblance of benefit to him, that constituted the true line of distinction between void and voidable deeds of the infant. But he admitted, that there were respectable sayings the other way. The point was held by the court not necessary to the determination of that case; because in that case the circumstances showed that there was a semblance of benefit sufficient to make the deed voidable only, upon the matter of the conveyance. There can be little doubt, that the decision in Zouch v. Parsons was perfectly correct; for it was the case of an infant mortgagee, releasing by a lease and release his title to the premises, upon the payment of the mortgage money by a second mortgagee, with the consent of the mortgagor. It was precisely such an act as the infant was bound to do; and would have been compelled to do by a court of equity as a trustee of the mortgagor. And certainly it was for his interest to do, what a court of equity would by a suit have compelled him to do.(*a*)

Upon this occasion, Lord Mansfield and the court approved of the law as laid down by Perkins (sect. 12), that "all such gifts, grants, or deeds made by infants, which do not take effect by delivery of his hand are void. But all gifts, grants, or deeds made by infants by matter of deed or in writing, which do take effect by delivery of his hand are voidable by himself, by his heirs, and by those who have his estate." And in Lord Mansfield's view, the words "which do take effect," are an essential part of the definition; and exclude letters of attorney, or deeds, which delegate a mere power and convey no interest.(*b*) So that, according to Lord Mansfield's opinion, there is no difference between a feoffment and any deeds which convey an interest. In each case, if the infant makes a feoffment or delivers a deed in person, it takes effect by such delivery of his hand, and is voidable only. But if either be done by letter of attorney from the infant, it is void, for it does not take effect by a delivery of his hand.

There are other authorities, however, which are at variance with this doctrine of Lord Mansfield, and which put a different interpretation upon the language of Perkins. According to the latter, the semblance of benefit to the infant or not, is the true ground of holding his deed voidable or void. That it makes no difference, whether the deed be delivered by his own hand or not; but whether it be for his benefit or not. If the former, then it is voidable; if the latter, then it is void. And that

(*a*) See —— v. Handcock, 17 Ves. 383. 1 Fonbl. Eq. B. 1, ch. 2, S. 5, and Notes. Co. Litt. 172 (*a*); Com. Dig. Infant, B. 5.

(*b*) See Saunders v. Mann, 1 H. Black, 75.

Perkins, in the passage above stated, in speaking of gifts and grants taking effect by the delivery of the infant's hand, did not refer to the delivery of the deed, but to the delivery of the thing granted; as, for instance, in the case of a feoffment to a delivery of seisin by the infant personally; and in case of chattels, by a delivery of the same by his own hand. This is the sense in which the doctrine of Perkins is laid down in Sheppard's Touchstone, 232. Of this latter opinion, also, are some other highly respectable text writers;(*a*) and, perhaps, the weight of authority, antecedent to the decision in Zouch v. Parsons, inclined in the same way. Lord Chief Justice Eyre, in Keane v. Baycott (2 Hen. Black. 515), alluded to this distinction in the following terms. After having corrected the generality of some expressions in Litt. s. 259, he added: "We have seen that some contracts of infants, even by deed, shall bind them; some are merely void, namely, such as the court can pronounce to be their prejudice; others, and the most numerous class, of a more uncertain nature as to benefit or prejudice, or voidable only; and it is in the election of the infant to affirm them or not. In Roll. Abridg. title Enfants (1 Roll. Abridg. 728), and in Com. Dig. under the same title, instances are put of the three different kinds, of good, void, and voidable contracts. Where the contract is by deed, and not apparently to the prejudice of the infant, Comyns states it as a rule, that the infant cannot plead non est factum, but must plead his infancy. It is his deed; but this is a mode of disaffirming it. He, indeed, states the rule generally; but I limit it to that case, in order to reconcile the doctrine of void and voidable contracts." A doctrine of the same sort was held by the court in Thompson v. Leach, 3 Mod. 310; in Fisher v. Mowbray, 8 East, 330; and Baylis v. Dineley, 3 M. & Selw. 477. In the last two cases, the court held, that an infant cannot bind himself in a bond with a penalty, and especially to pay interest. In the case of Baylis v. Dineley, Lord Ellenborough said: "In the case of the infant lessor, that being a lease, rendering rent imported on the face of it a benefit to the infant; and his accepting the rent at full age was conclusive that it was for his benefit. But how do these authorities affect a case like the present, where it is clear upon the face of the instrument that it is to the prejudice of the infant, for it is an obligation with a penalty, and for the payment of interest? Is there any authority to show, that if, upon looking to the instrument, the court can clearly pronounce, that it is to

(*a*) See Preston on Conveyancing, 248 to 250; Com. Dig. Enfant, c. 2; Shep. Touch. 232, and Acherly's note; Bac. Abridg. Infancy, I. 3; English Law Journal for 1804, p. 145; 8 Amer. Jurist, 327. But see 1 Powell on Mortg. by Coventry, note to p. 208; Zouch v. Parsons, 1 W. Black. 575; Ellsley's notes, (*h*) and (*v*); Co. Litt. 51, 6, Harg. note, 331; Holmes v. Blogg, 8 Taunt. 508; 1 Fonbl. Eq. b. 1, ch. 11, s. 3, and notes (*y*) (*z*) (*a*) (*b*).

the infant's prejudice, they will, nevertheless, suffer it to be set up by matter ex post facto after full age?" And then, after commenting on Keane v. Baycott, and Fisher v. Mowbray, he added: "In Zouch v. Parsons, where this subject was much considered, I find nothing which tends to show that an infant may bind himself to his prejudice. It is the privilege of the infant that he shall not; and we should be breaking down the protection, which the law has cast around him, if we were to give effect to a confirmation by parol of a deed, like this, made during his infancy."

It is apparent, then, upon the English authorities, that however true it may be, that an infant may so far bind himself by deed in certain cases, as that in consequence of the solemnity of the instrument it is voidable only and not void; yet that the instrument, however solemn, is held to be void, if upon its face it is apparent, that it is to the prejudice of the infant. This distinction, if admitted, would go far to reconcile all the cases; for it would decide, that a deed by virtue of its solemnity should be voidable only, unless it appeared on its face to be to his prejudice, in which case it would be void.(*a*)

The same question has undergone no inconsiderable discussion in the American courts. In Oliver v. Hendlet, 13 Mass. Rep. 239, the court seemed to think the true rule to be, that those acts of an infant are void, which not only apparently but necessarily operate to his prejudice. In Whitney v. Dutch, 14 Mass. Rep. 462, the same court said, that whenever the act done may be for the benefit of the infant, it shall not be considered void; but that he shall have his election, when he comes of age, to affirm or avoid it. And they added, that this was the only clear and definite proposition, which can be extracted from the authorities.(*b*) In Conroe v. Birdsall, 1 John. Cas. 127, the court approved of the doctrine of Perkins, § 12, as it was interpreted and adopted in Zouch v. Parsons, and in the late case of Roof v. Stafford, 7 Cowen's Rep. 180, 181, the same doctrine was fully recognised. But in an intermediate case, Jackson v. Burchin, 14 John. Rep. 126, the court doubted, whether a bargain and sale of lands by an infant was a valid deed to pass the land, as it would make him stand seized to the use of another. And that doubt was well warranted by what is laid down in 2 Inst. 673, where it is said that if an infant bargain and sell lands, which are in the realty, by deed indented and enrolled, he may avoid it when he will, for the deed was of no effect to raise a use.

The result of the American decisions has been correctly stated by Mr. Chancellor Kent, in his learned Commentaries (2 Com. Lect. 31), to be, that they are in favour of construing the acts and contracts of

(*a*) See Bac. Abridg. Infancy and Age, I. 3, I. 7.
(*b*) See Boston Bank v. Chamberlain, 15 Mass. Rep. 220.

infants generally to be voidable only, and not void, and subject to their election, when they become of age, either to affirm or disallow them; and that the doctrine of Zouch v. Parsons has been recognised and adopted as law. It may be added that they seem generally to hold, that the deed of an infant conveying lands is voidable only, and not void; unless, perhaps, the deed should manifestly appear on the face of it to be to the prejudice of the infant; and this upon the nature and solemnity, as well as the operation of the instrument.

It is not, however, necessary for us in this case to decide whether the present deed, either from its being a deed of bargain and sale, or from its nature, as creating a trust for the sale of the estate, or from the other circumstances of the case, is to be deemed void, or voidable only. For if it be voidable only, and has been avoided by the infant, then the same result will follow, that the plaintiff's title is gone.

Let us, then, proceed to the consideration of the other point, whether, supposing the deed to Wallach to be voidable only, it has been avoided by the subsequent deed of Barry to Mrs. Moreland. There is no doubt that an infant may avoid his act, deed, or contract, by different means, according to the nature of the act, and the circumstances of the case. He may sometimes avoid it by matter in pais, as in case of a feoffment by an entry, if his entry is not tolled; sometimes by plea, as when he is sued upon his bond or other contract; sometimes by suit, as when he disaffirms a contract made for the sale of his chattels, and sues for the chattels; sometimes by a writ of error, as when he has levied a fine during his nonage; sometimes by a writ of audita querela, as when he has acknowledged a recognisance or statute staple or merchant;(*a*) sometimes, as in the case of alienation of his estate during his nonage by a writ of entry, dum fuit infra ætatem, after his arrival of age. The general result seems to be that where the act of the infant is by matter of record, he must avoid it by some act of record (as for instance, by a writ of error, or an audita querela) during his minority. But if the act of the infant is a matter in pais, it may be avoided by an act in pais of equal solemnity or notoriety; and this, according to some authorities, either during his nonage or afterwards; and according to others, at all events, after his arrival of age.(*b*) In Co. Litt. 380, b., it is said, "Herein a diversity is to be observed between matters of record done or suffered by an infant, and matters in fait; for matters in fait he shall avoid either within age or at full age, as hath been said;

(*a*) See Com. Dig. Enfant, B. 1, 2, C. 2, 3, 4, 5, 8, 9, 11; 2 Inst. 673: 2 Kent Comm. sect. 31; Bac. Abridg. Infancy and Age, I. 5, I. 7.

(*b*) See Bac. Abridg. Infancy and Age, I. 3, I. 5, I. 7; Zouch v. Parsons, 3 Burr. 1694; Roof v. Stafford, 7 Cowen R. 179, 183; Com. Dig. Enfant, C. 9, C. 4, C. 11.

but matters of record, as statutes, merchants, and of the staple, recognisance acknowledged by him, or a fine levied by him, recovery against him, &c., must be avoided by him, viz. statutes, &c., by audita querela; and the fine and recovery by a writ of error during his minority, and the like." In short, the nature of the original act or conveyance generally governs, as to the nature of the act required to be done in the disaffirmance of it. If the latter be of as high and solemn a nature as the former, it amounts to a valid avoidance of it. We do not mean to say, that in all cases the act of disaffirmance should be of the same, or of as high and solemn a nature as the original act; for a deed may be avoided by a plea. But we mean only to say, that if the act of disaffirmance be of as high and solemn a nature, there is no ground to impeach its sufficiency. Lord Ellenborough, in Baylis v. Dineley (3 Maule and Selw. 481, 482), held a parol confirmation of a bond given by an infant after he came of age to be invalid; insisting that it should be by something amounting to an estoppel in law, of as high authority as the deed itself; but that the same deed might be avoided by the plea of infancy. There are cases, however, in which a confirmation may be good without being by deed; as in case of a lease by an infant, and his receiving rent after he came of age.(*a*)

The question then is, whether in the present case, the deed to Mrs. Moreland, being of as high and solemn a nature as the original deed to Wallach; is not a valid disaffirmance of it. We think it is. If it was a voidable conveyance which had passed the seisin and possession to Wallach, and he had remained in possession, it might, like a feoffment, have been avoided by an entry by an infant after he came of age.(*b*) But in point of fact Barry remained in possession; and therefore he could not enter upon himself. And when he conveyed to Mrs. Moreland, being in possession, he must be deemed to assert his original interest in the land, and to pass it in the same manner as if he had entered upon the land and delivered the deed thereon, or if the same had been in adverse possession.

The cases of Jackson v. Carpenter (11 John. R. 539), and Jackson v. Burchin (14 John. R. 124), are directly in point, and proceed upon principles, which are in perfect coincidence with the common law, and are entirely satisfactory. Indeed, they go farther than the circumstances of the present case require; for they dispense with an entry where the possession was out of the party when he made the second deed. In Jackson v. Burchin the court said, that it would seem not only upon

(*a*) See Bac. Abridg. Infancy and Age, I. 8.

(*b*) See Inhabitants of Worcester v. Eaton, 13 Mass. R. 375; Whitney v. Dutch, 14 Mass. R. 462.

principle but authority, that the infant can manifest his dissent in the same way and manner by which he first assented to convey. If he has given livery of seisin, he must do an act of equal notoriety to disaffirm the first act; he must enter on the land and make known his dissent. If he has conveyed by bargain and sale, then a second deed of bargain and sale will be equally solemn and notorious in disaffirmance of the first.(*a*) We know of no authority or principle, which contradicts this doctrine. It seems founded in good sense, and follows out the principle of notoriety of disaffirmance in the case of a foeffment by an entry; that is, by an act of equal notoriety and solemnity with the original act. The case of Frost v. Wolverton (1 Strange, 94) seems to have proceeded on this principle.

Upon these grounds we are of opinion, that the deed of Barry to Mrs. Moreland was a complete disaffirmance and avoidance of his prior deed to Wallach; and consequently, the instruction given by the circuit court was unexceptionable. To give effect to such disaffirmance, it was not necessary, that the infant should first place the other party in statu quo.

The second bill of exceptions, taken by the plaintiff, turns upon the instructions asked upon the evidence stated therein, and scarcely admits of abbreviation. It is as follows:

"The plaintiff, further to maintain and prove the issue on his side, then gave in evidence by competent witnesses, facts tending to prove that the said Richard N. Barry had attained the full age of twenty-one years on the fourteenth day of September, 1831; and that in the month of November, 1831, the said defendant, who was the mother of the said Richard, did assert and declare that the said Richard was born on the fourteenth day of September, 1810; and that she did assert to Dr. McWilliams, a competent and credible witness, who deposed to the facts, and who was the accoucher attending on her at the period of the birth of her said son, that such birth actually occurred on the said fourteenth of September, 1810, and applied to said Dr. McWilliams to give a certificate and deposition that the said day was the true date of the birth; and thereupon the counsel for the plaintiff requested the court to instruct the jury:—

"1. That, if the said jury shall believe, from the said evidence, that the said Richard N. Barry was of full age, and above the age of twenty-one years, at the time of the execution of said deed to Wallach, or if the defendant shall have failed to satisfy the jury from the evidence that said Barry was, at the said date, an infant under twenty-one years, that then the plaintiff is entitled to recover.

(*a*) See the same point, 2 Kent Comm. sect. 31.

"2. Or if the jury shall believe, from the said evidence, that if said Richard was under age at the time of the execution of said deed, that he did after his arrival at age, voluntarily and deliberately recognise the same as an actual conveyance of his right, or during a period of several months acquiesced in the same without objection, that then the said deed cannot now be impeached on account of the minority of the grantor.

"3. That the said deed from the said Richard N. Barry to the defendant, being made to her with full notice of said previous deed to said Wallach, and including other and valuable property, is not so inconsistent with said first deed as to amount to a disaffirmance of the same.

"4. That from the relative position of parties to said deed to defendant, at and previous to its execution, and from the circumstances attending it, the jury may infer that the same was fraudulent and void.

"That, if the lessors of the plaintiff were induced, by the acts and declarations of said defendant to give a full consideration for said deed to Wallach, and to accept said deed as a full and only security for the debt bona fide due to them, and property bona fide advanced by them, and to believe that the said security was valid and effective, that then it is not competent for said defendant in this action to question or deny the title of said plaintiff under said deed, whether the said acts and declarations were made fraudulently, and for the purpose of practising deception, or whether said defendant, from any cause wilfully misrepresented the truth.

"Whereupon the court gave the first of the said instructions so prayed as aforesaid, and refused to give to the others.

"To which refusal the counsel for the plaintiff excepted."

The first instruction, being given by the court, is of course excluded from our consideration on the present writ of error. The second instruction is objectionable on several accounts. In the first place, it assumes, as a matter of law, that a voluntary and deliberate recognition by a person after his arrival at age, of an actual conveyance of his right during his nonage, amounts to a confirmation of such conveyance. In the next place, that a mere acquiescence in the same conveyance, without objection, for several months after his arrival at age, is also a confirmation of it. In our judgment, neither proposition is maintainable. The mere recognition of the fact, that a conveyance has been made, is not, per se, proof of a confirmation of it. Lord Ellenborough, in Baylis v. Dineley (3 M. & Selw. 482), was of opinion, that an act of as high a solemnity as the original act was necessary to a confirmation. "We cannot (said he) surrender the interests of the infant into such hands as he may chance to get. It appears to me, that

we should be doing so in this case, (that of a deed,) unless we required the act after full age to be of as great a solemnity as the original instrument." Without undertaking to apply this doctrine to its full extent, and admitting that acts in pais may amount to a confirmation of a deed, still we are of opinion, that these acts should be of such a solemn and unequivocal nature as to establish a clear intention to confirm the deed, after a full knowledge that it was voidable.(a) *A fortiori*, mere acquiescence, uncoupled with any acts demonstrative of any attempt to confirm it, would be insufficient for the purpose. In Jackson v. Carpenter (11 Johns. R. 542, 543), the court held that an acquiescence by the grantor in a conveyance made during his infancy, for eleven years after he came of age, did not amount to a confirmation of that conveyance; that some positive act was necessary, evincing his assent to the conveyance. In Austin v. Patton (11 Serg. & Rawle, 311), the court held, that to constitute a confirmation of a conveyance or contract by an infant, after he arrives at age, there must be some distinct act, by which he either receives a benefit from the contract after he arrives at age, or does some act of express ratification. There is much good sense in these decisions, and they are indispensable to a just support of the rights of infants according to the common law. Besides; in the present case, as Barry was in possession of the premises during the whole period until the execution of his deed to Mrs. Moreland, there was no evidence to justify the jury in drawing any inference of any intentional acquiescence in the validity of the deed to Wallach.

The third instruction is, for the reasons already stated, unmaintainable. The deed to Mrs. Moreland contains a conveyance of the very land in controversy, with a warranty of the title against all persons claiming under him (Barry), and a covenant, that he had good right and title to convey the same, and therefore, is a positive disaffirmance of the former deed.

The fourth instruction proceeds upon the supposition, that if the deed to Mrs. Moreland was fraudulent between the parties to it, it was utterly void, and not merely voidable. But it is clear, that between the parties it would be binding, and available; however, as to the persons whom it was intended to defraud, it might be voidable. Even if it was made for the very purpose of defeating the conveyance to Wallach, and was a mere contrivance for this purpose, still it was an act competent to be done by Barry, and amounted to a disaffirmance of the conveyance to Wallach. In many cases, the disaffirmance of a deed made during infancy, is a fraud upon the other party. But this has never been held

(a) See Boston Bank v. Chamberlin, 15 Mass. Rep. 220.

sufficient to avoid the disaffirmance, for it would otherwise take away the very protection which the law intends to throw round him, to guard him from the effects of his folly, rashness, and misconduct. In Saunderson v. Marr (1 H. Bl. 75), it was held, that a warrant of attorney, given by an infant, although there appeared circumstances of fraud on his part, was utterly void, even though the application was made to the equity side of the court, to set aside a judgment founded on it. So, in Conroe v. Birdsall (1 John. Cas. 127), a bond made by an infant, who declared at the time, that he was of age, was held void, notwithstanding his fraudulent declaration; for the court said that a different decision would endanger all the rights of infants. A similar doctrine was held by the court in Austin v. Patton (11 Serg. & Rawle, 309, 310). Indeed, the same doctrine is to be found affirmed more than a century and a half ago, in Johnson v. Pie (1 Lev. 169); S. C. 1 Sid. 258; 1 Kebb. 995, 913.(*a*)

But what are the facts, on which the instruction relies as proof of the deed to Mrs. Moreland being fraudulent and void? They are "the relative positions of the parties to said deed, at and previous to its execution:" that is to say, the relation of mother and son; and the fact that she had then instituted a suit against him, and arrested him, and held him to bail, as stated in the evidence; and "from the circumstances attending the execution of it;" that is to say, that Mrs. Moreland was informed by Barry, before his deed to her, that he had so conveyed the said property to Wallach, and that subsequently, and with such knowledge, she prevailed on Barry to execute to her the same conveyance. Now, certainly, these facts, alone, could not justly authorize a conclusion, that the conveyance to Mrs. Moreland was fraudulent and void; for she might be a *bona fide* creditor to her son. And the consideration averred in that conveyance showed her to be a creditor, if it was truly stated (and there was no evidence to contradict it); and if she was a creditor, then she had a legal right to sue her son, and there was no fraud in prevailing on him to give a deed to satisfy that debt. It is probable, that the instruction was designed to cover all the other facts stated in the bill of exceptions, though in its actual terms it does not seem to comprehend them. But, if it did, we are of opinion, that the jury would not have been justified in inferring, that the deed was fraudulent and void. In the first place, the proceedings in the orphans' court may, for aught that appears, have been in good faith; and under an innocent mistake of a year of the actual age of Barry. In the next place, if not so, still the mother and the son were not estopped in any other proceeding to set up the nonage of Barry, whatever might have

(*a*) See Bac. Abridg. Infancy and Age, H. 2 Kent Comment. Lect. 31.

been the case as to the parties and property involved in that proceeding. In the next place, there is not the slightest proof that these proceedings had at the time, any reference to, or intended operation upon the subsequent deed made to Wallach; or that Mrs. Moreland was party to, or assisted in, the negotiations or declarations on which the deed to Wallach was founded. Certainly, without some proofs of this sort, it would be going too far to assert, that the jury might infer, that the deed to Mrs. Moreland was fraudulent. Fraud is not presumed either as a matter of law or fact, unless under circumstances not fairly susceptible of any other interpretation.

The fifth instruction was properly refused by the court, for the plain reason that there was no evidence in the case of any acts or declarations by Mrs. Moreland to the effect therein stated. It was, therefore, the common case of an instruction asked upon a mere hypothetical statement, ultra the evidence.

"The third bill of exceptions is as follows:—

"The court having refused the 2d, 3d, 4th, and 5th instructions prayed by the plaintiffs, and the counsel, in opening his case to the jury, contending that the questions presented by the said instructions were open to the consideration of the jury, the counsel for the defendant thereupon prayed the court to instruct the jury that, if, from the evidence so as aforesaid given to the jury, and stated in the prayers for the said instructions, they should be of opinion, that the said Richard was under the age of twenty-one years at the time he made his deed as aforesaid to the said Richard Wallach, under whom the plaintiffs claim their title in this case, and that at the time he made his deed as hereinbefore mentioned to the defendant, he was of full age, that such last-mentioned deed was a disaffirmance of his preceding deed to him, the said Richard Wallach, and that in that case the jury ought to find their verdict for the defendant, and that the evidence upon which the 2d, 3d, 4th, and 5th instructions were prayed by the plaintiff as aforesaid, which evidence is set forth in the instructions so prayed, is not competent in law to authorize the jury to find a verdict for the plaintiff upon any of the grounds or for any of the reasons set forth in the said prayers, or to authorize them to find a verdict for the plaintiff, if they should be of opinion, that the said Richard Barry was under the age of twenty-one years at the time he made his deed as aforesaid to the said Richard Wallach.

"Which instruction the court gave as prayed, and the counsel for the plaintiff excepted thereto."

It is unnecessary to do more than to state, that the bill of exceptions is completely disposed of by the considerations already mentioned. It

contains no more than the converse of the propositions stated in the second bill of exceptions, and the reassertion of the instructions given by the court in the first bill of exceptions.

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

VASSE *v.* SMITH.

FEBRUARY TERM, 1810.

[REPORTED, 6 CRANCH, 226–233.]

ERROR to the circuit court for the District of Columbia.

The declaration had two counts; first, a special count, charging the defendant Smith, who was a supercargo, with breach of orders; second, *trover*.

The first count stated that Vasse, the plaintiff, was owner and possessed of 70 barrels of flour, and, at the instance and request of the defendant, put it on board a schooner at Alexandria to be shipped to Norfolk, under the care, management and direction of the defendant, to be by him sold for and on account of the plaintiff, at Norfolk, for cash, or on a credit of 60 days, in good drafts on Alexandria, and negotiable in the bank of Alexandria. That the defendant was retained and employed by the plaintiff for the purpose of selling the flour as aforesaid, for which service the plaintiff was to pay him a reasonable compensation. That the defendant received the flour at Alexandria, put it on board the schooner, and sailed, with the flour under his care and direction, to Norfolk; "yet the defendant, not regarding the duty of his said employment, so badly, carelessly, negligently, and improvidently behaved himself in said service and employment, and took such little care of the said flour by him so received as aforesaid, that he did not sell the same, or any part thereof, at Norfolk, for cash, or on a credit of 60 days for drafts on Alexandria, negotiable in the bank of Alexandria, but the said defendant, on the contrary thereof, by and through his own neglect and default, and through his wrongful conduct, carelessness and improvidence, suffered the same, and every part of the said 70 barrels of flour, in his possession as aforesaid, to be embezzled, or otherwise to be wholly lost, wasted, and destroyed."

The second count was a common count in *trover* for the flour.

The defendant, besides the plea of *not guilty*, pleaded *infancy* to both counts; and to which last plea the plaintiff demurred generally.

The court below rendered judgment for the defendant upon the demurrer to the plea of infancy to the first count; and for the plaintiff upon the demurrer to that plea to the second count. Upon the trial, in the court below, of the issue of not guilty, to the count for *trover*, three bills of exception were taken by the plaintiff.

The first bill of exceptions stated, that the defendant offered evidence to prove that the flour was consigned and delivered to the defendant by the plaintiff, under the following letter of instructions:

"Mr. Samuel Smith:—Sir—I have shipped on board the schooner, Sisters, Captain ——, bound to Norfolk, 70 barrels of superfine flour marked A. V., to you consigned. As soon as you arrive there I will be obliged to you to dispose of it as soon as you can to the best advantage for cash, or credit at 60 days in a good draft on this place, negotiable at the bank of Alexandria. I should prefer the first, if not much difference; however, do for the best of my interest.

(Signed) "AMB. VASSE."

And that the defendant received the flour in consequence of that letter of instructions, and upon the terms therein mentioned. That the flour was not sold by the defendant at Norfolk, but was shipped from thence by him, without other authority than the said letter of instructions, to the West Indies, for and on account of one Joseph Smith, as stated in the bill of lading, which was for 398 barrels, 70 of which were stated in the margin to be marked A. V., 198 I. S., 100 D. I. S., and 30 P. T.

That the defendant when he received the flour, and long after he shipped it, was an infant under the age of twenty-one years. Whereupon the court, at the prayer of the defendant, instructed the jury that if they found the facts as stated, the defendant was not liable upon the count for *trover*.

The second exception was the admission of evidence of the defendant's *infancy*.

The third exception stated that, "upon the *facts aforesaid*, (the facts in the first bill of exceptions mentioned,) the plaintiff prayed the court to instruct the jury that if they shall be of opinion that the defendant was under the age of twenty-one years, and between the age of nineteen and twenty years, and that the defendant *of his own head* shipped the flour to the West Indies, in a vessel which has been lost by the perils of the sea, and that the said shipment was made with other flour, on account of his father Joseph Smith, in such case the defendant has thereby committed a *tort* in regard to the plaintiff, for which he is liable in this action,

notwithstanding his infancy aforesaid; which instruction the court refused to give.

The verdict and judgment being against the plaintiff, he brought his writ of error.

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

1. The infancy of the defendant was no bar to the first count, because it was a count in *tort*, and not upon contract, and infants are liable for torts and injuries of a private nature. 3 East, 62. Govett v. Radnidge and others, 3 Bach. Ab. 132; Noy, 129; Roll. Abr. 530. Fearnes v. Smith, 3 Bac. Abr. 126.

2. The shipping of the flour without authority was a conversion. Peake's Ni. Pr. Cases, 49. Youl v. Harbottle, 4 T. R. 260. Syeds v. Hay, 1 Wils. 328. Perkins v. Smith, Bull. N. P. 35. 6 Mod. 212; 6 East, 539. M'Combie v. Davis.

3. Infancy cannot be given in evidence upon the issue of not guilty.

It is admitted that if the possession had been obtained by a *tort*, the infant would be liable; but it is contended that the possession having been rightfully obtained, a subsequent misapplication of the property by an *infant* cannot be a conversion unless it be actually a conversion to his own use.

But there are no cases to justify such a doctrine, and it is contrary to the principles of analogous cases. In an action of trespass for mesne profits infancy is no bar, although he becomes a trespasser by implication of law. Latch. 21. 1 Bac. Abr. 132. 1 Esp. Rep. 172. So a *feme covert* is liable in an action of trover, because the conversion is a *tort*. Yelv. 166.

Although infancy may be given in evidence upon *non assumpsit*, yet it cannot upon any other general issue. Gilb. L. E. 164, 216, 217; 2 Term Rep. 166. Upon not guilty, the defendant cannot give in evidence a *license*, nor a right to a way, nor any other matter of a justification. Str. 1200. 1 Tidd, 591, 598, 600.

Any act which, if done by a person of full age, would be a conversion, will be a conversion if done by an infant.

In the present case the bill of lading, which is a negotiable instrument, being in the name of Joseph Smith, the plaintiff had no power or control over it. It would unquestionably be a conversion if done by an adult. The only question is, whether the nature of the act is altered by being done by an infant. 1 Term Rep. 216, 744. 2 Term Rep. 63. 6 Term Rep. 131. 5 Term Rep. 583.

Swann, contra.

An infant is liable for actual, not for constructive *torts* founded upon

contract, or bailment, which is in the nature of a contract. In this case the action might as well have been brought upon the *contract*, as upon the *tort*. If it had been brought upon the contract, infancy would have been a bar.

The case is clearly within the reason of the law of infancy, and it cannot be in the power of the plaintiff by his form of action to deprive the defendant of his defence. The case cited from Peake's Cases arose entirely *ex delicto*. These are cases in which infancy may be given in evidence upon *not guilty*. 5 Burr. 2826.

March 5.

MARSHALL, Ch. J., delivered the opinion of the court as follows:

The first error, alleged in this record, consists in sustaining the plea of infancy to the first count in the declaration.

This count states a contract between the plaintiff and defendant, by which the plaintiff committed seventy barrels of flour to the care of the defendant, to be carried to Norfolk, and there sold for money, or on sixty days' credit, payable in drafts on Alexandria, negotiable in the bank. The plaintiff then alleges that the defendant did not perform his duty in selling conformably to his instructions, but, by his negligence, permitted the flour to be wasted so that it was lost to the plaintiff.

The case, as stated, is completely a case of contract, and exhibits no feature of such a tort as will charge an infant. There can be no doubt but that the court did right in sustaining the plea.

The second count is *in trover*, and charges a conversion of the flour.

That an infant is liable for a conversion is not contested. The circuit court was of itself of that opinion, and therefore sustained the demurrer to this plea. But, in the progress of the cause, it appeared that the goods were not taken wrongfully by the defendant, but were committed to his care by the plaintiff, and that the conversion if made, was made while they were in his custody under a contract. The court then permitted infancy to be given in evidence on the plea of not guilty. To this opinion an exception was taken.

If infancy was a bar to a suit of trover brought in such a case, the court can perceive no reason why it may not be given in evidence on this plea. If it may be given in evidence on *non assumpsit*, because the infant cannot contract, with at least an equal reason may it be given in evidence in an action of trover in a case in which he cannot convert.

But this court is of opinion that infancy is no complete bar to an

action of trover, although the goods converted be in his possession, in virtue of a previous contract. The conversion is still in its nature a tort; it is not an act of omission but of commission, and is within that class of offences for which infancy cannot afford protection. Yet it may be given in evidence, for it may have some influence on the question, whether the act complained of be really a conversion, or not.

The court, therefore, does not consider the admission of this testimony as error.

The defendant exhibited the letter of instructions under which he acted, which is in these words: "Sir," &c., but the plaintiff offered evidence that the flour was not sold in Norfolk, but was shipped by the defendant to the West Indies, for and on account of a certain Joseph Smith, as by the bill of lading which was produced. The defendant then gave his infancy in evidence, and prayed the court to instruct the jury, that if they believed the testimony, he was not liable on the second count stated in the plaintiff's declaration, which instruction the court gave, and to this opinion an exception was taken.

This instruction of the court must have been founded on the opinion that infancy is a bar to an action of trover for goods committed to the infant, under a contract, or that the fact proved did not amount to a conversion.

This court has already stated its opinion to be, that an infant is chargeable with a conversion, although it be of goods which came lawfully to his possession. It remains to inquire whether this is so clearly shown not to be a conversion, as to justify the court in saying to the jury, the defendant was not liable in this action.

The proof offered was, that the defendant shipped the goods on account of Joseph Smith. This fact, standing unconnected with any other, would unquestionably be testimony which, if not conclusive in favour of the plaintiff, was, at least, proper to be left to the jury. But it is urged that this statement refers to the bill of lading, from the notes in the margin of which it appears that, although the bill of lading, which was for a much larger quantity of flour, was made out in the name of Joseph Smith, yet, in point of fact, the shipment was made for various persons, and, among others, for the plaintiff.

The court perceive, in this bill of exceptions, no evidence explanatory of the terms under which this shipment was made, and the marks in the margin of the bill of lading do not, in themselves, prove that the shipment was not made for the person in whose name the bill was filled up.

It is possible that it may have been proved to the jury that this flour was really intended to be shipped on account of the plaintiff, and that the defendant did not mean to convert it to his own use. But

the letter did not authorize him so to act. It was not, therefore, a complete discharge; and should it be admitted that an infant is not chargeable with a conversion made by mistake, this testimony ought still to have been left to the jury. The defendant would certainly be at liberty to prove that the shipment was in fact made for Vasse, and that he acquiesced in it so far as to consider the transaction not as a conversion; but without any of these circumstances which, if given in evidence, ought to have been left to the jury, the court has declared the action not sustainable.

This court is of opinion that the circuit court has erred in directing the jury that, upon the evidence given, the defendant was not liable under the second count; for which their judgment is to be reversed, and the cause remanded for further proceedings.(*a*)

The rule that a contract clearly beneficial is binding upon an infant, that one clearly prejudicial is void, and that such as may be either beneficial or injurious are voidable, has been approved of in the courts of several States; *Vent* v. *Osgood*, 19 Pickering, 572, 573; *Lawson* v. *Lovejoy*, 8 Greenleaf, 405; *Fridye* v. *The State, use of Kirk*, 3 Gill & Johnson, 104, 115; *Kline* v. *Beebe*, 6 Connecticut, 494, 503; *Wheaton* v. *East*, 5 Yerger, 41, 61; *Langford, Adm'r* v. *Frey, Ex'r*, 8 Humphreys, 443, 446; *M'Gan* v. *Marshall*, 7 Id. 121, 125; *West* v. *Penny*, 16 Alabama, 187; in some others, it has been objected to as unsatisfactory and liable to exceptions; *Fonda* v. *Van Horne*, 15 Wendell, 631, 635. See the principles discussed at large in *Breckenridge's Heirs* v. *Ormsby*, 1 J. J. Marshall, 236; *Cheshire* v. *Barrett*, 4 M'Cord, 241; *Lester* v. *Frazer*, Riley's Chancery, 76, 86.

Notwithstanding the respectability of the opinions which have given support to this rule, the rule seems to be neither sound nor practical. It does not suggest the most important distinction in the whole subject, that between the conveyance of an interest and the appointment of an attorney: the provision, that all contracts clearly prejudicial are void, if on the one hand, it be interpreted of the security only, would render void, bonds, recognisances, negotiable notes, (which indeed one court was led by a reliance on this rule to pronounce void, in *M'Minn* v. *Richmonds*, 6 Yerger, 9, 19,) the contract of a surety (as the same court held in *Wheaton* v. *East*, 5 Id. 41, 61), and many other obligations, all of which undoubtedly are voidable, and not void; and if, on the other hand, it be construed with reference to the whole transaction, and the inducements which have led the infant to contract, it can have no practical application at all, for all contracts *may* be beneficial; and in some

(*a*) The Chief Justice noticed also the phraseology of the third bill of exceptions. It prays the opinion of the court upon certain facts, without stating that any evidence of those facts was given to the jury. It is doubtful whether those facts exist in the case, and whether the court would be bound to give an opinion upon them.

cases, as where an infant gives a bond, or bond and warrant, for necessaries which he cannot procure on any other terms, acts clearly voidable or void, would require upon this view to be held binding. The rule quoted in *Tucker et al.* v. *Moreland*, from Perkins, apparently embodies the true principle; and is accordingly preferred in *Phillips et ux.* v. *Green*, 3 Marshall, 7, 9. It would be sufficient if properly understood; but it does not teach its own application.

The numerous decisions which have been had in this country, justify the settlement of the following definite rule, as one that is subject to no exceptions. The *only* contract binding on an infant, is the *implied* contract for necessaries: the only act which he is under a legal incapacity to perform, is the appointment of an attorney; all other acts and contracts, executed or executory, are voidable or confirmable by him at his election. No reference is had at present to the acts of an infant as executor, or to transactions between himself and his guardian, which depend on special rules of law or policy.

(1) The *only* liability absolutely binding on an infant, is the *implied* contract for necessaries; *dictum* in *Roof* v. *Stafford*, 7 Cowen, 179, 182: express contracts, as by bond, note, or account stated, fixing prices for necessaries, are not, as such, binding, and cannot be enforced, without ratification; *dicta* in *Beeler* v. *Young*, 1 Bibb, 519, 520; *Vent* v. *Osgood*, 19 Pickering, 572, 575. A negotiable note, therefore, though for necessaries, cannot be sued on either by the original payee, or by a *bonâ fide* endorsee, unless ratified; *M'Crillis* v. *How*, 3 New Hampshire, 348; *Bouchell* v. *Clary*, 3 Brevard, 194; *Hussey et al.* v. *Jewett, Ex'r*, 9 Massachusetts, 100; *Swasey* v. *Adm'r of Vanderheyden*, 10 Johnson, 33; *Fenton* v. *White*, 1 Southard, 100; the practice in *Dubose* v. *Wheddon*, 4 M'Cord, 221, was therefore not regular. In Massachusetts, the practice has become established of allowing suit to be brought on an express contract for necessaries, and a recovery had to the extent of the consideration; but this is certainly inconsistent with principle, for in a count on a special and express contract, all or nothing should be recovered: see *Earle* v. *Reed*, 10 Metcalf, 387, 390. Though an infant is liable in damages for a tort, a promissory note given by an infant as compensation for such damages, is not binding; *Hanks* v. *Deal*, 3 M'Cord, 257.

The articles for which an infant can be rendered liable, as necessaries, must not only belong to that class which the law pronounces generally to be necessary for infants, but they must be *actually* necessary in the particular case; and if an infant be supplied by a parent, guardian, or other person, he cannot himself become liable to a tradesman; *Kline* v. *L'Amoureux*, 2 Paige, 419; *Guthrie* v. *Murphy*, 4 Watts, 80; *Wailing* v. *Toll*, 9 Johnson, 141; *dicta* in *Angel* v. *McLellan*, 16 Massachusetts, 28, 31; in *Pool* v. *Pratt*, Chipman, 252, 253; in *Gay* v. *Ballou*, 4 Wendell, 403, 406; and in *Beeler* v. *Young*, 1 Bibb, 519, 521: and the fact that an infant is living with his father, or a daughter with her mother, is *primâ facie* evidence that necessaries are supplied by the parent, and there must be distinct evidence that they are not so supplied, before the infant can be rendered personally liable; *Connolly* v. *Assignees of Hull*, 3 M'Cord, 6; *Jones & Danforth* v. *Colvin*, 1 M'Mullan, 14. Whether articles are of a class for which an infant may be made liable as necessary, is a question of law; whether actually necessary, as respects quantity and non-supply by others, and of reasonable price is for the jury; *Bent* v. *Manning*, 10 Vermont, 225, 230; *Beeler* v. *Young*, 1 Bibb, 519, 521; *Grace* v. *Hale*, 2 Humphreys, 27, 29; *Tupper* v. *Cadwell*, 12 Metcalf, 559, 563; subject of course to the control of the court as to the weight of evi-

dence; *Johnson* v. *Lines*, 6 Watts & Sergeant, 80, 84. As to the legal definition of necessaries, see *Harrison* v. *Fane*, 1 Manning & Granger, 550; *Brooker* v. *Scott*, 11 Meeson & Welsby, 67; *Wharton* v. *Mackenzie*, 5 Queen's Bench, 606; *Phelps* v. *Worcester*, 11 New Hampshire, 51, 53; *Smithpeters* v. *Griffin's Ad'r*, 10 B. Monroe, 259, 260. Necessaries for an infant's wife and children are necessaries for which he is liable; *dicta* in *Abell* v. *Warren*, 4 Vermont, 149, 152, and *Beeler* v. *Young*, 1 Bibb, 519, 520; and see the very interesting case of *Chapple* v. *Cooper*, 13 Meeson & Welsby, 252. The wants to be supplied, however, are personal; either those for the body, as food, clothing, lodging, or those for the mind, as suitable instruction: but expenditures upon the infant's real estate, however beneficial and requisite, can never be regarded as 'necessaries,' in law; *Tupper* v. *Cadwell*, 12 Metcalf, 559; and for contracts, express or implied, growing out of trade in which the infant is engaged, personally, or with others, he is not liable; *Mason and another* v. *Wright and another*, 13 Id. 306. Money lent to an infant, though for the purpose of buying necessaries, gives no right of action against the infant, for he may squander it on articles not necessary; and the fact that subsequently it is expended by him for necessaries, cannot affect his liability, which must arise from, and at the time of, the loan, and cannot be changed by subsequent events; but equity will subrogate the lender of the money to the rights of the vendor of the necessaries, as against the infant; *Beeler* v. *Young*, 519, 521, 522; *Hickman* v. *Hall's Ad'rs*, 5 Littell, 338, 342; *Walker* v. *Simpson*, 7 Watts & Sergeant, 83, 88; *Bent* v. *Manning*, 10 Vermont, 225, 230; and in the last case, it is said to be questionable whether courts of law, now, might not consider money, to a certain extent, necessary to be furnished to an infant, under some circumstances. Money paid at an infant's request for necessaries, or to discharge a debt contracted by him for necessaries, has been held to be recoverable as necessaries; *Randall* v. *Sweet*, 1 Denio, 460; *Conn* v. *Coburn*, 7 New Hampshire, 368; *Adm'r of Haine* v. *Tarrant*, 2 Hill's So. Car. 400; and money lent, in and about the purchase of necessaries, and so applied directly by the lender and under his directions, has been held recoverable on a count for money lent and advanced; *Smith* v. *Oliphant*, 2 Sandford's S. Ct., 306, 308. A father is not liable, merely on the relation of father and son, for necessaries furnished to his son, but only upon a contract, express or implied, and in consequence of a previous authority, or subsequent recognition, which cannot be presumed where the son has abandoned his father's home; *Varney* v. *Young*, 11 Vermont, 258; *Gordon* v. *Potter*, 17 Id. 349; *Hunt* v. *Thompson*, 3 Seammon, 179; *Angel* v. *McLellan*, 16 Massachusetts, 28: but see, *In the matter of Ryder*, 11 Paige, 185, 188. An infant is not liable for necessaries, if credit was given to his father or guardian; *Simms* v. *Norris & Co.*, 5 Alabama, 42; dictum in *Johnson* v. *Lines*, 6 Watts & Sergeant, 80, 83; and that is inferred where the articles or services are rendered by direction of the father or guardian; *Phelps* v. *Worcester*, 11 New Hampshire, 51.

Besides the liability for necessaries, there may be some acts which are, in effect, binding upon an infant, because they are such as he was compellable to do, and could be compelled to do immediately again in the same way, if he avoided them. Thus, in a case where a father had purchased land in the name of his infant son, for the purpose of defrauding his creditors, and had afterwards sold the land to a purchaser for a valuable consideration, and the infant had at the father's instance conveyed the legal title to the purchaser, it was decided that he could

not, after age, avoid his conveyance; because, though the legal title was cast upon him, by the fraudulent conduct of his father, he had no right to the land against a creditor or purchaser, and therefore, when he conveyed to the purchaser from his father, he merely parted with the naked title, and only did that which a court of equity would have compelled him to do, and which, if disaffirmed, he would be compelled to do again; *Elliott* v. *Horn*, 10 Alabama, 348, 353. So as to equal partition of lands and just admeasurement of dower; *Bavington and others* v. *Clarke*, 2 Pennsylvania, 115, 124; *Commonwealth* v. *Hantz*, Id. 333, 337; *Jones et ux.* v. *Brewer*, 1 Pickering, 314, 317: yet it cannot be considered that the act of the infant concludes him as to the correctness of the division or allotment, or that if, on arriving at age, he at once renounced and disaffirmed the act, he would not be at liberty to do so: see *Brown* v. *Caldwell*, 10 Sergeant & Rawle, 114; *Hege and others* v. *Hege and others*, 1 Pennsylvania, 83, 91. By statute, of course, contracts, such as of naval apprenticeship or enlistment, may be made binding; *Commonwealth* v. *Murray*, 4 Binney, 487; *U. S.* v. *Bainbridge*, 1 Mason, 71. See *U. S.* v. *Blakeney*, 3 Grattan, 405; *U. S.* v. *Lipscomb*, 4 Id. 41; and on the other hand, *Commonwealth* v. *Fox*, 7 Barr, 336. The binding effect of proceedings in partition in Pennsylvania where a purpart is accepted by a guardian, depends upon statutes; *Case of Gelbach's Appeal*, 8 Sergeant & Rawle, 205; and that of a jointure to an infant feme covert, (as to which see *Lester* v. *Frazer*, Riley's Chancery, 76, 83,) on the jointure's being, not a contract by the wife, but a provision by the husband, operating as a bar, by statute or by analogy to a statute; *Shaw & wife* v. *Boyd*, 5 Sergeant & Rawle, 309, 311. As to marriage articles on the part of an infant feme, see *Healy et als.* v. *Rowan et als.*, 5 Grattan, 414. In *The People* v. *Moores*, 4 Denio, 519, where a bastardy bond given by an infant was held to be binding, the ground of the decision was that the statute of the state, which obliged the infant to enter into such a bond, gave him a legal capacity to make a binding obligation in that form. In *Woodruff* v. *Logan*, 1 English, 276, it was held that a contract of apprenticeship by an infant by deed was binding, as being a thing manifestly for his benefit; but as a confirmation, after age, was alleged, the case is not an authority for any such doctrine.

(2) An act which an infant is under a legal incapacity to perform, is the appointment of an attorney; *dicta*, per Parker, C. J., in *Whitney et al.* v. *Dutch et al.*, 14 Massachusetts, 457, 461, 463; per Woodworth, J., in *Roof* v. *Stafford*, 7 Cowen, 179, 180; per Jones, C., in *Stafford* v. *Roof*, 9 Id. 626, 628; per Bronson, J., in *Fonda* v. *Van Horne*, 15 Wendell, 631, 635, and in *Bool* v. *Mix*, 17 Id. 120, 131; per Perkins, J., in *Hiestand* v. *Kuns*, 8 Blackford, 345, 348; or, in fact, an agent of any kind; *Doe* d. *Thomas* v. *Roberts*, 16 Meeson & Welsby, 778. And this rule depends upon reasoning, which if somewhat refined, is yet perhaps well founded. The constituting of an attorney by one whose acts are in their nature voidable, is repugnant and impossible, for it is imparting a right which the principal does not possess, that of doing valid acts. If the acts when done by the attorney remain voidable at the option of the infant, the power of attorney is not operative according to its terms; if they are binding upon the infant, then he has done through the agency of another what he could not have done directly,—binding acts. The fundamental principle of law in regard to infants requires that the infant should have the power of affirming such acts done by the attorney, as he chooses, and avoiding others, at his option: but this involves an immediate contradiction, for to possess the right

of availing himself of any of the acts, he must ratify the power of attorney, and if he ratifies the power, all that was done under it, is confirmed. If he affirms part of a transaction, he at once confirms the power, and thereby, against his intention, affirms the whole transaction. Such personal and discretionary legal capacity as an infant is vested with, is, therefore, in its nature, incapable of delegation: and the rule that an infant cannot make an attorney is, perhaps, not an arbitrary or accidental exception to a principle, but a direct, logical necessity of that principle. But if the considerations suggested as the foundation of this rule be not satisfactory, the rule itself is established by a conclusive weight of authority. Accordingly, a power of attorney by an infant, to sell land, is absolutely void; *Lawrence* v. *M'Arter*, 10 Ohio, 37, 42; *Pyle, &c.* v. *Cravens*, 4 Littell, 17, 21; and a warrant of attorney to confess judgment, is absolutely void, and judgment entered upon it will be set aside on motion; *Bennett* v. *Davis*, 6 Cowen, 393; *Waples* v. *Hastings*, 3 Harrington, 403; *Carnahan et al.* v. *Allderdice et al.*, 4 Id. 99. Apparently upon this legal incapacity on the part of an infant, to create an attorney, the courts of New York have established an important consequence in respect to sales of chattels, that a present sale of chattels by an infant, without manual delivery by him, is void; *Stafford* v. *Roof*, 9 Cowen, 626, 628; *Fonda* v. *Van Horne*, 15 Wendell, 631, 636. But this is believed to be a misapprehension. Even if the transfer of possession were necessary to the completeness and validity of the sale, there is a difference between an authority to give possession and a license to take possession, and there is no reason why the latter should be considered void. But transfer of possession is not necessary to the validity of a sale of chattels: on a contract of present sale, the property passes immediately, without delivery. It is true, that upon a sale of chattels by an infant without manual delivery, trespass will lie against the vendee taking possession, according to the old authorities: (see *Grace* v. *Hale*, 2 Humphreys, 27, 29; and *Hoyt* v. *Chapin et al.*, 6 Vermont, 42:) but that is not because the sale was always void. Trespass lies, where there was no personal delivery by the infant, because when the voidable contract of sale is disaffirmed, it is made void *ab initio*, by relation, and affords no justification for acts done under it by the vendee; but where there has been a manual delivery by the infant, trespass will not lie, because accepting possession from the owner of property, even if he be an infant, can never be a trespass. In Connecticut, by statute, some contracts of an infant are wholly void; *Maples* v. *Wightman*, 4 Connecticut, 376.

(3) Subject to the foregoing explanations, the universal principle of law appears to be, that all contracts, executory or executed (*Abell* v. *Warren*, 4 Vermont, 149, 152, 153), of an infant, are voidable or confirmable, or are void or valid, at his election: see *Oliver et al.* v. *Houdlet*, 13 Massachusetts, 237; *Reed* v. *Batchelder*, 1 Metcalf, 559. A feoffment, a deed of bargain and sale, in fact every species of conveyance by deed, as grant, lease and release, partition, exchange, &c.: *Tucker et al.* v. *Moreland; Bool* v. *Mix*, 17 Wendell, 120, 131; *Eagle Fire Co.* v. *Lent*, 6 Paige, 635, 638; *Gillett* v. *Stanley*, 1 Hill's N. Y., 122, 125; *Kline* v. *Beebe*, 6 Conneeticut, 494, 504; *Dana et al.* v. *Coombs*, 6 Greenleaf, 89, 90; *Lessee of Drake & wife* v. *Ramsay et al.*, 5 Ohio, 251; *Cresinger* v. *Lessee of Welch*, 15 Id. 156, 191; *Wheaton* v. *East*, 5 Yerger, 41; *Freeman* v. *Bradford*, 5 Porter, 270, 273; *Breckenridge's heirs* v. *Ormsby*, 1 J. J. Marshall, 236, 242; *Wallace's Lessee* v. *Lewis*, 4 Harrington, 75, 80; *Lester* v. *Frazer*, Riley's Chancery, 76, 86; a deed of mortgage; *Boston Bank* v. *Chamberlin et al.*, 15 Massachusetts, 220; *Hubbard et al., Ex'rs* v. *Cum-*

mings, 1 Greenleaf, 11; *Lynde* v. *Budd*, 2 Paige, 191; *Roberts* v. *Wiggins*, 1 New Hampshire, 73; *M'Gan* v. *Marshall*, 7 Humphreys, 121, 126; a bond; *Conroe* v. *Birdsall*, 1 Johnson's Cases, 127; a negotiable note; *Goodsell* v. *Myers*, 3 Wendell, 479; *Reed* v. *Batchelder*, 1 Metcalf, 559; *Hesser* v. *Steiner*, 5 Watts & Sergeant, 476; *Wright* v. *Steele*, 2 New Hampshire, 51; *Best* v. *Givens and Wood*, 3 B. Monroe, 72, 73; *Jefford's Adm'r* v. *Ringgold & Co.*, 6 Alabama, 544, 548; or the endorsement of one; *Nightingale* v. *Withington*, 15 Massachusetts, 272, 274; a written contract to pay, not under seal; *Fant* v. *Cathcart*, 8 Alabama, 726; an award under a submission by a guardian; *Barnaby* v. *Barnaby*, 1 Pickering, 221; indentures of apprenticeship, and other contracts of service; *Nickerson* v. *Easton*, 12 Pickering, 110, 112; *Vent* v. *Osgood*, 19 Id. 572; *The State* v. *Dimick*, 12 New Hampshire, 194, 199; all judicial acts against an infant, as judgments and decrees, without a guardian ad litem; *Porter's heirs* v. *Robinson*, 3 Marshall, 253, 254; *Beeler's heirs* v. *Bullitt's heirs*, Id. 280, 282; *Allison* v. *Taylor, &c.*, 6 Dana, 87, 88; *Bourne & wife* v. *Simpson*, 9 B. Monroe, 454, 457; *Austin* v. *Charlestown Female Seminary*, 8 Metcalf, 196, 203; *Bloom* v. *Burdick*, 1 Hill's N. Y., 131, 143; *Barber* v. *Graves*, 18 Vermont, 292; and recognizances for others; *Patchin* v. *Cromach*, 13 Vermont, 330; are not void, but are voidable or confirmable at the option of the infant. An account stated is not void, but voidable or affirmable at option: *Williams* v. *Moor*, 11 Mecson & Welsby, 256. In *Curtin and another* v. *Patton and another*, 11 Sergeant & Rawle, 305, 310, it was said that a contract of suretyship by an infant was void; but as it was held that the obligation might be confirmed by the infant, it is obvious that the court meant that it was voidable at his election; and in *Hinely* v. *Margaritz*, 3 Barr, 428, it is decided that a contract of suretyship by means of a promissory note, by an infant, is voidable or affirmable at his election. A deed by an infant feme covert executed in a way to overcome the disability of coverture, is yet voidable by her for infancy; *Phillips et ux.* v. *Green*, 3 Marshall, 7, 11; *Prewit* v. *Graves, &c.*, 5 J. J. Marshall, 114, 120; *Oldham* v. *Sale et al.*, 1 B. Monroe, 76; *Hughes* v. *Watson*, 10 Ohio, 127, 133; *Sanford* v. *M'Lean*, 3 Paige, 117, 122; *Bool* v. *Mix*, 17 Wendell, 120, 130. An infant feme covert cannot, by joining her husband in a conveyance, bar her right of dower; *Cunningham* v. *Knight*, 1 Barbour, 399, 404.

The fact, that one dealing with the infant, supposed him to be of age; *Van Winkle* v. *Ketcham*, 3 Caines, 323; or, that the infant fraudulently represented himself to be of age; *Conroe* v. *Birdsall*, 1 Johnson's Cases, 127; *Stoolfoos & another* v. *Jenkins & wife*, 12 Sergeant & Rawle, 399, 403; *Burley* v. *Russell*, 10 New Hampshire, 184; *Norris* v. *Vance*, 3 Richardson, 164; or, that the infant was in business, and in the habit of contracting for himself; *Tandy* v. *Masterson's Adm'r*, 1 Bibb, 330; *Curtin and another* v. *Patton and another*, 11 Sergeant & Rawle,, 305 309; *Houston* v. *Cooper*, Pennington [866]; will make no difference in the infant's liability on his contract; it still cannot be enforced against his will.

An infant of marriageable years, marrying an adult wife, becomes at once liable upon her contracts; for, her contracts were valid, being made by an adult, and the husband's liability for them, is an incident of the marriage, a contract which the infant was capable of making; *Roach* v. *Quick*, 9 Wendell, 238; *Butler* v. *Breck & Leavitt*, 7 Metcalf, 164, 168.

Where an infant is a party jointly with others to a promissory note or other instrument, the English practice is, after all have been sued, and infancy has been pleaded, to discontinue, and begin another suit against

the adults alone, or perhaps in the first instance to omit the infant and sue the adults only, for it is said that on a plea of infancy, neither a *nolle prosequi* can be entered against the infant, nor a verdict, without it, taken against the others; *Burgess* v. *Merrill*, 4 Taunton, 468; and this seems to be recognised in *Connolly* v. *Assignees of Hull*, 3 M'Cord, 6, 8: but it is certain that a negotiable instrument given by a firm of which one member is an infant is not void as to the infant, but voidable, or confirmable by him; *Whitney et al* v. *Dutch et al*, 14 Massachusetts, 457; and in accordance with this principle, the practice almost universally established in this country, is, whenever one of several co-contractors is an infant, to sue all the parties to the joint contract, and if infancy is pleaded by one, or given in evidence, to enter a *nolle prosequi* as to him, or take issue on his plea, or allow a verdict to go in his favour, and take a verdict, and judgment upon it, against the others; *Hartness and another* v. *Thompson and others*, 5 Johnson, 160; *Woodward* v. *Newhall et al.*, 1 Pickering, 500; *Tuttle* v. *Cooper*, 10 Id. 281, 288; *Cutts* v. *Gordon*, 13 Maine, 474; *Allen* v. *Butler & others*, 9 Vermont, 122; *Barlow* v. *Wiley et al.*, 3 Marshall, 457, 459; and a suit against the adult alone is erroneous; *Wamsley* v. *Lindenberger & Co.*, 2 Randolph, 478: see the discussions in *Mason* v. *Denison*, 15 Wendell, 64. Infancy cannot be given in evidence under *non est factum; Bool* v. *Mix*, 17 Wendell, 120, 132; but may, under *non assumpsit; Kimball* v. *Lamson*, 2 Vermont, 138, 144; *Wailing* v. *Toll*, 9 Johnson, 141.

A contract made by an infant is voidable only by himself, during his life, and after his death by his legal representatives; and not by his sureties, endorsers, or any strangers; *Oliver et al.* v. *Houdlet*, 13 Massachusetts, 237; *Parker* v. *Baker and another*, 1 Clarke's Chancery, 136; *Roberts* v. *Wiggin*, 1 New Hampshire, 73; his personal representatives, as his administrators and executors, possess the same power that he has, of avoiding or admitting his contracts; *Hussey et al.* v. *Jewett, Ex'r.*, 9 Massachusetts, 100; *Jefford's Adm'r* v. *Ringgold & Co.*, 6 Alabama, 544, 547; *Parsons* v. *Hill*, 8 Missouri, 135; and so do his privies in blood, where the estate upon avoidance would vest in them, but not his assignee or other privy in estate only; *Austin* v. *Charlestown Female Seminary*, 8 Metcalf, 196, 203, citing *Wittingham's case*, 8 Coke, 42 *b*; *Breckenridge's heirs* v. *Ormsby*, 1 J. J. Marshall, 236, 248. A contract, whether executory or executed, between an adult and an infant, is binding on the adult, and voidable only on the side of the infant; *Boyden* v. *Boyden and another*, 9 Metcalf, 519, 521; *M'Ginn* v. *Shaeffer*, 7 Watts, 412, 414. On mutual promises to marry, an infant is not liable, but the adult is, and the infant's voidable promise is a sufficient consideration; *Holt* v. *Ward*, *Clarencieux*, 2 Strange, 937; *Hunt* v. *Peake*, 5 Cowen, 475; *Willard* v. *Stone*, 7 Id. 22; *Cannon* v. *Alsbury*, 1 Marshall, 76; *Pool* v. *Pratt*, Chipman, 252; an infant is not liable, without affirmance, in covenant upon indentures of apprenticeship, nor in assumpsit on a parol apprenticeship; *M'Knight* v. *Hogg*, 3 Brevard, 44; *Frazier* v. *Rowan*, 2 Id. 47; yet the adult is bound to, and, if the consideration be performed, is suable by, the infant, on such contracts; *Eubanks* v. *Peak*, 2 Bailey, 497, 499.

The affirmance, of contracts made during infancy, may take place in different ways.

An *executory* contract of an infant, at least a parol contract, may, after full age, be ratified by parol; but a ratification, when by parol, must be actual and express. There is an entire difference between the ratification of a contract made during infancy, and an avoidance of the statute of limitations: for the former, a mere acknowledgment, or partial payment, will not be sufficient: there must be either an

express promise to pay, or such a direct confirmation as expressly ratifies the contract, although it be not in the language of a formal promise; *Wilcox* v. *Roath*, 12 Connecticut, 551, 556; *Gay* v. *Ballou*, 4 Wendell, 403, 405; *Millard* v. *Hewlett*, 19 Id. 301, 302; *Martin* v. *Mayo et al., Ex'rs.*, 10 Massachusetts, 137, 140; *Whitney et al.* v. *Dutch et al.*, 14 Id. 457, 460; *Thompson et al.* v. *Lay et ux.*, 4 Pickering, 48; *Pierce* v. *Tobey and another*, 5 Metcalf, 168, 172; *Smith and others* v. *Kelley*, 13 Id. 309, 310. In a late case which concerned the ratification of an acceptance, the Court of Exchequer gave the following definition: "We are of opinion (apart from Lord Tenterden's act), that any act or declaration which recognises the existence of the promise as binding is a ratification to it, as, in the case of agency, anything which recognises as binding an act done by an agent, or by a party who has acted as agent, is an adoption of it. Any written instrument signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will in the case of an infant who has attained his majority amount to a ratification." *Harris* v. *Wall*, 1 Exchequer, 122, 129. The ratification must be before the commencement of the suit; *Ford* v. *Phillips*, 1 Pickering, 202; *Goodridge & another* v. *Ross*, 6 Metcalf, 487, 490; *Merriam et a.* v. *Wilkins et a.*, 6 New Hampshire, 432; *Hale* v. *Gerrish*, 8 Id. 374; *Thing* v. *Libbey*, 16 Maine, 55, 57; it must be voluntary, deliberate, and intelligent, in the knowledge that without it, he is not bound, and it must not be made under terror of arrest; *Ford* v. *Phillips; Curtin & another* v. *Patton & another*, 11 Sergeant & Rawle, 305, 311; *Hinely* v. *Margaritz*, 3 Barr, 428; if it be conditional, it must be shown that the condition has been fulfilled according to its tenor; *Thompson et al.* v. *Lay et ux.; Everson* v. *Carpenter*, 17 Wendell, 419, 422; and it must be made to the party himself or his agent, for a mere declaration of an intention to pay, made to a stranger having no interest or authority in the matter, is ineffective; *Goodsell* v. *Myers*, 3 Wendell, 479; *Bigelow* v. *Grannis*, 2 Hill's N. Y., 120; *Hoit* v. *Underhill*, 9 New Hampshire, 437; 10 Id. 220. A clause in a will directing all just debts to be paid, was decided at law not to be a confirmation of a promissory note; *Smith* v. *Mayo et al., Ex'rs.*, 9 Massachusetts, 62; but in *Merchants' Fire Ins. Co.* v. *Grant*, 2 Edwards, 544, a court of equity held, in the case of a bond and mortgage, that it amounted to a confirmation; *acc.* Abr. Eq. Ca. 282, C. 5, citing Nelson's Ch. Rep. 55. By st. 9 Geo. 4, c. 14, s. 5, no action can be maintained to charge any person upon a promise after age to pay a debt contracted during infancy, or on any ratification after age of a promise or simple contract made during infancy, unless the promise or ratification be in writing signed by the party to be charged. See *Hartley* v. *Wharton*, 11 Adolphus & Ellis, 934.

It was decided in *Baylis* v. *Dineley*, 3 Maule & Selwyn, 477, that an infant's bond, or at least one that expressly secured the payment of interest, could not be confirmed by parol, but only by something amounting to an estoppel in law of as high authority as the deed itself. But this seems to imply that such a bond is void. It is difficult to see, upon this decision, what express confirmation of an infant's bond there can be. It is probable that neither an express acknowledgment under seal that the bond was valid, nor an express confirmation of it by instrument under seal, could be replied as an estoppel in law. There seems to be no doubt that there may be an express confirmation of an infant's bond: but why need it be under seal? The authority of Perkins, title, *Deeds*, sec. 154, page 69, edit. 1762, which is relied on by Lord Mansfield in *Zouch* v. *Parsons*, Burrow, 1805, is express, that if an infant have once made and

delivered a deed, and afterwards when he comes to full age, delivers it again as his deed, the second delivery is void. The execution therefore was good, and continues to be good: a confirmation is not required for the purpose of setting up the instrument as the party's deed: a confirmation could have no action or effect upon its character as a deed. It is not the execution of the instrument, that, in the case of an infant, is tainted with infirmity: it is not against the execution, specifically, that the avoiding effect of the plea acts, for, if it were, non est factum, which goes to the time of plea pleaded, would be a good avoidance: it is the *contract*, evidenced by the deed,—the mental consent—which in the case of an infant is revocable, and, which by the plea of infancy, is recalled. There is an entire difference between a plea of a discharge under a decree of bankruptcy, and a plea of infancy. The former is in the nature of a plea of a release by the operation of proceedings in a judicial tribunal: a bond of a bankrupt is discharged in law, from the time of the certificate, which the plea shows as a foregone fact; and a bond so discharged, cannot, probably, be set up as a bond by any parol promise (though even on this point the decisions appear to be in conflict: compare *Maxim* v. *Morse*, 8 Massachusetts, 127, with *The case of Field's Estate*, 2 Rawle, 351). But a plea of infancy operates by its own force as an averment or declaration of record, and from the time that it is pleaded, as an expression of the party's election to treat the bond as void. If there were wanted an estoppel against a deed of release, or against a judicial or statutory discharge of the obligation, or an avoidance of the effect of such a bar, it would be reasonable to require it to be by something of as high a nature as the bond itself: but what is wanted is, something that shall avoid or nullify the effect of the party's declaration in court, by plea, of his election to treat the bond as void. What is called a confirmation or ratification of an infant's contract is not an estoppel, nor is it pleaded as an estoppel, in any case; it operates indeed in the nature of an equitable estoppel. An infant's bond is a valid obligation unless the infant, after age, elect to treat it as void: a confirmation or ratification, as it is called, defeats the election by plea to avoid, by showing that the party has already exercised his right of election, and has elected not to treat the contract as void, but to treat it as valid. If an election to treat a promissory note as valid may become fixed by a parol promise, so that the party cannot afterwards change his election, may not an election in the case of a bond be determined in the same manner? If parol matter acting in the nature of an equitable estoppel, will toll the right of avoiding the liability or of pleading the plea of infancy, in case of one kind of contract, will it not by the same operation toll the same right in case of any other kind of contract? The operation of a confirmation, or ratification, in case of an infant's contract of any character, is not to impart to it anything which did not exist in it before, but merely to take from it, its quality of voidableness: and if a bond by an infant, be voidable, in just the same sense, and for just the same reasons, that a simple contract is, which seems to be the case, the same circumstances ought to obviate the voidableness of both. . . . . If an express promise by parol to pay a bond given during infancy to be made after full age, can it be doubted that such a liability must be enforceable in some way? Yet there can be no remedy but on the bond, for certainly assumpsit will not lie. If the party promise to pay a part of the indebtedness upon such bond, assumpsit upon the consideration so acknowledged by the promise would be the remedy, the promise to pay but a part, necessarily avoiding the bond as an entire obligation; *Bliss et al.* v. *Perryman*, 1 Scammon, 484; but upon a parol promise to pay the whole bond,

assumpsit will not lie, for it cannot be maintained unless the bond is void, and where the infant has not only not avoided it, but has expressly promised to pay it, the other party cannot treat it as void. Regarding it as conclusively settled in this country, that an infant's bond is merely voidable, it does not seem that the doctrine of *Baylis* v. *Dineley*, can consistently be adopted in this country: and it is believed, that, in the American courts, a bond or other sealed instrument, given by an infant, may be confirmed by a parol or verbal promise after full age. See *West* v. *Penny*, 16 Alabama, 187.

An election to confirm his executory contracts may, however, be implied from the *acts* of the infant when he has become of age; as, by enjoying or claiming a benefit or advantage under a contract or transaction which he might have wholly rescinded; *Barnaby* v. *Barnaby*, 1 Pickering, 221, 223; and so, in case of indentures of apprenticeship, remaining in the service voluntarily for more than a year after becoming of age, without dissent, and receiving pay, has been held to be a confirmation of the contract; *The State* v. *Dimick*, 12 New Hampshire, 194, 199. If an infant confirms part of a contract, by appropriating the benefit of it, he confirms the whole. Thus, if during infancy, he sold a horse with warranty and took the purchaser's note, and after age sues upon the note, he thereby confirms the sale so as to make himself liable on the warranty; *Morrill* v. *Aden*, 19 Vermont, 506. In *Miller & Co.* v. *Sims and Ashford*, 2 Hill's So. Car. 479, it was held that an infant partner who afterwards confirmed the contract of partnership by transacting the business, receiving the profits, &c., became thereby liable on all the previous liabilities of the firm, even such as were not known to him: but this case seems to be questioned in *Dana and others* v. *Stearns and others*, 3 Cushing, 372, 375; and it is in conflict with *Crabtree* v. *May*, 1 B. Monroe, 289; where it was decided that by such conduct an infant rendered himself liable for only such contracts as there was evidence that he had knowledge of, and knew that he was looked to as a party liable on. In *Orvis* v. *Kimball*, 3 New Hampshire, 314, while it was admitted that a mere declaration of intention to pay a note given during infancy, not made to the creditor himself, would not confirm the note, it was held that the fact of employing an agent to find the note and authorizing him to pay it, amounted to a confirmation: but if these circumstances were not communicated to the creditor, perhaps this doctrine would not be applicable. In *Best* v. *Givens & Wood*, 3 B. Monroe, 72, an infant had incurred a debt, part of which was for necessaries, and had given a promissory note for the whole; being sued on the note he pleaded infancy; being sued afterwards on the consideration, he relied on the merger by the note; and it was held that this confirmed the note, and might be replied as a confirmation in the former suit. This might very well have been relied upon as a confirmation by estoppel; for a confirmation by an act operating as evidence of intention, and not as an estoppel, as well as a confirmation by parol, must be before suit brought; *Aldrich* v. *Grimes*, 10 New Hampshire, 194, 198. Where a contract is entire, a confirmation by acts, extending to part of the consideration, would generally confirm the whole contract, but a confirmation by a parol promise may be of part, and will not render the party liable beyond the extent of the promise; *Ibid.*: in case of such a partial promise, the suit must of course be on the consideration as acknowledged by the promise which must be considered as avoiding the entire contract; but where a contract has been entirely confirmed by a promise, the suit must be on the original contract.

In regard to the implied confirmation of *executed* contracts, by acts or conduct after age, there is a difference between the case of a sale and the

case of a purchase, and perhaps between a purchase of chattels and a purchase of land, upon the ground of the general principle that appropriating after full age a benefit from a contract made during infancy confirms it.

A *purchase* of a chattel by an infant is confirmed by any unequivocal act of ownership exercised by him over the chattel, after he is of age, as by selling it, or by otherwise converting it to his use; so that he will be liable on a note given during infancy for the chattel; *Cheshire* v. *Barrett*, 4 M'Cord, 241; *Deason &c.* v. *Boyd &c.*, 1 Dana, 45; *Lawson* v. *Lovejoy*, 8 Greenleaf, 405; and keeping possession of the chattel for several years, or beyond a reasonable time, with a continual assertion of ownership, is of itself a sufficient confirmation; *Alexander* v. *Heriot*, 1 Bailey's Equity, 223; *Eubanks* v. *Peak*, 2 Bailey, 497, 499; *Boyden* v. *Boyden and an other*, 9Metcalf, 519. Where the defendant, while an infant, drew an order, and gave it in part consideration for the note of another person residing out of the state; and, after he had attained his majority, went to the latter state to demand payment of the note which he had purchased, and for which he gave the order in question; and received notice of the non-payment of the order, and suffered several years to elapse, and never offered to return the note or disaffirm the contract; the court held that these acts and omissions warranted the implication that the defendant intended to abide by his undertaking, and were sufficient, in the absence of anything to counteract their effect, to establish an affirmation of the contract, and take away the defence of infancy: *Thomasson* v. *Boyd*, 13 Alabama, 419, 421. Where a chattel had been bought by an infant subject to the right of returning it if it was not liked, the purchaser after full age retaining it for two months after being requested by the vendor to return it if he did not like it, has been deemed a confirmation of the purchase; *Aldrich* v. *Grimes*, 10 New Hampshire, 194. But in order that the jury may infer a ratification from the act of the minor, after age, it must be a voluntary act manifesting his intention to keep the property, when he has the power to keep or relinquish it, at his election; and if he had not actual possession and control of the goods, and made no sale or disposition of them after coming of age, and before action brought, the non-return of the goods, from circumstances not under his control, would not be sufficient evidence of a ratification; *Smith and others* v. *Kelley*, 13 Metcalf, 309, 310: accordingly, if he had sold or wasted the property during his minority, he would not be liable as upon a ratification; *Dana and others* v. *Stearns and others*, 3 Cushing, 372, 376; and where he had during infancy sold a part of the goods, and assigned the residue as security for a debt, and remained in possession after age as agent of the assignee, such possession was held not to amount to a confirmation, nor to render the party liable on a note given for the goods; *Thing* v. *Libbey*, 16 Maine, 55.

Upon *sales* of chattels, executed on the part of the infant, such an act as suing for, or receiving, the purchase-money after age, will be a confirmation; *Boody* v. *McKenney* 23 Maine, 517, 525; and though mere non-disaffirmance is not a confirmation, yet acquiescence for a long time under circumstances equitably implying a ratification, that is, under circumstances which render silence an act of fraud is reasonable evidence of a confirmation. In *Delano* v. *Blake*, 11 Wendell, 85, it was held that an infant's receiving the note of a third person in satisfaction of a debt for services, and retaining it after age for eight months and until the party liable upon it had failed, amounted to a confirmation; but as this was a contract executed on both sides, there was a sufficient bar to the right of recovering the consideration, in the infant's inability to place the purchaser in the situation he was

in before the sale, the holder of the note being necessarily liable for the loss occasioned by his neglect to demand payment of the note in due season. In *Meriweather's adm'r* v. *Herran, &c.*, 7 B. Monroe, 162, 165, in chancery, the court said, that, on a sale of personal interests, the right of avoidance would be lost "by such continued acquiescence as might afford an implication of confirmation or waver, or by the failure to assert the right for such a length of time, as in analogy to the statute of limitations, and in view of its purpose, of giving repose to society, should operate, according to the principles and practice of a court of equity, to prevent its future assertion." As to what amounts to a confirmation generally, see *Norris* v. *Wait*, 2 Richardson, 148; *Norris* v. *Vance*, 3 Id. 164.

In regard to the confirmation of contracts relating to real estate, see the general principles stated in *Phillips, &c.* v. *Green*, 5 Monroe, 344, 354: a *purchase* or hiring of land, or a reservation of a rent, is confirmed by retaining possession of the land beyond a reasonable time, or receiving the rent, after age; *Boody* v. *McKenney*, 23 Maine, 517, 524; *Bigelow* v. *Kinney*, 3 Vermont, 353, 359; *Robbins* v. *Eaton*, 10 New Hampshire, 562, 566; or by selling it after age to a stranger; and if an infant buys land and mortgages it at the same time, and the whole is one transaction, the retaining possession of the land beyond a reasonable time is a confirmation of the mortgage, but it is not so where the mortgage is a subsequent and distinct transaction; *Hubbard et al., Ex'rs* v. *Cummings*, 1 Greenleaf, 11; *Dana et al.* v. *Coombs*, 6 Id. 89; *Robbins* v. *Eaton*, 10 New Hampshire, 562; *Lynde* v. *Budd*, 2 Paige, 191; *Bigelow* v. *Kinney*, 3 Vermont, 353; *Richardson* v. *Boright*, 9 Id., 368.—Where land has been *sold* by an infant, it was said in *Kline* v. *Beebe*, 6 Connecticut, 494, where the acquiescence was for thirty-five years, that the infant ought to declare his disaffirmance within a reasonable time: but there seems to be no doubt, upon the decided cases, that mere acquiescence is no confirmation of a sale of lands, unless it has been prolonged for the statutory period of limitation, and that an avoidance may be made any time before the statute has barred an entry; *Tucker et al.* v. *Moreland; Lessee of Drake and wife* v. *Ramsay et al.*, 5 Ohio, 251, 255; *Cresinger* v. *Lessee of Welch*, 15 Id. 156, 193; *Boody* v. *McKenney*, 23 Maine, 517, 523, 524; and slight, or vague, declarations, will not amount to a ratification; *Clamorgan et al.* v. *Lane*, 9 Missouri, 447, 473; there may, however, be an acquiescence and assent under such circumstances as to amount to an equitable estoppel upon the vendor; thus, in *Wheaton* v. *East*, 5 Yerger, 41, 62, it was held where an infant had sold land, and after coming to age, saw the purchaser making large expenditures in valuable improvements, and said nothing in disaffirmance for four years, that "the circumstances were such as not to excuse this long silence;" and, there being evidence that on several occasions the vendor had said, after age, that he had sold the land and been paid for it, and was satisfied, and had authorized a proposition to be made for the purchase of the land, it was held that the sale was confirmed. And in like manner, *Wallace's Lessee* v. *Lewis*, 4 Harrington, 75, 80, it was held, that an infant's acquiescing in a conveyance for four years after age, and seeing the property extensively improved, would be a confirmation. Though mere lapse of time will not be a confirmation, unless continued for twenty-one years, yet the lapse of a less period in connexion with other circumstances, may amount to a ratification; *Cresinger* v. *Lessee of Welch*, 15 Ohio, 156, 193. A recital in another deed by the grantor when of full age, of the prior deed with an expressed design to confirm it, has been held to operate as a confirmation; *Phillips &c.* v. *Green*, 5 Monroe, 344, 355.

As to the time and manner of avoid-

ing contracts;—in cases of sales of land, the infant may enter under age and hold and take the profits, but cannot conclusively avoid the conveyance till he is of age; *Stafford* v. *Roof*, 9 Cowen, 626, 628; *Bool* v. *Mix*, 17 Wendell, 120, 132; *Matthewson and wife* v. *Johnson and others*, 1 Hoffman's Chancery, 560, 565: and the avoidance, then, may be by entry, ejectment, writ dum fuit infra ætatem, or special plea, or by any act unequivocally manifesting an intention to avoid; a resale after age by the infant will avoid a previous bargain and sale, if the first grantee be not in actual possession, but if there be an adverse possession, then, in those states where one out of possession cannot sell, there should be an entry by the grantor; *Tucker et al.* v. *Moreland; Jackson* v. *Carpenter*, 11 Johnson, 539; *Jackson* v. *Burchin*, 14 Id. 124; *Bool* v. *Mix*, 17 Wendell, 120, 133; *Inhabitants of Worcester* v. *Eaton*, 13 Massachusetts, 371, 375; *Roberts* v. *Wiggin*, 1 New Hampshire, 73, 75; *Phillips et ux.* v. *Green*, 3 Marshall, 7, 14; *Lessee of Drake and wife* v. *Ramsay et al.*, 5 Ohio, 251, 253; *Cresinger* v. *Lessee of Welch*, 15 Id. 156, 192; *Harris* v. *Cannon and another*, 6 Georgia, 382. But in *McGan* v. *Marshall*, 7 Humphreys, 121, 126, it was held, that the principle of one deed being avoided by another deed for the same property after age, must be understood of absolute deeds inconsistent with one another, whereby it becomes manifest that it was the intention of the party to disaffirm the former deed; and that a mortgage of lands during infancy is not avoided by a subsequent mortgage or deed of trust, of the same lands after full age; for it may be that the estate is of much greater value than the debt secured by the first mortgage; and as the second mortgagee would obtain the benefit of such additional value, the execution of the second mortgage would not necessarily indicate an intention to avoid the previous one. It was said also, in this case, that a second deed which was void, would not avoid a prior deed. Contracts of a personal kind, or relating to personal property, may be avoided, under age and immediately; otherwise irreparable injury might ensue; *Stafford* v. *Roof*, 9 Cowen, 626, 628; *Shipman* v. *Horton*, 17 Connecticut, 481, 483; *Willis* v. *Twambly*, 13 Massachusetts, 204, 205; (*dictum* contra in *Boody* v. *McKenney*, 23 Maine, 517, 525; and see *Farr* v. *Sumner*, 12 Vermont, 28, 31;) and the avoidance may be by any act clearly demonstrating a renunciation of the contract, as, in case of a contract of apprenticeship, leaving the service and going elsewhere; *McGill* v. *Woodward*, 1 Constitutional R. So. Car. 468; S. C. 3 Brevard, 401; *Vent* v. *Osgood*, 19 Pickering, 572, 573. The right of an infant to avoid his contracts is an absolute and paramount right, superior to all equities of other persons, and may therefore be exercised against *bona fide* purchasers from the grantee; *Myers et al.* v. *Sanders' Heirs*, 7 Dana, 506, 521; *Hill* v. *Anderson*, 5 Smedes & Marshall, 216, 224.

In regard to the consequences of avoiding the contract, we may consider separately, the cases where the contract is *executory* on the part of the infant, and where it has been executed by him or by both.—Every executory liability may be avoided by an infant; but where the contract had been executed by the adult, and the infant had received possession, and then would avoid his liability upon it, he must surrender the consideration, if it be in his possession or control. It is a settled rule that an infant cannot be permitted to retain property purchased by him, and, at the same time, repudiate the contract upon which he received it. Accordingly, where one partner, upon the dissolution of the firm, conveyed all his interest in the firm effects to the other who was an infant, upon condition that he would pay the firm debts, and the latter avoided this obligation on the ground of infancy, it was decided that the

other partner had a right to insist that his original interest on the effects should be applied to pay the debts in the same manner as if the dissolution had not taken place; *Kitchen* v. *Lee*, 11 Paige, 107. A distinction, therefore, arises between the case in which the infant is in possession after age, and where he has wasted, sold, or otherwise ceased to be in possession of the property, before arriving at age. In the former case, we have seen that by selling or otherwise putting the property out of his power, he confirms the contract, as, in *Cheshire* v. *Barrett*, *Lawson* v. *Lovejoy*, *&c.*; and it would probably be the same if having possession, he refused to deliver it on demand; and it may be doubted whether the confirming effect of such a conversion could be countervailed by a mere parol disaffirmance of the liability, if the other party chose to treat the act as an affirmance: but if he has actually disaffirmed the contract, as by defeating payment at law, or, if having disaffirmed by parol, the adult chooses to treat his words as a disaffirmance, and he still keep possession, the other, after demand and refusal may maintain trover, or may bring replevin or detinue; for the effect of avoidance is to revest the property in the vendor; *Badger* v. *Phinney*, 15 Massachusetts, 359, 364; *Boyden* v. *Boyden and another*, 9 Metcalf, 519; *Jefford's Adm'r* v. *Ringgold & Co.*, 6 Alabama, 544, 548. But if he has during infancy wasted, sold, or otherwise ceased to possess the property, these acts done in infancy cannot be a conversion, because he then held the goods under an executed transfer of property which authorized him to use and dispose of them as owner, and a refusal after age to deliver on demand, when he has not the goods, is not a conversion, and trover will therefore not lie: and this just and sound distinction is taken in the very clear opinion in *Fitts* v. *Hall*, 9 New Hampshire, 441, 446; and recognised in *Robbins* v. *Eaton*, 10 Id. 562, 565, and *Boody* v. *McKenney*, 23 Maine, 517, 525, 526; nor can detinue be maintained, for it lies not where the goods, though once in possession, have been parted with in a manner authorized by law: in such case, therefore, he may avoid the contract without being made liable for the consideration in an action sounding in tort. See *Brawner & wife* v. *Franklin et al.*, 4 Gill, 463.

Where a contract has been executed on the side of the infant, and he avoids it, he may recover from the other party. If services have been performed by the infant, in partial or entire execution of an express contract, and he avoids the contract, he may recover in *quantum meruit* the value that his services have been upon the whole state of the case; *Moses* v. *Stevens*, 2 Pickering, 332; *Vent* v. *Osgood*, 19 Id. 572; *Voorhees* v. *Wait*, 3 Green, 343, 344; *Thomas* v. *Dike*, 11 Vermont, 273; *Judkins* v. *Walker*, 17 Maine, 38; *Medbury* v. *Watrous*, 7 Hill, 110: the case of *M' Coy* v. *Huffman*, 8 Cowen, 84, (upon the authority of which *Weeks* v. *Leighton*, 5 New Hampshire, 43, and *Harney* v. *Owen*, 4 Blackford, 337, were decided,) denied the right of recovery where money has been paid or services performed under a contract which is afterwards avoided; but this case was grounded on *Holmes* v. *Blogg*, 8 Taunton, 508, which is essentially overruled by *Corpe* v. *Overton*, 10 Bingham, 252, where it is decided that an infant having avoided a contract from which he has received no benefit, may recover back money which he has paid under it; and in *Medbury* v. *Watrous*, *M' Coy* v. *Huffman*, is itself expressly overruled, leaving the New Hampshire and Indiana cases without any support from authority. In *Whitemarsh* v. *Hall*, 3 Denio, 375, it was held that, in such cases, the infant might recover the full value of his services, without any abatement for the injury he may have done by the breach of the express contract. In case of a purchase executed on both sides, the infant renouncing

the purchase, may recover back the purchase-money; *Bigelow* v. *Kinney*, 3 Vermont, 353, 358; and in case of an executed sale or exchange, he may recover back the article sold or given in exchange; *Williams* v. *Norris*, 2 Littell, 157, 158; *Hill* v. *Anderson*, 5 Smedes & Marshall, 216; *Grace* v. *Hale*, 2 Humphreys, 27; and in such cases he must restore the purchase-money or other consideration; *Smith* v. *Evans*, 5 Humphreys, 70; *Badger* v. *Phinney*, 15 Massachusetts, 359, 363; and when an infant goes into chancery after age to set aside his conveyance, he must offer in his bill to restore the purchase-money; *Hillyer* v. *Bennett*, 3 Edward's Chancery, 222; for the only reason why the rescission of a contract in any case gives a right to recover what has passed by the contract, is, that the consideration of such transfer has totally failed; and unless the party is restored to the situation which he was in before, the consideration has not wholly failed as to him; in other words there can be no avoidance by parol so as to give a right to recover back property once lawfully transferred and vested, so long as any part of the consideration is withheld; see *Brawner & wife* v. *Franklin et al.*, 4 Gill, 463. In *Farr* v. *Sumner*, 12 Vermont, 28, an infant bought on credit, and gave a chattel in satisfaction of the debt, and, when he was of age, brought trover to recover the chattel; and it was held that, while retaining the consideration, he could not do so. In *Taft & Co.* v. *Pike*, 14 Id. 405, it was held that where an infant worked for hire, and was partially paid in property, he could not recover the full price of his labour, without returning, or allowing for, the articles received. In *Eubanks* v. *Peak*, 2 Bailey, 497, 499, there was a debt from the adult for services, for which property was received in satisfaction, and a release given by the infant, and the infant afterwards expressed himself satisfied, and kept the property; and it was decided that this was a confirmation of the settlement and release, and barred the infant's right of action for the original debt. And in *Walker* v. *Ferrin*, 4 Vermont, 523, 527, it was declared that a receipt by an infant of satisfaction of a debt, and a release thereupon, are binding upon him where he retains the satisfaction. Upon a similar principle, it was held in *Baker* v. *Lovett*, 6 Massachusetts, 78, that an infant upon whom an assault has been committed, and who has accepted a sum of money in satisfaction and release of damages, may set aside the release and bring trespass; but that if the jury find that the money received was an adequate compensation for the injury, they are to assess nominal damages, but if inadequate, they will give such further sum, as, with that previously received, will amount to a reasonable satisfaction.—To the same principle, that an executed transaction cannot be rescinded so as to give a right of action out of it to the infant, unless the other party is restored to his rights, may be referred probably the case of an endorsement of an infant payee to transfer a right, upon which the payment is made to the endorsee. The infant cannot set aside his endorsement as void, and recover as payee, because the transaction has become executed in favour of his appointee, and cannot be rescinded and opened, unless the maker of the note is placed in the same situation that he was before: see *Dulty* v. *Brownfield*, 1 Barr, 497; *Willis* v. *Twambly*, 13 Massachusetts, 204, 206; *Nightingale* v. *Withington*, 15 Id. 272, 274.

In the late case of *Weed* v. *Beebe et al.*, 21 Vermont, 495, 500, the general principle is declared, that an infant cannot avoid that part of his contract, which binds him, without also avoiding that part which is in his favour. If he purchase land, and execute notes for the purchase, or a mortgage of the land to secure the purchase-money, he cannot disaffirm the notes and mortgage, and claim the land under his deed; and, if he sell land and take

notes, he cannot avoid his deed and compel payment upon his notes; and the good sense and equity of this doctrine (it was said) are too apparent to require any reasoning or authority to support it.

For mere torts, an infant is legally liable, as an adult is; *Hartfield* v. *Roper*, 21 Wendell, 615, 620; *Brown* v. *Maxwell*, 6 Hill's N. Y. 592, 594. "If an infant commit an assault, or utter slander," said Lord Kenyon, in *Jennings* v. *Randall*, 8 Term, 337, "God forbid that he should not be answerable for it in a court of justice." Accordingly, an infant is liable in trespass for an assault, though his infancy might in some cases be evidence to show that the act complained of was an inevitable accident; *Bullock* v. *Babcock*, 3 Wendell, 391; he is liable also for a constructive trespass, as by procuring another to commit a trespass; *Sikes* v. *Johnson & others*, 16 Massachusetts, 389; and, civilly, for a trespass committed by command of his father, though from the want of intention he might not be liable criminally; *Humphreys* v. *Douglass*, 10 Vermont, 71. In *Wallace* v. *Morss*, 5 Hill's N. Y. 391, an infant who obtained goods fraudulently without intending to pay for them was held to be liable for the fraud: and in general, when money or goods have gone into an infant's hands without contract and wrongfully, or are retained by him wrongfully, they may be recovered: *Bristow et al.* v. *Eastman*, 1 Espinasse, 172; *Mills* v. *Graham*, 1 New, 140.

But a liability really *ex contractu*, though infected with fraud, cannot be changed into a *tort*, by altering the form of the action; for the substantial ground of the liability is regarded by the law, and not merely the form which the action assumes; *The People* v. *Kendall*, 25 Wendell, 399, 401. But as to the mode of avoiding the liability *ex contractu*, when urged in the form of an action *ex delicto*, some distinctions exist in consequence of differences in pleading. In an *action on the case*, the declaration shows upon its face, that the tort is merely constructive, being in effect but a breach of contract; the action, therefore, cannot be maintained at all, after the fact of infancy appears; in other words, a plea of infancy is a bar, and evidence of infancy under the general issue a conclusive defence. It has been determined, therefore, that an action on the case against an infant for injuries done negligently or wrongfully to goods entrusted to him under any kind of bailment, (*Vasse* v. *Smith*; *Schenks* v. *Strong*, 1 Southard, 87; *Campbell* v. *Stakes*, 2 Wendell, 138, 143,) or for fraud or fraudulent warranty on a sale, (*Brown* v. *Dunham*, 1 Root, 272; *West* v. *Moore*, 14 Vermont, 447,) will not lie. The case of *Word* v. *Vance*, 1 Nott & M'Cord, 197, that case for deceit in a warranty on an exchange of horses, and *Peigne* v. *Sutcliffe*, 4 M'Cord, 387, that case for the embezzlement of goods confided to carry, will lie against an infant, are clearly wrong; and indeed in *Evans* v. *Terry*, 1 Brevard, 80, that doctrine seems to have been held by but two judges out of five. In *Fitts* v. *Hall*, 9 New Hampshire, 441, a distinction is suggested of this nature, that an infant is not liable in case for any fraudulent affirmation that makes a part of the contract, as for a fraudulent representation as to the quality of goods, but that for fraudulent representations anterior or subsequent to the contract, and not parcel of it, he is liable: and upon this it was decided, that for an affirmation that he is of age, by which a contract is afterwards made with him, an infant is liable in case. This decision, which directly overrules *Johnson* v. *Pie*, 1 Levinz, 169, is clearly unsound: the representation, by itself, was not actionable, for it was not an injury, and the avoidance of the contract which alone made it so, was the exercise of a perfect legal right on the part of the infant. The contract, in such a case as *Fitts* v. *Hall*, forms an essential part of the right of action, and no liability

growing out of contract can be asserted against an infant. The test of an action against an infant is, whether a liability can be made out without taking notice of the contract. It is admitted, in the same court, that such an affirmation as in *Fitts* v. *Hall*, does not estop the infant so as to render him liable on the contract; *Burley* v. *Russell*, 10 New Hampshire, 184; which implies that the avoidance of a contract induced by such a representation is not a *fraud*.

In trover, the nature of the liability does not appear from the declaration; and it cannot be told whether the action is brought for a pure tort, or such merely constructive conversion as consists only in a breach of contract. In trover, therefore, infancy cannot, as a special plea, be a bar, nor be a conclusive defence under the general issue: but it may be given in evidence upon the question, whether the alleged act be, in the case of an infant, a conversion or not. This is the satisfactory principle established in *Vasse* v. *Smith*; and it gives the infant, through another channel, the full benefit of his legal protection: for the evidence is to be applied in accordance with the general principle above stated; that is to say, a mere breach of contract, such as, in case of hiring, going elsewhere or further than the agreement allowed, is not an actionable conversion in an infant; but an actual and wilful conversion, totally unconnected with the contract, such as, a destruction of the property, or a refusal to deliver on demand when it is in his possession, is an actionable tort in trover; the test still being, whether a conversion is made out without calling the contract in aid. The cases sustain this distinction. In *Jennings* v. *Rundall*, 8 Term, 335, the count in trover was not objected to, and Lawrence, J., expressly says, (p. 337,) "in trover an infant is always liable." So far as *Homer* v. *Thwing et al.*, 3 Pickering, 492, determines that trover will lie against an infant, the point really presented to the court, it is no doubt an authority, but it goes too far in denying the distinction between actual and constructive conversion. *Penrose* v. *Curren*, 3 Rawle, 351, is called an action on the case; *Wilt* v. *Welsh*, 6 Watts, 9, was trover: these cases deciding that for a constructive tort or conversion in driving a hired horse elsewhere than the contract allowed, or managing him negligently, an infant cannot be made liable in any way, are certainly correct; but the mode of taking advantage of the privilege of non-age, and the principles of pleading connected with the subject, were not discussed in those cases. In *Lewis* v. *Littlefield*, 15 Maine, 233; 17 Id. 40, it is decided that trover lies against an infant for a conversion in delivering over what had been entrusted to him as a stakeholder under an unlawful contract: and Shipley, J., remarks, (15 Id. 236,) that the difference between the Massachusetts and Pennsylvania cases is as to what is evidence of a conversion in the case of an infant.

In regard to trespass, where there has been a possession by the infant under a contract, as the declaration takes no notice of any contract, the action will always lie against an infant; but as trespass is an injury to possession, it will not lie against either adult or infant, where there has been a bailment, unless the bailee has determined his legal possession by some violent act done to the property; but if he has so determined it, and has committed in law a trespass upon the property, the infant is liable for it, notwithstanding the contract; *Campbell* v. *Stakes*, 2 Wendell, 138, 143: the objection made to this case in *Wilt* v. *Welsh*, proceeds perhaps upon a too strict construction of the language of the court, and a misapprehension that the court had meant to say that any breach of contract rendered the infant a trespasser. The court in *Campbell* v. *Stakes* probably meant that the same acts of tort which would determine the possession of an adult bailee, and make

him a trespasser, will have the same effect in the case of an infant: what are such acts, belongs to another branch of the law.

Criminally, an infant may be liable notwithstanding the transaction be connected with a contract; as, for obtaining goods on false pretences; *The People* v. *Kendall*, 25 Wendell, 399; or for neglect of duty as a member of a military company; *Winslow* v. *Anderson*, 4 Massachusetts, 376.

At law, an infant may prosecute suits either by guardian or *prochein ami*; *McGiffin* v. *Stout*, Coxe, 92; *Rucker* v. *M'Neely*, 4 Blackford, 179; the writ, indeed, may be in the ordinary form, but the declaration must be by guardian or next friend; *Groff* v. *Groff*, Pennington, [656]; *Bouche* v. *Ryan*, 3 Blackford, 472; *Haines* v. *Oatman*, 2 Douglass, 430, 431. A suit by prochein ami will be good without the assent, and, if it be for the infant's benefit, even against the dissent, of the general guardian; *Thomas* v. *Dike*, 11 Vermont, 273; *Hardy* v. *Scanlin*, 1 Miles, 87; see *Trask* v. *Stone*, 7 Massachusetts, 241. And in case of suit by either prochein ami or guardian, there ought regularly to be an admission of him by the court to sue, but the recital of admission in the declaration is a sufficient record and proof of the admission; *Miles* v. *Boyden*, 3 Pickering, 213, 219; and without such an admission or entry as makes the prochein ami liable for costs, the defendant is not bound to plead, but may have the suit dismissed; *Keeran* v. *Clowser*, 5 Blackford, 604; *Haines* v. *Oatman*, 2 Douglass, 430; but in Connecticut and Pennsylvania, there need not be an appointment or express allowance of prochein ami by the court, nor a record of it; *Judson* v. *Blanchard*, 3 Connecticut, 580, 584; *Turner* v. *Patridye*, 3 Pennsylvania, 172; *Heft* v. *McGill*, 3 Barr, 256, 264; see the different practices stated at large in *Apthorp* v. *Backus*, Kirby, 407, 410. The opinion in *Wilson* v. *Vandyke*, 2 Harrington, 29, that an infant may sue by his general guardian without admission, or recital of it, is incorrect, if meant as a rule of the common law; *Pechey* v. *Harrison*, 1 Lord Raymond, 232; Co. Lit. 135, *b*, note (1); but the neglect to allege admission is cured by verdict; *Kid* v. *Mitchell*, 1 Nott & M'Cord, 335; *Apthorp* v. *Backus*, Kirby, 407, 411. A suit by prochein ami, without alleging in the declaration *the infancy of the plaintiff* and the admission of the prochein ami by the court, is bad on general demurrer, or writ of error; *Shirley* v. *Hagar*, 3 Blackford, 225; *M'Gillicuddy* v. *Forsythe*, 5 Id. 435, 436. The appointment of a prochein ami is properly the act of the court, who have a discretion on the subject; and if an improper person, such as an uncertificated bankrupt be appointed, the court on application will direct his removal; *Watson* v. *Frazer*, 8 Meeson & Welsby, 660. The court may control his conduct; and it is said that his power does not extend to the doing of any act that may be to the prejudice of the infant; he cannot receive the money due upon the judgment that is recovered, but it must be paid to the general guardian; *Isaacs* v. *Boyd et al.*, 5 Porter, 389; *Bethea* v. *McCall*, 3 Alabama, 450; *Smith* v. *Redus & wife*, 9 Id. 99, 101; see *Turner* v. *Patridge*, 3 Penrose & Watts, 172, 173; *Apthorp* v. *Backus*, Kirby, 407, 410. If an infant declare by attorney, the defendant can plead it only in abatement, and it is not a ground of nonsuit; *Smith* v. *Van Houten*, 4 Halsted, 381; *Schemerhorn* v. *Jenkins*, 7 Johnson, 373; *Fellows* v. *Niver*, 18 Wendell, 563; *Heft* v. *McGill*, 3 Barr, 256, 264; *Drago* v. *Moso*, 1 Speers, 212, overruling *M'Daniel* v. *Nicholson*, 2 Mill's Constitutional, 344; *Blood* v. *Harrington*, 8 Pickering, 552, 555.—As to defence, suits may be brought against an infant, but he cannot appear by attorney (*Comstock* v. *Carr*, 6 Wendell, 526), but only by guardian *ad litem* admitted or appointed by the court; *Alderman* v. *Tirrell*, 8 Johnson, 418;

Arnold v. *Sandford*, 14 Id. 417; *Bustard* v. *Gates & wife*, 4 Dana, 429, 436; *Cook's Heirs* v. *Totton's Heirs*, 6 Id. 108; *Knapp* v. *Crosby*, 1 Massachusetts, 479; *Starbird et al.* v. *Moore*, 21 Vermont, 530. See the whole subject of guardian *ad litem* in *Clarke* v. *Gilmanton*, 12 New Hampshire, 515, 517. In Pennsylvania, an an infant defendant may appear by his general guardian appointed by the Orphans' Court: *Mercer* v. *Watson*, 1 Watts, 330, 350. If no appearance by guardian *ad litem* is entered, the plaintiff may have a rule to assign a guardian for the infant, which is a power incident to every court; *Judson* v. *Storer*, 2 Southard, 544; *Cole v. Pennell, &c.*, 2 Randolph, 174; *Mockey* v. *Grey*, 2 Johnson, 192; and the practice is said, in *Fearing* v. *Clawson*, 1 Hall, 55, and *Mercer* v. *Watson*, 1 Watts, 330, 349, to be to appoint a nominal person; but in *Young, &c.* v. *Whitaker*, 1 Marshall, 398, 400, it is said that the guardian thus appointed should be a fit and responsible person; and in *Greenup's Representatives* v. *Bacon's Executors*, 1 Monroe, 108, 109, it is said that if no guardian will appear, it is the duty of the court to appoint one of its officers whom it can control, and to see that he appears and takes defence, and that the appointee is responsible for his acts done under the appointment. A minor sued as trustee, by means of the trustee process, must defend by guardian, and if no guardian appear for him, the plaintiff must apply to the court to have a guardian *ad litem* appointed; *Wilder et al.* v. *Eldridge & Tr.*, 17 Vermont, 227; *Keeler* v. *Fassitt*, 21 Id. 540. Judgment against an infant without the appointment of a guardian *ad litem* is erroneous; and to justify a judgment by default the order of appointment should appear of record, but if there has been an actual defence by one acting as guardian, the want of express appointment is probably not error; see *Brown* v. *M'Rae's Executors*, 4 Munford, 439; *Priest & others* v. *Hamilton*, 2 Tyler, 44, 49; *Mercer* v. *Watson*, 1 Watts, 330, 358: and the guardian must enter an appearance, or at least accept the appointment, for without his accepting the appointment, or acting, so far as to appear, there can be no valid judgment against the infant; *Shaefer* v. *Gates & wife*, 2 B. Monroe, 453, 456; *Fox et al.* v. *Cosby et al.*, 2 Call, 1: if he appears, the court does not further protect the infant, but judgment for after-defaults may be entered, the recourse of the infant being against the guardian for injuries occasioned by his neglect or mismanagement; *Young, &c.*, v. *Whitaker*, 1 Marshall, 398, 400. A judgment against several, erroneous on account of one infant defendant appearing not by guardian, will be reversed entirely, a judgment being an entirety; *Cruikshank* v. *Gardner*, 2 Hill's N. Y., 333; *Sargeant et a.* v. *French*, 10 New Hampshire, 444; *Starbird et al.* v. *Moore*, 21 Vermont, 530. See *Mason* v. *Denison*, 15 Wendell, 64: and a release of errors by the infant will not bar a writ of error, as a right of reversal exists in the other defendants; *Blanchard, Coolidge et al.* v. *Gregory*, 14 Ohio, 413, 417. When an infant brings a writ of error to reverse a judgment rendered against him without an appearance by guardian, the court vacates the judgment only, and does not set aside the proceedings altogether; *Barber* v. *Graves*, 18 Vermont, 290.

The practice in chancery is similar. Infants file their bill by prochein ami, and even if the suit is conducted by the general guardian, it should be in the name of the infant, by him as prochein ami; *Bradley* v. *Amidon*, 10 Paige, 236, 239; *Hoyt* v. *Hilton*, 2 Edwards, 202; *Lemon, guardian*, v. *Hansbarger*, 6 Grattan, 301: as to the prochein ami, see *Fulton* v. *Rosevelt*, 1 Paige, 179. Infants defend only by guardian appointed *ad litem*; the general guardian of the person and estate is not competent to defend by virtue of his office; *Shield's heirs* v. *Bryant*, 3 Bibb, 525. If the infant

does not apply within a certain time to have a guardian *ad litem* appointed for himself, the complainant may apply to have one appointed: *Anonymous*, 10 Paige, 41; as to the manner of appointment, see *Bank of the U. S.* v. *Ritchie et al.*, 8 Peters, 129, 144. The order of appointment must be of record, for it is not enough that one answering for the infant, calls himself his guardian; *Irons, Ex'x* v. *Crist*, 3 Marshall, 143; *Letcher's Heirs* v. *Letcher*, 2 Id. 158; *Searcey's Heirs* v. *Morgan*, 4 Bibb, 96; *Shields, &c.* v. *Craig*, 1 Monroe, 72; *Ewing's Heirs* v. *Armstrong*, 4 J. J. Marshall, 68: but it seems that there may be a binding recognition of one acting for the infant, as guardian *ad litem*, by orders and proceedings of the Court, though no direct order of appointment has been made; *Cato* v. *Easley*, 2 Stewart, 214, 220. And the guardian must not only be appointed, but must accept the appointment, by appearing, or otherwise; *Carneal et al.* v. *Sthreshley*, 1 Marshall, 471; *Daniel, &c.* v. *Hannagan*, 5 J. J. Marshall, 48; *Heirs, &c. of St. Clair* v. *Smith & Milliken*, 3 Ohio, 355, 364: and a decree against an infant without a guardian, is erroneous. A decree against infant heirs defendants must give day, which in practice is six months, after age, to show cause against it; and a decree which does not give day will be reversed on appeal for that error alone; *Beeler, &c.* v. *Bullitt*, 4 Bibb, 11; *Collard's Heirs* v. *Groom*, 2 J. J. Marshall, 487, 488; *Jones's Heirs* v. *Adair*, 4 Id. 220; *Arnold's Admr'x* v. *Voorhies*, Id. 507, 508; *Passmore's Heirs* v. *Moore*, 1 Id. 591, 593; *Harlan, &c.*, v. *Barnes' Adm'rs*, 5 Dana, 219, 223; *Mills* v. *Dennis*, 3 Johnson's Chancery, 367; *Harris & others* v. *Youman & others*, 1 Hoffman's Chancery, 178; *Wright* v. *Miller*, 1 Sandford, 104, 120; *Coffin* v. *Heath and another*, 6 Metcalf, 77, 81; or is ground for bill of review without leave of the Court; *Lee* v. *Braxton*, 5 Call, 459. If the infant afterwards succeeds in showing that the decree ought not to have been made, the Court will place him, so far as is conveniently practicable, in the situation in which he was before the decree was made; *Pope, &c.* v. *Lemaster, &c.*, 5 Littell, 76, 80; *Prutzman* v. *Pitesell*, 3 Harris & Johnson, 77, 82. A distinction as to the extent to which the proceeding may be overhauled, exists between decrees of foreclosure and other decrees: In cases of foreclosure, whether with or without sale, the infant on arriving at full age, and showing cause, can only allege error on the face of the decree; whereas, in other cases, he will be permitted to file a new answer, and litigate the merits of the case: *McClay, Adm'r, et al.* v. *Norris*, 4 Gilman, 370, 381. A decree need not give day to infant complainants, as they have no right to overhaul the decree; *Williamson's Heirs*, v. *Johnston's and Nash's Heirs*, 4 Monroe, 253, 255; *Jameson, &c.* v. *Moseley*, Id. 414, 416; *McClay, Adm'r, et al.* v. *Norris*, 4 Gilman, 370, 383; *Brown* v. *Armistead*, 6 Randolph, 594, 602; *Hanna* v. *Spotts's Heirs*, 5 B. Monroe, 362, 367.

An infant plaintiff or complainant is not liable for costs, but the prochein ami is; *Sproule, &c.* v. *Botts*, 5 J. J. Marshall, 162; *Waring* v. *Crane*, 2 Paige, 80; but in Massachusetts, upon the construction of a statute, an infant plaintiff is liable; *Smith* v. *Floyd*, 1 Pickering, 275; and a prochein ami is not; *Crandall* v. *Slaid & wife*, 11 Metcalf, 288. If the prochein ami is not a responsible man, the court may order security for costs; or appoint another who is responsible; *Cotheal et al.* v. *Moorehouse et al.*, 1 Zabriskie, 336.

As to the time and manner of avoiding judicial proceeding on account of infancy; the general rule is, that a voidable act by matter of record can be avoided only by matter of record. A fine, common recovery, or recognizance, are to be avoided during infancy, by audita querela, and the fact of infancy is determined by in-

spection; *Phillips et ux.* v. *Green*, 3 Marshall, 7, 11; *Prewit* v. *Graves, &c.*, 5 J. J. Marshall, 114, 120; *Bool* v. *Mix*, 17 Wendell, 120, 132; *Chase* v. *Scott*, 14 Vermont, 77; *Patchin* v. *Cromach*, 13 Id. 330; but in the last case it is intimated that a recognizance might be avoided upon suit, by plea, like other obligations. A judgment against an infant without guardian, may be reversed by writ of error after full age, and the trial is *per pais; Sliver* v. *Shelback*, 1 Dallas, 165: and whenever a writ of error lies, such a judgment cannot be impeached collaterally, for it is a rule, that where a party to an erroneous judgment is entitled to a writ of error to reverse it, it cannot be avoided in any other way: but a party to an erroneous judgment, who is not entitled to a writ of error to reverse it, may avoid it on motion, or by plea, in a court of competent jurisdiction; *Austin* v. *Charleston Female Seminary*, 8 Metcalf, 196, 204; accordingly, it was decided in *Etter* v. *Curtis*, 7 Watts & Sergeant, 170, in perfect accordance with settled principles, that in debt on a judgment of a justice of the peace, against an infant, infancy might be pleaded, because no writ of error lay to remove the judgment, and a certiorari would correct no more than errors apparent on the face of it. As to setting aside judgments or executions by audita querela, see *Chase* v. *Scott; Starbird et al.* v. *Moore*, 21 Vermont, 530; and *Mason* v. *Denison*, 15 Wendell, 64, 68.

There are some judicial acts of the Court of Chancery which being performed under an authority not derived from the infants, are binding upon them; as, decrees of sale under mortgage, or under a power in a will to sell; *Mills* v. *Dennis*, 3 Johnson's Chancery, 367, 369; *Brown* v. *Armistead*, 6 Randolph, 594, 602: any other power which that court may have to decree sales of the land of infants must be derived from statutes, as it has no such power inherently; *Rogers* v. *Dill*, 6 Hill's N. Y., 415; *McKee's Heirs* v. *Hann, &c., and McKee, &c.*, 9 Dana, 526; *Pierce's Adm'r, &c.* v. *Trigg's Heirs*, 10 Leigh, 408, 421; unless it may be merely for the purpose of changing a fund; *Huger and others* v. *Huger and others*, 3 Desaussure, 18, 21.

Application of Payments.

THE MAYOR AND COMMONALTY OF ALEXANDRIA *v.* PATTEN AND OTHERS.

In the Supreme Court of the United States.

FEBRUARY TERM, 1808.

[REPORTED, 4 CRANCH, 317–321.]

If the debtor at the time of payment does not direct to which account the payment shall be applied, the creditor may at any time *apply it* to which account he pleases.

ERROR to the Circuit Court of the District of Columbia, sitting at Alexandria, in an action of debt brought by the mayor and commonalty of Alexandria, for the use of John G. Ladd, against Thomas Patten and his sureties, on a bond given for the performance of his duty as vendue-master.

The object of the suit was to recover a sum of money alleged to remain in his hands as vendue-master on account of goods sold for Ladd. Patten was also the debtor of Ladd for goods sold by him to Patten, who gave in evidence payments which exceeded the amount due upon the latter account, and which, if applied to the former account, would nearly, if not entirely, discharge that debt. The payments were attended by circumstances which the defendants considered as evidence of a clear intention to apply them to the debt due from Patten as *vendue-master ;* " whereupon the counsel for the plaintiffs prayed the opinion of the court whether, from the manner in which the payments were made as aforesaid, the said John G. Ladd had not a right to apply so much of the money, paid to him as aforesaid, as would discharge the debt due to him as aforesaid, for *goods sold* as aforesaid, to the said Thomas Patten to the discharge of the same. Whereupon the court instructed the jury, that if they should be satisfied by the evidence that the payments of the money by the defendant Patten were made on account of the goods *sold at vendue*, and so understood by both parties at the time of the payments, they must be applied to that account.

" If Mr. Patten, at the time of paying the money, did not direct to which account it should be applied, and if it was not understood by the

parties at the time of payment, on which account it was made, the *plaintiff* had a right *immediately* to make the application to which account he pleased; but such application must have been *recent*, and before any alteration had taken place in the circumstances of Mr. Patten.

"If neither of the parties made the application as aforesaid, and if the parties did not then understand on which account it was made, then the payments ought in law to be applied to the discharge of the *vendue account*, the non-payment of which is alleged as the breach of the bond upon which the present suit is brought."

To this opinion the plaintiffs excepted, and the verdict and judgment being against them, brought their writ of error.

Swann, for the plaintiffs in error, contended, that where there are different debts due by a debtor to his creditor, and a payment be made generally *on account*, the creditor has a right to apply the payment, *whenever* he pleases, *to which account he pleases*, and cited the case of Goddard v. Cox, 2 Stra. 1194.

Youngs, contra.

It is admitted that the defendant had the right at the time of payment to direct its application, and that if he did not then exercise that right, it devolved upon the plaintiff. But the question is, *when* is the plaintiff to exercise the right? Can he, at any definite period after the payment, and under any change of circumstances, apply the payment as he pleases? Can he, at the moment of trial, when the defendant produces evidence of payments, say, I choose to apply these payments to the other account? The rules of law are all founded in reason. Some reasonable limit must be supposed to the exercise of this right. In the present case the interests of third persons are involved. The sureties may have been lulled into security by the evidence of these payments.

The court below was bound to decide according to the laws of Virginia, which have been adopted by Congress for the government of the county of Alexandria.

The law is conclusively settled in Virginia, by the highest tribunal in that state, in the case of Braxton v. Southerland, 1 Wash. 133, where the president of the court of appeals, in delivering the opinion of the court says, "Although, if the debtor neglect to make the application at the time of payment, the election is then cast upon the creditor, yet it is incumbent upon the latter, in such a case, to make a *recent* application, by entries in books or papers, and not to keep parties and securities in suspense, changing their situation from time to time, as his inte-

rest, governed by events, might dictate." And upon this principle, the decree of the court in that case was founded. It was not a mere *dictum*, but the very ground of the court's decision. This, then, being the law of Virginia, the court below was bound by it.

If the opinion of the court of appeals of Virginia needed support, it would be found in 2 Pothier on Obligations, 45, who gives it as a rule of the civil law, "that when the debtor in paying makes no application, the creditor to whom money is due for different causes, may apply it to the discharge of which he pleases." But he goes on to say, "It is necessary, 1st. That this application should have been made *at the time;* and 2d. That the application which the creditor makes should be equitable." Another rule, in p. 49, is, that "when the application has not been made either by the debtor or the creditor, the application ought to be made to that debt which the debtor had, at the time, most interest to discharge." And as a *corollary*, he says, "The application is made rather to the debt, for which the debtor has given a *surety*, than to those which he owes alone. The reason is, that in paying the former he discharges himself towards *two* creditors—his principal creditor, and his surety whom he is bound to indemnify."

These principles are confirmed by 1 Domat, 287, tit. De Solutione.

The case of Goddard v. Cox, cited for the plaintiffs, is a mere *nisi prius* case before Chief Justice Lee, in Middlesex; and it only decides the principle, that where a defendant is indebted to the plaintiff on two simple contracts of equal dignity and of the same nature, and for neither of which is any other person bound, and the payment is made generally on account, without any application having been made by the defendant, the right to make the application devolves on the plaintiff. It does not decide the question now before the court, which is, whether the plaintiff is not bound to make a recent application in cases where the interests of sureties are concerned.

All the cases in which the plaintiff has been permitted at law to make his election, are cases where the debts were of equal dignity and of similar nature, and where it did not appear to be important to the debtor, or any other person, to which debt the payment should be applied. Esp. N. P. 229.

There is, in truth, no difference in principle between the rule in equity and the rule at law, as to the application of payments.

March 7.

MARSHALL, Ch. J., after stating the case, delivered the opinion of the court, as follows:

It is a clear principle of law, that a person owing money on two several accounts, as upon bond and simple contract, may elect to apply his payments to which account he pleases; but if he fails to make the application, the election passes from him to the creditor. No principle is recollected which obliges the creditor to make this election immediately. After having made it he is bound by it; but until he makes it he is free to credit either the bond or simple contract.

Unquestionably, circumstances may occur, and perhaps did occur in this case, which would be equivalent to the declaration of this election on the part of the debtor, and, therefore, the court was correct in instructing the jury, that if they should be satisfied that the payments were understood to be made on account of the goods sold at vendue, they ought to apply them to the discharge of that account; but in declaring that the election, which they supposed to devolve on the plaintiff if the application of the money was not understood at the time by the parties, was lost if not immediately exercised, that court erred.

Their judgment, therefore, must be reversed, and the cause remanded for a new trial.

FIELD & OTHERS *v.* HOLLAND & OTHERS.

In the Supreme Court of the United States.

FEBRUARY TERM, 1810.

[REPORTED, 6 CRANCH, 8–29.]

ERROR to the circuit court for the district of Georgia, in a chancery suit, in which Field, Hunt, Taylor and Robeson, were complainants, and Holland, Melton, Tigner, Smith, Cox and Dougherty, were defendants.

The decree of the court below dismissed the bill as to all the defendants.

The bill stated that, on the 21st of July, 1787, Micajah Williamson obtained from the state of Georgia a grant of 12,500 acres in Franklin county, in that state. On the 9th of July, 1788, Williamson conveyed to Sweepson, who, on the 23d of July, 1792, conveyed to Cox, who, on the 3d of September, 1794, conveyed to Naylor, who, on the 18th of December, 1794, conveyed to the complainant Field, and one Harland, as tenants in common, and that Harland afterwards conveyed his undivided interest to the other complainants.

That the defendants Melton, Tigner, and Smith, claim title to the land in virtue of a sale made by the sheriff to the defendant Melton, upon two writs of fieri facias, founded upon judgments obtained by the defendant Holland against the defendant Cox; one in the year 1793, for 1556*l.*, the other in 1794, for 3000*l.*, which executions were levied, and sales made thereon in 1799. That the complainants were ignorant of those judgments at the time of their purchase. That the judgments, or the greater part thereof, were paid and discharged by Cox before the executions issued thereon; but the sheriff, well knowing the same, proceeded to levy and sell, &c.

That John Gibbons, the complainants' agent, exhibited to the sheriff an affidavit stating that the executions had issued illegally, on which it became the duty of the sheriff to return the same into court, and discontinue ministerial proceedings thereon until the judgment of the court whence the executions issued was first had and obtained in the premises, according to the provisions of the act in such case made and provided. The affidavit of Gibbons stated, that the executions were illegal, because they had not been credited with a partial payment made by Cox.

The bill states that the sheriff's sale was fraudulently made with a view to get the land at a very low price; the sale being for 300 dollars; and the land worth 25,000. That the purchaser Melton, at the time of his purchase, knew of the complainants' title, and indemnified the sheriff for proceeding in the sale, and agreed that he should participate in its benefits.

Melton's answer states, that in the year 1787, having land warrants, he surveyed three tracts of 920 acres each, on what he then supposed was vacant land, but which appears now to be within Williamson's elder grant, of which he had no intimation till the year 1797, when he had sold parts of his surveys. Finding that Naylor had Williamson's title, and being desirous of protecting the titles of so much of the land as he had sold, he purchased of Naylor 4505 acres. That with the same view, he afterwards purchased a judgment against Naylor, which he discovered was prior to Naylor's deed to him; upon this judgment, he caused an execution to be issued, and levied upon the land, which he bought in at a fair sale, under the execution, for 300 dollars. That afterwards, finding that the land had been sold for taxes, and purchased by George Taylor, he purchased Taylor's claim, and paid him 300 dollars for it. That in June, 1799, he first heard of the claim of the complainants, and made a verbal agreement with Gibbons, their agent, for the purchase thereof, at a dollar an acre; but finding Holland had a prior judgment against Cox which bound the land, and which he was about to enforce by an execution and sale of the land, and Gibbons having failed to compromise with Holland, or otherwise to stop the sale, he (Melton) agreed

with Holland that he (Melton) should become the purchaser at the sale, and would pay Holland 1500 dollars for the land without regard to the sum at which it might be struck off to him, which sum he has paid. That this was done without any fraudulent intention, and to secure his title; being fully satisfied that the lands were liable to the judgments.

The answer of Dougherty, the sheriff, denies all fraud, combination, and interest in the transaction, and avers, that he acted merely in the discharge of his official duty; and that the sale was fair and bona fide.

Smith's answer is immaterial, as it relates only to 75 acres of the land which he claimed under a title prior to the complainant's.

Tigner answers merely as to 357 acres which he purchased of the defendant Melton, in the year 1797.

Holland's answer states, that subsequent to the two judgments, he made large advances to Cox in goods, and took his obligations.

It states sundry payments and negotiations made by Cox, particularly three drafts, or inland bills of exchange, given by Cox to Holland in February, 1795, and payable in May, June, and July following, for which Holland gave the following receipt: "Washington, 21st February, 1795. Received from Zachariah Cox, Esq., three sets of bills of exchange, dated the 5th and 15th instant, for twenty thousand dollars, payable in Philadelphia, which when paid will be *on account of my demand against said Cox.*"

That in September, 1796, a settlement took place between Cox and Holland, of all their transactions *distinct from, and independent of the two judgments*, and Holland took Cox's note for 18,000 dollars, for the balance, and gave a receipt, *with a stay of execution upon the two judgments* for three years.

That the judgments "*never were dormant, but have been regularly kept alive and remain unsatisfied.*"

That it was an established rule between Cox and Holland, that all payments made were to go to the discharge of running and liquidated accounts, independent of the judgments, and that mode of settlement was adopted on their last settlement in 1796.

The answer of Cox states, positively, that the *judgments were paid and satisfied*, as early as the 14th of September, 1796, by settlement of that date, when the parties passed receipts in full of all past transactions.

That the three bills of exchange, amounting to 20,000 dollars, were by him delivered to Holland *on account of the two judgments*, and that the bills have been *duly* paid and discharged.

That the settlement of the 14th of September, 1796, was a final settlement of all accounts prior to that day, including judgments, bonds,

notes, and all demands whatever up to that time, and *particularly*, the judgments in question. That they exchanged receipts in full, ("which receipt the defendant has lost or mislaid.") That, upon the settlement being made, Holland promised and verbally engaged to enter up satisfaction upon the said judgments.

The evidence on the subject of the payment of the judgments consisted principally of Mr. Vaughan's deposition, and the letters and receipt of Holland for the bills for 20,000 dollars.

Mr. Vaughan stated, that although he had no particular knowledge how Holland and Cox settled, yet when a new advance was made by Holland to Cox, after the 14th of September, 1796, he understood the *old concern* was settled. In a letter from Holland to Vaughan, of the 18th of April, 1795, enclosing the bills for 20,000 dollars, he says, "you will oblige me much by procuring the payment of these bills. I have delayed the execution and sale of Mr. Cox's property to the great injury of my own affairs, and I request you may assure him that should the bills not be paid immediately, the consequence must be an assignment of the judgment against him, the result of which will be an immediate sale of his property, which I will not be able to prevent, unless his punctuality in this instance steps forward." "The late stoppage of Mr. Morris and Nicholson, I am fearful may affect them, but as they, together with Mr. Greenleaf, are concerned with Mr. Cox, in the valuable property which my execution is upon, I expect, they will *for their own sakes* see me satisfied, and *these drafts paid, to prevent worse consequences.*" He afterwards says, "I have not security by judgment to the *extent* of my debt against him." He also urges Mr. Vaughan to obtain security from Cox in case the bills should not be paid. In a letter of May 29, 1795, Holland again says, "I hope you will be able to make some arrangement for the payment of the 18,000 dollars, *as I feel reluctance in pushing the execution* I have against the property of Mr. Cox, although by doing so I would make *some thousands.*"

It appeared from Mr. Vaughan's account with Cox, as stated in his deposition, that the bills for 20,000 dollars, and also a draft on I. Nicholson for 2,570 dollars, and 10 per cent. damages on the 20,000 dollars, excepting a balance of about 1,500 dollars, had been paid before the 6th of February, 1796; and Mr. Vaughan had given up to Cox his drafts of 18,000 dollars, and 1,000 and 3,000 dollars, all of which had been given to Holland on account of prior claims. On the 23d of December, 1803, it was agreed by the parties to this suit, that W. W., I. W., and J. C., or any two of them be appointed auditors, with power to *examine* all papers and documents relative to payments made by

Zachariah Cox, in satisfaction of judgments obtained by Holland against him, and charged in the bill to be satisfied.

On the 21st of April, 1804, the auditors reported that they were of opinion, from the papers laid before them by both parties, that the judgments had been satisfied by payments made prior to February, 1796.

Upon exceptions being taken to this report, it was set aside on the 14th of May, 1804, and G. A., I. P. W., and E. S., were appointed auditors by the court, to report whether the judgments were really satisfied; and that they report a statement of the payments made on the judgments.

On the 7th of December, 1804, those auditors reported that they were of opinion that *no payments* appear to have been made on the judgments, no vouchers having been produced to that effect.

To this report exceptions were filed on the 14th of December, 1804. It does not appear upon the record that any order was taken either respecting the report or the exceptions to it.

On the 17th of May, 1805, the court decreed, that the bill should be dismissed with costs as to Melton, Dougherty, Smith and Tigner; and that Holland should bring an action of debt upon the judgments against Cox, who was to appear by attorney and plead payment, upon the trial of which issue, the bill, answers, exhibits, and testimony in this cause, was to be considered as evidence.

No other notice is taken of the order for an issue at law, and on the 15th of May, 1807, the court passed the following decree.

"This cause is involved in much obscurity, but, upon mature deliberation, we are of opinion that there is sufficient ground for us to decree upon. The defendant Holland is in possession of a judgment against Cox, which the latter contends is satisfied, and one of the objects of this bill is to have satisfaction entered of record upon the said judgment. The only difficulty arises upon the application of sundry payments which the complainants contend extinguished the judgment, but which the defendant Holland replies were applicable to other demands. The principle on which the court has determined to decree is this; that all payments shall be applied to debts existing when they were made, and as it appears that there were sundry demands of Holland's on Cox which were not secured by judgment, that those sums shall be first extinguished, and the balance only applied to the judgments.

"This application of those payments is supported by general principles, as well as the particular circumstances of the case.

"1. The payer had a right at the time of payment to have applied it to which debt he pleased where a number existed, but if he neglects

to do so generally, it rests in the option of the receiver to make the application. In this case Cox takes his receipts *generally*. Even when the large payment of 20,000 dollars was made, he takes a receipt on account.

"2. It appears that the application of those payments has actually been made in the manner we adjudge; for from a letter of Mr. Vaughan, through whom most of the payments were made, he intimates that he had given up the evidences of several debts to Cox, because they had been satisfied. Such an act could only have been sanctioned by a knowledge on his part that the money paid through him was in part applicable to those debts.

"The sums which we adjudge to have been due to Holland are the following, viz.:

	l.	*s.*	*d.*
Amount of first judgment,	1,556	0	0
Interest from 1st of May, 1793,			
Amount of second judgment,	3,000	0	0
Interest from 21st of June, 1793,			
Amount of acknowledged account,	332	10	7
Interest from 11th of February, 1794,			
Note of March 1, 1794, int. Feb. 1, 1794,	2,278	0	0
Note due 1st May, 1794,	1,500	0	0
Interest from 1st May, 1794,			

"The payments made by Cox are the following:

	l.	*s.*	*d.*
1794, May 25th, amount paid,	11	13	4
June 25th, amount paid,	1,563	17	10
1795, Feb. 21, amount of bills $20,000,	4,666	13	4
26, amount paid,	28	0	0
Bills on Greenleaf,	700	0	0
Bills on Cox himself,	11	13	4

"Upon the foregoing data, the register will state the account between the parties, calculating interest upon the whole amount bearing interest to the time of payment, and applying the payments according to their dates."

The register having, upon these principles, stated an account, by which a balance of 11,086 dollars remained still due on the judgments,

the court, by a final decree, dismissed the bill; and the complainants sued out their writ of error.

Jones and *Harper*, for the plaintiffs in error, contended,

1. That the court below erred in setting aside the report of the auditors who had been appointed by consent. The report was like an *award*, which cannot be set aside but for fraud, or partiality, or gross mistake.

2. In not having decided upon the exceptions taken to the second report of the auditors.

3. In not enforcing or setting aside the order to try an issue.

4. In dismissing the bill as to the purchasers, and retaining it as to Holland. The purchasers had notice of the payment of the judgments. The plaintiffs, at the time of the sale, could not be presumed to have known the full extent of the payments made. It was sufficient that the purchasers had notice of the complainant's claim, and that the validity of the sale would be disputed.

The 20,000 dollars, in bills, ought to be applied to the judgments, because that is most beneficial to the payer, as no other debt was then bearing interest. The receipt is upon account of Holland's *demand;* evidently alluding to the single demand on the judgments. If it had been intended as a general payment, it would have been on account of his *demands*, in the plural.

The object of the bill is to set aside the sheriff's sale to Melton. He is the only real defendant. Holland is only incidentally interested. It would have been no cause of demurrer if he had not been made a party. Nor is Cox a necessary party.

It is true that the answer of one defendant cannot be taken as evidence against another. If one defendant wishes to avail himself of the testimony of another, he must take out a commission and examine him as a witness. Holland's answer is no more evidence in favour of Melton, than Cox's answer is evidence against him. Holland's answer is only evidence for *himself*, and no decree is sought against *him*. If, then, the answers of Cox and Holland are both excluded, the only evidence is Vaughan's deposition, and Melton's answer. If Holland's and Cox's answer be both admitted, the result will be the same, for one destroys the other. Cox is not discredited by Vaughan's deposition. The only facts proved are the two judgments and the payment of 20,000 dollars.

If money be paid *on account*, it is to be applied, in equity, most beneficially for the debtor. It is not now in the power of the creditor to apply it to which demand he pleases. If neither party, at the time of payment, made the application, it is the province of the court of equity

to make it now. The court is to judge, from all the circumstances of the case, what was the intention of the parties, and what application of the money would be most beneficial to the debtor.

Vaughan considered it as a settlement of all accounts.

Notice that the judgment was satisfied was not necessary; the purchaser was bound to take notice—*caveat emptor*. But if notice was necessary, enough was given to put the purchaser upon inquiry.

MARSHALL, Ch. J. Can the sheriff, in Georgia, sell the whole of a large tract for a small debt? or must he confine himself to the sale of enough to pay the debt?

JOHNSON, J. The sheriff cannot divide a tract of land. If there are several tracts of land, he may sell that which comes nearest to the sum.

Harper. An objection has been made to the copy of the deed from Williamson to Sweepson, that it does not appear that the original deed was recorded in due time.

But this objection comes too late in the appellate court. Not having been made in the court below, it must be considered as having been waived.

The first report of the auditors was pursuant to their authority, and can only be impeached for corruption, or gross impropriety of conduct, or mistake appearing upon the record.

F. S. Key and *C. Lee*, contra.

The report made by auditors, under an order made by consent, may be set aside as well as a report made by auditors under a reference made by the simple order of the court.

The report was excepted to because the auditors report only their *opinion* generally, that the judgments were satisfied, and do not report the payments in particular which had been made upon them.

LIVINGSTON, J. It does not appear what was done with those exceptions.

Key. It is to be presumed that they were properly disposed of. The cause was afterwards fully heard.

The second report states, that no payments appear to have been made upon the judgments. The exceptions to this report were abandoned.

As to the issue ordered to be tried, it was a mere interlocutory order, which the court was not bound to pursue; but might, if they thought

proper, proceed to a final hearing without trying the issue, or setting it aside formally.

No notice that the judgments were satisfied, is averred or proved. The payments were not made upon the judgments, and have been properly applied to other accounts.

If Cox did not at the time direct to which account the payments should be applied, Holland might apply them to which account he pleased. If neither party has applied them, the court will apply them to claims not secured by judgments.

Every debt due to Holland from Cox made but one demand. The notes due to Holland were payable in May; the bills for 20,000 dollars did not become due till after May, although drawn in February. If the bills were given on account of the judgments, there would have been a stay of execution until the bills became payable. When arrested in Philadelphia, Cox did not allege that the judgments had been satisfied; nor is it averred in his answer.

No good title is shown from Williamson. The original deed is not produced, and it does not appear from the copy whether the original was recorded in due time.

The first auditors exceeded their authority; they were only authorized to do a ministerial act, but they assumed to act *judicially*.

The report of the second auditors was correct; they were competent to say that no payments had been made upon the judgments. Cox's answer is no evidence against Holland. If the complainants wished to avail themselves of Cox's testimony, they ought to have taken out a commission and examined him.

But Holland's answer is evidence for him and those claiming under him, and is conclusive unless contradicted by two witnesses.

Cox's answer is discredited in a material point, viz. the payment of the judgments.

This court decided in the case of the Mayor and Commonalty of Alexandria v. Patten and others (ante, v. 4, p. 317), that if the debtor do not, at the time of payment direct to which account it shall be applied, the creditor may *at any time* afterwards apply it to which account he pleases. In equity, all debts bear interest.

February 12.

MARSHALL, Ch. J., delivered the opinion of the court as follows:

In this case some objections have been made to the regularity of the proceedings in the circuit court, which will be considered before the merits of the controversy are discussed.

In May term, 1803, the following order was made.

"By consent of parties, it is agreed, that William Wallace, James Wallace, and John Cumming, or any two of them, be appointed auditors, who shall have power to examine all papers and documents relative to payments made by Zachariah Cox, in satisfaction of judgments obtained by said Holland against said Zachariah, and charged in said bill to be satisfied, and that the testimony of John Vaughan, taken by complainants before Judge Peters, and now in the clerk's office, may be produced by them to said auditors. And it is further agreed, that said auditors may meet at any time after the first day of April next, and not before, on ten days' notice given to the adverse party."

The auditors returned the following report.

"We are of opinion, from the papers laid before us, by both parties, that the judgments in the above case have been satisfied by payments made prior to February, 1796."

On exceptions this report was set aside.

By the plaintiffs in error it is contended, that the order under which the auditors proceeded was equivalent to a reference of the cause by consent, and that their report is to be considered as an award obligatory on all the parties, unless set aside for some of those causes which are admitted to vitiate an award. But this court is unanimously of opinion, that the view taken of this point by the plaintiffs is incorrect. The order in question bears no resemblance to a rule of court referring a cause to arbiters. It is a reference to "auditors," a term which designates agents or officers of the court, who examine and digest accounts for the decision of the court. They do not decree, but prepare materials on which a decree may be made. The order in this case, so far from implying that the decision of the auditors shall be made the decree of the court, does not even require, in terms, that the auditors shall form any opinion whatever. They are merely directed to examine all papers and documents relative to payments made in satisfaction of the judgments.

From the nature of their duty they were bound to report to the court, and to state the result of their examination, but this report was open to exception, and liable to be set aside. In the actual case the report was a very unsatisfactory one, and was, on that account, as well as on account of the objections to its accuracy, very properly set aside.

The cause was again referred to auditors, who reported that no evidence had been offered to them of payments to be credited on the judgments alleged by the plaintiffs to have been discharged.

The defendants insist that this report ought to have terminated the cause. But the court can perceive no reason for this opinion. If there were exhibits in the cause which proved that payments had been made, the plaintiffs ought not to be deprived of the benefit of those payments,

because the auditors had not noticed the vouchers which established the fact.

The court, without making any order relative to this report, directed an issue for the purpose of ascertaining, by the verdict of a jury, the credits to which the plaintiffs were entitled.

It was completely in the discretion of the court to ascertain this fact themselves, if the testimony enabled them to ascertain it; or, if it did not, to refer the question either to a jury, or to auditors. There was, consequently, no error, either in directing this issue, or in discharging it.

But, without trying the issue, or setting aside the order, the court has made an interlocutory decree, deciding the merits of the case by specifying both the debits and credits which might be introduced into the account, and directing their clerk to state an account in conformity with that specification.

This interlocutory decree is undoubtedly an implied discharge of the order directing an issue, and is substantially equivalent to such discharge. Had the issue been set aside, in terms, in the body of the decree, or by a previous order, it would have been more formal, but the situation of the case and of the parties would have been essentially the same. The only real objection to the proceeding is, that the parties might not have been prepared to try the cause in court, in consequence of their expectation that it would be carried before a jury. There is, however, no reason to believe that this could have been the fact. Had there been any objection to a hearing on this ground, it would certainly have been attended to, and, if overruled, would have been respected by this court. But no objection appears to have been made, and the inference is, that the cause was believed to be ready for a trial.

These preliminary questions being disposed of, the court is brought to the merits of the case.

The plaintiffs claim title to a tract of land in the state of Georgia, under several mesne conveyances from Micajah Williamson, the original patentee. In the year 1793, while these lands were the property of Zachariah Cox, one of the defendants, two judgments were rendered against him in favour of John Holland, also a defendant, for the sum of 4,556*l.* sterling. These judgments remained in force until the year 1799, when executions were issued on them, which were levied on the lands of the plaintiffs held under conveyances from Cox, made subsequent to the rendition of the judgments. John Gibbons, the agent of the plaintiffs, objected to the sale, because the judgments were satisfied either in whole or in part, but as he failed to take the steps prescribed in such case by the laws of Georgia, the sheriff proceeded, and the lands were sold to Melton and others, who are also defendants in the cause.

This bill is brought to set aside the sale and conveyance made by the sheriff; and it also contains a prayer for general relief.

As the judgments constituted a legal lien on the lands in question, and the title at law passed to the purchasers by the sale and conveyance of the public officer, the plaintiffs must show an equity superior to that of the persons who hold the legal estate. That equity is, that the legal estate was acquired under judgments which were satisfied, and that sufficient notice was given to the purchasers to put them on their guard.

If the facts of the cause support this allegation, the equity of the plaintiffs must be acknowledged; but it is incumbent on them to make out their case.

In the threshold of this inquiry, it becomes necessary to meet an objection suggested by the plaintiffs relative to the testimony of the cause. It is alleged that neither Holland nor Cox are necessary or proper parties, and that their answers are both to be excluded from consideration.

The correctness of this position cannot be admitted. The whole equity of the plaintiffs depends on the state of accounts between Holland and Cox. They undertake to prove that the judgments obtained by Holland against Cox are satisfied. Surely to a suit instituted for this purpose, Holland and Cox are not only proper but necessary parties. Had they been omitted, it would be incumbent on the plaintiffs to account for the omission, by showing that it was not in their power to make them parties. Not only are they essential to a settlement of accounts between themselves, but in a possible state of things, a decree might have been rendered against one or both of them.

Neither is it to be admitted that the answer of Holland is not testimony against the plaintiffs. He is the party against whom the fact, that the judgments were discharged, is to be established, and against whom it is to operate. This fact, when established, it is true, affects the purchasers also, but it affects them consequentially, and through him. It affects them as representing him. Consequently, when the fact is established against or for him, it binds them.

The plaintiffs themselves call upon Holland for a discovery. They aver that the judgments were discharged, and expressly require him to answer this allegation. They cannot now be allowed to say that this answer is no testimony.

The situation of Cox is different. Though nominally a defendant, he is substantially a plaintiff. Their interest is his interest: their object is his object. He, as well as the plaintiffs, endeavours to show that the judgments were satisfied. He is not to be considered as really a defendant, nor does the bill charge him with colluding to

defraud the plaintiffs, or require him to answer the charge of contributing to the imposition alleged to have been practised on them. It is not in the power of the plaintiffs, in such a case, to avail themselves of the answer of a party, who is, in reality, though not in form, a plaintiff.

The answer of the defendant Holland, then, where it is responsive to the bill, is evidence against the plaintiffs, although the answer of Cox is not testimony against Holland.

The evidence in the cause, then, is the answer of Holland, the deposition of Vaughan, and the various exhibits and documents of debt which are found in the record. Does this testimony support the interlocutory decree which was rendered in May term, 1805?

That decree specifies the debits and credits which are to be allowed, and directs a statement to be made showing how the account will stand, allowing the specified items.

To this order two objections may be made.

1. That it ought to have been more general. If this be overruled,
2. That its principles are incorrect.

Upon the first objection it is to be observed, that a court of chancery may, with perfect propriety, refer an account generally, and, on the return of the report, determine such questions as may be contested by the parties; or it may, in the first instance, decide any principle which the evidence in the cause may suggest, or all the principles on which the account is to be taken. The propriety of the one course or of the other depends on the nature of the case. Where items are numerous, the testimony questionable, the accounts complicated, the superior advantage of a general reference, with a direction to state specially such matters as either party may require, or the auditors may deem necessary, will readily be perceived.

Where the account depends on particular principles which are developed in the cause, the convenience of establishing those principles before the report is taken will also be acknowledged.

The discretion of the judge will be guided by the circumstances of the case, and his decree ought not to be reversed, because he has pursued the one course or the other, unless it shall appear either that injustice has been actually done, or that there is reason to apprehend it has been done.

In this case it might, perhaps, have been more satisfactory had the parties been permitted to lay all their claims and all their objections before auditors, so that the precise points of difference between them, and the testimony upon those points, might be brought in a single view before the court.

But it is to be observed that two orders of reference had before been

made, on neither of which was a satisfactory report obtained. That an issue had been directed, which had, for several terms, remained untried. The probability is, that the controversy depended less on items than on principles, and that all parties were desirous of obtaining from the court a decision of those principles. That no debits nor credits were claimed but those which were stated in the papers, and that all parties wished the opinion of the court on the effect and application of those items. Under such circumstances, a judge would feel much difficulty in withholding his opinion.

In such a case the justice of the cause could be defeated only by the exclusion of some item which ought to be admitted, or by an erroneous direction with respect to those items which were introduced.

This court perceives in the record no evidence of any credit to which the defendant Cox might be entitled, which is not comprehended in the recapitulation of credits allowed him in the circuit court, and they are the more inclined to believe that no such omission was made, as the fact would certainly have been suggested by the counsel for the plaintiffs, and the circumstances under which they claimed the item disallowed by the court would have been spread upon the record. It is true, an additional credit is claimed in the assignment of errors; but the testimony in the record does not support this claim.

The majority of the court, therefore, is of opinion, that there is no error in the interlocutory decree, unless it shall appear that the principles it establishes are incorrect.

The items claimed by Holland, and allowed by the court, are supported by documents, the obligation of which has not been disproved.

There is, then, no question on the merits but this. Were the payments properly applied by the court, or were they applicable, to the judgments?

The principle, that a debtor may control, at will, the application of his payments is not controverted. Neither is it denied that, on his omitting to make the application, the power devolves on the creditor. If this power be exercised by neither, it becomes the duty of the court; and, in its performance, a sound discretion is to be exercised.

It is contended by the plaintiffs that if the payments have been applied by neither the creditor nor the debtor, they ought to be applied in the manner most advantageous to the debtor, because it must be presumed that such was his intention.

The correctness of this conclusion cannot be conceded. When a debtor fails to avail himself of the power which he possesses, in consequence of which that power devolves on the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his

power, in consequence of which it devolves on the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious. That course has been pursued in the present case.

But it is contended, that bills for 20,000 dollars were received, and have been applied in discharge of debts which became due two months afterwards.

If the receipt given for these bills purported to receive them in payment, this objection would be conclusive. If an immediate credit was to be given for them, that credit must be given on a debt existing at the time, unless this legal operation of the credit should be changed by express agreement. But the receipt for these bills does not import that immediate credit was to be given for them. They are to be credited when paid. The time of receiving payment on them is the time when the credit was to be given; and consequently, the power of application, which the creditor possessed, if no agreement to the contrary existed, was then to be exercised. It cannot be doubted that he might have credited the sums so received to any debt actually demandable at the time of receiving such sum, unless this power was previously abridged by the debtor.

It is contended that it was abridged; and that this is proved by the form of the receipt. The receipt states, that the bills, when paid, are to be credited on account of the demand of Holland against Cox, and the plaintiffs insist that the words import a single demand, and one existing at the time the receipt was given.

This court is not of that opinion. The whole debt due from one man to the other, may well constitute an aggregate sum not improperly designated by the term demand, and the receipt may very fairly be understood to speak of the demand existing when the credit should be given.

If the principles previously stated be correct, there is no evidence in the cause which enables this court to say that there was not due, on the judgment obtained by Holland against Cox, a sum more than equal to the value of the lands sold under execution. If so, the plaintiffs have no equity against the purchaser of those lands, whose conduct appears to have been perfectly unexceptionable; and the bill, both as to him and Holland, was properly dismissed.

It is the opinion of the majority of the court, that there is no error in the proceedings of the circuit court, and that the decree be affirmed.

Where a partial payment is made by a person indebted on more than one account, the general rule, acknowledged in all the cases, is (1) that the person paying may, at or before the time of payment, prescribe the application of the payment; (2) if he omit to do so, the creditor may apply it as he pleases; (3) if neither apply the payment, the application devolves on the court, who will make such appropriation as is reasonable and equitable.

(1.) As the payment is voluntary on the part of the debtor, he may fix the terms upon which he pays; and if the creditor accept the payment, he is, by such acceptance, bound to the conditions which the debtor has appointed, even though at the time he expressly refused to admit them: if, therefore, the debtor pay with one intent, and the creditor receive with another, the intent of the payer shall prevail. See *Pinnel's case*, 5 Coke, 117, *b*; *Bois* v. *Cranfield*, Style, 239; *Anonymous*, Cro. El. 68; *Colt* v. *Nettervill*, 2 P. Wms. 304, 308; *Bosley* v. *Porter, &c.*, 4 J. J. Marshall, 621; *Hall & Montross* v. *Constant*, 2 Hall, 185, 189; *M'Donald* v. *Pickett*, 2 Bailey, 617, 618; *Black* v. *Shooler*, 2 M'Cord, 293, 295; *Bonaffé* v. *Woodberry*, 12 Pickering, 456, 463; *Hussey* v. *Manuf. and Mech. Bank*, 10 Id. 415, 422; *Martin* v. *Draher*, 5 Watts, 544; *Moorehead* v. *West Branch Bank*, 3 Watts & Sergeant, 550; *Boutwell* v. *Mason & Scott*, 12 Vermont, 608; *Caldwell* v. *Wentworth*, 14 New Hampshire, 431, 437; *Randall* v. *Parramore & Smith*, 1 Florida, 410, 428; *Bayley* v. *Wynkoop*, 5 Gilman, 449, 452. Thus, where money was sent to the creditor, with notice of the account on which it was paid, and the creditor refused to accept it on those terms, and continued to refuse admitting the payment as on that account, yet did receive and retain the money, it was decided that by so doing he was concluded to the appropriation which he had been directed to make; *Reed* v. *Boardman*, 20 Pickering, 441, 446. So absolute is the debtor's right of appropriation, that, though it is a general rule, that a payment on account of a debt bearing interest, is to be applied first in discharge of the interest, yet the debtor may direct the application to so much of the principal, in exclusion of the interest, and the creditor, if he receives the money, is bound to apply it accordingly; *Pindall's Ex'x, &c.* v. *Bank of Marietta*, 10 Leigh, 481, 484; *Miller* v. *Trevilian, &c.*, 2 Robinson's Virginia, 2, 27.

This power of the debtor may be completely exercised without any *express* direction given at the time. A direction may be evidenced by circumstances, which may demonstrate the application of a payment as completely as words could demonstrate it: thus, a positive denial of one debt, and acknowledgment of another, with a delivery of the sum due upon it, would be conclusive; the fact that the money paid agreed in amount with one of the debts, or, that at the time of payment, the evidence of one of the debts was given up, would be a strong circumstance: in cases of this kind, upon proper evidence, the intention of the debtor, or of both parties, is a question of fact for the jury; *Tayloe* v. *Sandiford*, 7 Wheaton, 14, 20; *Mitchell* v. *Dall*, 2 Harris & Gill, 160, 173; S. C. 4 Gill & Johnson, 361, 372; *Fowke* v. *Bowie*, 4 Harris & Johnson, 566; *Robert and others* v. *Garnie*, 3 Caines, 14; *West Branch Bank* v. *Moorehead*, 5 Watts & Sergeant, 542; *Dickinson College* v. *Church*, 1 Id. 462, explained in 6 Id. 15; *Schnell* v. *Schroder*, Bailey's Equity, 335, 342; *Scott* v. *Fisher, &c.*, 4 Monroe, 387; *Stone* v. *Seymour*, 15 Wendell, 19, 24, 25; S. C. 8 Id. 404, 417; *Newmarch* v. *Clay and others*, 14 East, 239; *Shaw* v. *Picton*, 4 Barnewall & Cresswell, 715; *Marryatts* v. *White*, 2 Starkie, 91. See *Lysaght* v. *Walker*, 5 Bligh N. S. 2, 29; *The U. S.* v. *Bradbury et al.*, Davies, 146, 150; *Caldwell* v. *Wentworth*, 14 New Hampshire, 431, 440; *Dulles* v. *De Forest*,

19 Connecticut, 191, 204; *Oliver* v. *Phelps*, Spencer, 180, 198.

There are some particulars, also, in which the indication of the debtor's intention, afforded by the nature of the case, assumes the character of an absolute, legal presumption, not to be counteracted except by an express agreement of the parties. Thus a general payment is always to be referred to a debt that is due, in preference to one that is not due, because it is not to be supposed that a debtor intends to make a deposit and not a payment; *Hammersley et al.* v. *Knowlys*, 2 Espinasse, 666; *McDowell* v. *Blackstone Canal Company*, 5 Mason, 11; *Baker* v. *Stackpoole*, 9 Cowen, 420, 436; *Bacon* v. *Brown*, 1 Bibb, 334, 336; *Stone* v. *Seymour*, 15 Wendell, 19, 24; *Upham & others* v. *Lefavour*, 11 Metcalf, 174, 185; *Law's ex'ors* v. *Sutherland et als.*, 5 Grattan, 357, 362; *Caldwell* v. *Wentworth*, 14 New Hampshire, 431, 440; and *acc.* Civil Code of Louisiana, 2162; *Lebleu* v. *Rutherford and others*, 9 Robinson, 95; *Follain and another* v. *Orillion*, Id. 506; and see *Lamprell* v. *Billericay Union*, 3 Exchequer, 284, 307; and to a debt due by the payor absolutely and as principal, rather than one due contingently and collaterally, or held as collateral security; *Merrimack Co. Bank* v. *Brown*, 12 New Hampshire, 321, 327; *Sawyer* v. *Tappan*, 14 Id. 352; *Portland Bank* v. *Brown*, 22 Maine, 295; *Niagara Bank* v. *Rosevelt*, 9 Cowen, 410, 412; *Newman* v. *Meek*, 1 Smedes & Marshall's Chancery, 331, 337: yet, by the express agreement of the parties, a payment may be appropriated to a debt not due; *Shaw* v. *Pratt*, 22 Pickering, 305, 308. It is to be observed, also, that where a note, bill, or other security for money to be received at a future time, or property to be converted into money, is given, the time when the application takes effect is the time when the article becomes a payment, which may be at once, if the property is expressly received as absolute payment; but if the property is assigned as collateral security for several debts, the creditor may apply the money realized to any of the notes that are due at the time the money is received; *Field* v. *Holland; Allen* v. *Kimball*, 23 Pickering, 473, 475. If, however, there be only one debt incurred at the time when property is assigned out of which the creditor is to pay himself, and before the money is received, another debt is contracted, the application must of course be to the former, and the creditor could not apply to the latter without an express permission to do so; *Donally* v. *Wilson*, 5 Leigh, 329.

It is a settled rule, also, that the source or fund from which a payment is made, will direct the appropriation; that is, when money has come from a particular fund, it must be applied by the creditor in relief of the source from which the fund arises. Thus, where one who was a creditor on mortgage and by simple contract, received a sum of money from an assignee of the mortgagor of part of the mortgaged premises, in consideration of the release of such part from the mortgage, he was held bound to apply the money to the mortgage debt; *Hicks* v. *Bingham*, 11 Massachusetts, 300; *Brett* v. *Marsh*, 1 Vernon, 468; see *dictum* in *Gwinn* v. *Whitaker*, 1 Harris & Johnson, 754, 755: and see *Waller* v. *Lacy*, 1 Manning & Granger, 54.

(2.) If there have been no actual appropriation by the debtor, at or before the payment, either expressly declared, or to be inferred from circumstances, his right to control the application is gone; the right, after that, belongs to the creditor, who may make any application that he pleases; *Goddard* v. *Cox*, 2 Strange, 1194; *Bowes* v. *Lucas*, Andrews, 55; *Mann* v. *Marsh*, 2 Caines, 99; *Reynolds & M'Farlane* v. *M'Farlane*, Overton, 488; *Arnold* v. *Johnson*, 1 Scammon, 196, 197; *McFarland et al.* v. *Lewis et al.*, 2 Id. 345, 347; *Hillyer* v. *Vaughan*, 1 J. J. Marshall, 583; *Briggs* v. *Williams et als.*, 2 Vermont, 283, 286; *Rosseau et*

al. v. *Cull et al.*, 14 Id. 83, 86; *Selleck* v. *The Sugar Hollow Turnpike Company*, 13 Connecticut, 453, 460; *Caldwell* v. *Wentworth*, 14 New Hampshire, 431, 437; *Rackley* v. *Pearce*, 1 Kelly, 241, 242. The appropriation on the creditor's part, may become fixed, either by verbal declaration, or by the terms of the receipt given, or by rendering an account, or bringing a suit grounded on a specific appropriation, or by any other act manifesting an intent, or inducing a belief that a particular application is made: See *Starrett* v. *Barber*, 20 Maine, 457, 461; *Allen* v. *Kimball*, 23 Piekering, 473, 475; *Upham and others* v. *Lefavour*, 11 Metcalf, 174, 185; *Allen* v. *Culver*, 3 Denio, 285, 291; *Lindsey* v. *Stevens*, 5 Dana, 104, 107; *The U. S.* v. *Bradbury et al.*, Davies, 146, 151.

It has been stated above, that there are some considerations which of themselves and without express declaration by the debtor, appropriate a payment so as to control the creditor's discretion, either as affording legal presumptions of the debtor's intention, or as being paramount obligations of reason and justice. The ereditor, also, may, from the relation in whieh he stands to third persons, or from agreements with them, express or implied, be obliged to make a particular application. Thus, if one debt be due to him in his own right and the other to him as trustee or agent for another, neither being secured, and a general payment be made, the debts will be considered as satisfied in law and equity, rateably, because a trustee is bound to take the same care of his cestui que trust's interests, or of the trust property, that he does of his own; *Scott* v. *Ray & Trs.*, 18 Pickering, 361, 366; *Barrett* v. *Lewis*, 2 Id. 123; and see *Cole* v. *Trull*, 9 Id. 325, 327. To a principle of this kind, or rather to the principle of an agreement between both parties, to be presumed from obvious duty in both of them, is to be referred the case of *Harker and another* v. *Conrad and another*, 12 Sergeant & Rawle, 301, in which it was decided that where the creditors had suffered another lien to expire, a general payment must be so applied as not to enforce a lien against a purchaser without notice, who stood in superior equity to both, the debtor being bound to protect the title he had conveyed, and the creditors being bound by every consideration of equity to perpetuate their other lien, and thus, while they secured themselves, to cast the burden on those whose duty it was to bear it. It is difficult, however, to see how the third person in this case could be considered a purchaser without notice, the claim itself being legal notiee during the time allowed for filing it of record: and the case perhaps can be sustained only on the ground of an equity similar to that recognised in *Naylor* v. *Stanley*, and in *Cowden's Estate*, 1 Barr, 268. But under any view, the decision is not entirely satisfactory.

Subject, however, to the interference of such special eonsiderations of this nature, as every general rule must in its application be controlled by, the creditor, when the right devolves upon him, may make any application that suits his interest or convenienee. Thus, if one debt be the sole obligation of the debtor, and the other be with a surety, guarantor, or joint debtor, whether the sole debt be earlier or later in point of time, than the debt with a surety, and if earlier, whether the surety had at the time of incurring his engagement, notice of it or not, the creditor may apply a general payment, made by the debtor from his own funds, to the debt which is not protected, and continue to hold the surety bound; a guarantor or surety, merely as such, being considered as having no equity to control or change an application made by the creditor; *Mayor, &c., of Alexandria* v. *Patten and others; Sturges et al.* v. *Robbins*, 7 Massachusetts, 301, 305; *Brewer* v. *Knapp et al.*, 1 Pickering, 332, 337; *Logan* v. *Mason*, 6 Watts & Sergeant, 9, 15;

The Stamford Bank v. *Benedict*, 15 Connecticut, 438; *Mitchell* v. *Dall*, 4 Gill & Johnson, 361, 372; *Clark & Clark* v. *Burdett*, 2 Hall, 197, 200; *Van Rensselaer's Executors* v. *Roberts*, 5 Denio, 470, 475; *Kirby* v. *The Duke of Marlborough*, 2 Maule and Selwyn, 18; *Hutchinson* v. *Bell*, 1 Taunton, 558; and see *Campbell* v. *Hodgson*, Gow, 74: and if one debt be by bond, or covenant under seal, and the other by simple contract or open account, the creditor may apply to the latter; *Mayor, &c., of Alexandria* v. *Patten and others; Hamilton* v. *Banbury*, 2 Haywood, 385; *Mitchell* v. *Dall*, 4 Gill & Johnson, 361, 372; *Peters* v. *Anderson*, 5 Taunton, 596; or, if one be by judgment, and the other by simple contract, the creditor may apply to the latter; *Richardson* v. *Washington Bank*, 3 Metcalf, 536; *Chitty* v. *Naish*, 2 Dowling, 511; *Brazier* v. *Bryant*, Id. 477. In like manner, if there be several notes, or several bonds, due at successive times, the creditor need not apply so as to satisfy them in the order of time, but may, if he pleases, apply to all rateably; *Washington Bank* v. *Prescott*, 20 Pickering, 339, 343; *Brewer* v. *Knapp et al.*, 1 Id. 332; *Smith* v. *Screven*, 1 M'Cord, 368; but see to the contrary *Ayer* v. *Hawkins*, 19 Vermont, 26: or, if the debts are distinct, he may apply to the latest; *Hutchinson* v. *Bell; Peters* v. *Anderson*. In *Frazer* v. *Bunn*, 8 Carrington & Payne, 704, it was ruled, that a performer at a theatre, who was paid a certain sum on account of arrears of salary, might apply the payment to any part of the account that he chose. And even further, if some items would be barred by the statute of limitations, the creditor may apply a general payment to them, and sue upon those which are not barred; *Mills* v. *Fowkes*, 5 Bingham, N. C., 455; *Williams* v. *Griffith*, 5 Meeson & Welsby, 300; see, however, *Ayer* v. *Hawkins*, 19 Vermont, 26, 30; and if one debt be, from the relations of the parties, enforceable only in equity, the creditor may apply to it, and sue on the legal one; *Bosanquet* v. *Wray*, 6 Taunton, 597, 607 (but see *Birch and another* v. *Tebbutt*, 2 Starkie, 66); or if one be not enforceable in consequence of an informality in the ground or evidence of the claim, yet be justly due; *Arnold* v. *The Mayor of Poole*, 4 Manning & Granger, 860, 897; or if one be not recoverable at law in consequence of a provision by statute prohibiting a recovery for such debts, the creditor may make the application to such claim, and sue upon the valid or enforceable one; *Philpott* v. *Jones*, 2 Adolphus & Ellis, 41; *Cruickshanks* v. *Rose*, 1 Moody & Robinson, 100; and see *Hilton* v. *Burley*, 2 New Hampshire, 193, 196; and *Biggs* v. *Dwight*, 1 Manning & Ryland, 308. In *Wright* v. *Laing*, 3 Barnewall & Cresswell, 165, however, it was held, that if one contract be lawful, and the other forbidden by law, as by the statutes against usury, and no appropriation has been made by either the debtor or creditor, so that the matter devolves on the law, the law will appropriate the payment to the lawful debt.

The only point upon which there is any question, is as to the *time* when the application must be made by the creditor. The civil law requires it to be made immediately: it is admitted, on all hands, that greater indulgence is given by the common law, but as to the length of time allowed, there is some confusion. There are a few dicta requiring that the application be made within a *reasonable* time; *dicta* of Best, J., in *Simson* v. *Ingham*, 2 Barnewall & Cresswell, 65, 75; repeated in *Harker and another* v. *Conrad and another*, 12 Sergeant & Rawle, 301, 305; in *Briggs* v. *Williams et als.*, 2 Vermont, 283, 286; and in *Fairchild* v. *Holly*, 10 Connecticut, 176, 184. But the true principle appears to be that established in *Mayor, &c., of Alexandria* v. *Patten and others*, that if the creditor has once made the appropriation, whether by

verbal declaration, or rendering an account, or by conduct inducing a reliance on a particular appropriation, or bringing suit in a way which declares the application, he cannot afterwards change it; and this is the point in *Hill and another* v. *Southerland's Executors*, 1 Washington, 128, 133; in *White* v. *Trumbull*, 3 Green, 314, 318; and in *Hilton* v. *Burley*, 2 New Hampshire, 193, 196; see also *Hopkins* v. *Conrad and Lancaster*, 2 Rawle, 316, 325; *Martin* v. *Draher*, 5 Watts, 544, 545; *Bank of North America* v. *Meredith*, 2 Washington, C. C. 47; *Allen* v. *Culver*, 3 Denio, 285, 291: but subject to this, he may make the application *at any time*. There is a *dictum* of Story, J., in *U. States* v. *Kirkpatrick*, 9 Wheaton, 720, 737, repeated in *Robinson & Wiggin* v. *Doolittle et al.*, 12 Vermont, 246, 249, and in *Fairchild* v. *Holly*, 10 Connecticut, 176, 184, that the application cannot be made by the creditor after a controversy has arisen. If by this is meant that after the creditor has declared his application, and a controversy involving that point has arisen, he cannot change his ground, it is no doubt true, but its correctness in any other sense cannot be admitted. The later English cases show that where the creditor has not committed himself, by the mode of bringing suit, or otherwise, he may direct the appropriation, even at the trial: of course, the application and payment must be considered as having taken place in law, before suit brought, as the right of action must be complete and fixed before the commencement of the suit, but the creditor need not, in many cases, do any act to declare or manifest his election, till the trial. It is certain, however, that when it becomes proper for the creditor to declare his election, he cannot refuse to do so, and that he will not be allowed, to the inconvenience or injury of others, to hold the application in reserve, to await the result of future occurrences; as is held in *Pattison* v. *Hull*, 9 Cowen, 747, 764; and probably in this sense the *dictum*, that he must make the application in a reasonable time, is to be understood: he cannot unreasonably refuse or neglect to make or declare the appropriation, when a proper regard for the rights or convenience of others requires it.

That the *general* principle is, that the creditor's right of appropriation is indefinite, and may be exercised at any time, is established by a conclusive weight of authority in England and in this country. It is implied in *Goddard* v. *Cox*, 2 Strange, 1194. In *Wilkinson* v. *Sterne*, 9 Modern, 427, where this was the point in controversy, Lord Hardwicke said, "The distinction is this: where a man is indebted by mortgage and bond, and pays money to his creditor, he must make the application, and declare to which debt he applies the money, at the very time he pays it, and he cannot make the application afterwards; but his creditor may make the application any time after a general payment by his debtor, so as he does it before an account settled between them; and there have been abundance of cases on this distinction;" and he added, that the testator, (the creditor,) "if he had been living, might apply it to which security he pleased, even now." Sir William Grant, in Clayton's case, 1 Merivale, 606, said that he should collect from these cases, and from *Newmarch* v. *Clay*, 14 East, 239, and *Peters* v. *Anderson*, 5 Taunton, 596, that the creditor was authorized to make his election when he thought fit, and was not confined to making it at the period of payment; but he thought that some doubt was thrown on the principle by *Meggot* v. *Mills*, 1 Ld. Raymond, 287, and *Dawe* v. *Holdsworth*, Peake, 64, notwithstanding the explanation given in *Peters* v. *Anderson*, of those cases as exceptional and founded on the statutes of Bankruptcy. It is to be observed, that in the former, *Meggot* v. *Mills*, Lord Holt expressly refused to give an absolute

opinion on the point; and that *Dawe* v. *Holdsworth* appears to have been the case of an open current account where no appropriation having been made, the court applied the payments to the earlier items. Since *Clayton's case*, the decisions as to time are conclusive. In *Bosanquet* v. *Wray*, 6 Taunton, 597, the creditor was held entitled to make the application at the time of trial. See also *Kirby* v. *The Duke of Marlborough*, 2 Maule and Selwyn, 18; *Frazer* v. *Bunn*, 8 Carrington & Paine, 704; and *Campbell* v. *Hodgson*, Gow, 74. *Simson* v. *Ingham*, 2 Barnewall & Cresswell, 65, is precisely in point with *Mayor, &c., of Alexandria* v. *Patten & others*, that when the creditor has once declared the application, he cannot change it, but that till it is declared, he may make it at any time: in that case, the creditors had, at the time, made a particular application by entries in their books, but it was decided that they were not bound by such private entries; but might make a different appropriation when they sent the account to the debtor, an appropriation not being conclusive until communicated. *Philpott* v. *Jones*, 2 Adolphus & Ellis, 41, is yet more express: the debtor having made no application, the creditor, said Lord Denman, C. J., "might elect at any time to appropriate" as he pleased; "he was not bound," said Taunton, J., "to tell the defendant, at the time, that he made such application; he might make it at any time before the case came under the consideration of a jury." In *Mills* v. *Fowkes*, 5 Bingham, N. C. 455, it was decided that the application might be directed by the creditor before the arbitrator: "he may make the appropriation at any time before action; Best, J., was the only judge (in *Simpson* v. *Ingham*) who said that the appropriation must be made within a reasonable time," said Tindal, C. J.: "at any time before the action commenced," said Bosanquet, J.: "the more correct view," said Coltman, J., "seems to be, that the creditor is not limited in point of time." See also *Williams* v. *Griffith*, 5 Meeson & Welsby, 300. Although it is said, in these cases, that the application must be made before action brought, yet they do not require it to be declared or manifested till the controversy in court. — The American decisions are equally satisfactory. The case of *Mayor, &c., of Alexandria* v. *Patten and others*, where it was the direct point in judgment, is, itself, the highest authority that there ever can be in American law, and it ought to be considered conclusive: it is expressly adopted as the law, in *Brady's Adm'r* v. *Hill & Keese*, 1 Missouri, 315, 317, and is admitted in *Hilton* v. *Burley*, 2 New Hampshire, 193, 196. In *Starrett* v. *Barber*, 20 Maine, 457, 461, it was decided that an application manifested by bringing suit within three months, was early enough: see also *Lindsey* v. *Stevens*, 5 Dana, 104, 107. In *Heilbron* v. *Bissell & Warner*, 1 Bailey's Equity, 430, the point is particularly and fully examined by Harper, Ch., and the conclusion arrived at, is, that the creditor's right of appropriation is indefinite, and that the application may be made by him at any time. See, also, *Jones* v. *The United States*, 7 Howard, 681, 690. In *Moss* v. *Adams*, 4 Iredell's Equity, 42, 51, Ruffin, C. J., after reviewing the English and American cases, concludes that the principle is settled in both countries, that the creditor, when the right of appropriation has devolved upon him, may make it at any time before suit brought.

If the foregoing views are correct, the Chief Justice in *Logan* v. *Mason*, 6 Watts & Sergeant, 9, 14, conceded too much to the admirers of the civil law, in saying that the application ought to be simultaneous with the reception, and should appear to be a part of the *res gesta* of payment. The views as to time, expressed in that case, it is believed, go upon a wrong principle, and are not sound.

When a legal appropriation of a pay-

ment has been made upon one of two or more claims of a creditor against the same debtor, one of the parties cannot change that appropriation; see *Shaw et al.* v. *Br. Bank at Decatur*, 16 Alabama, 708; but it may be changed by the consent of both, and in that case the indebtedness first discharged is revived by implication of law, when there is no express promise; *Rundlett* v. *Small*, 25 Maine, 29, 31.

(3) If no appropriation be made or indicated by either party, the application devolves on the law, or the court; which, it is said, will direct it according to equity. It is obvious, however, that under this head there are two distinct cases: 1. Where the money has been voluntarily paid by the debtor; 2. The other where the payment is made by the law either under execution, or under an assignment for creditors under control of the law. The former may be considered first.

1. There is a clear difference between these cases, and it seems to be that in the former the court professes to proceed upon a presumption of the intention of the parties, whereas, in the latter, the appropriation is purely judicial. There is no doubt that when the appropriation of a voluntary general payment devolves on the court, the paramount rule is, that whenever the intention or understanding of the parties, before or at the time, can be inferred or implied from any circumstances, it shall prevail; see *Emery* v. *Tichout*, 13 Vermont, 15, 17; *Robinson & Wiggin* v. *Doolittle et al.*, 12 Id. 246; *Hillyer* v. *Vaughan*, 1 J. J. Marshall, 583; *The Stamford Bank* v. *Benedict*, 15 Connecticut, 438, 443; *Cheston* v. *Wheelwright*, Id. 562, 568; *Caldwell* v. *Wentworth*, 14 New Hampshire, 431, 440; and when no particular inference of intention can be made from the case, the court, it seems, will be guided by a general presumption of intention founded on reason, probability, and justice; see *Chitty* v. *Naish*, 2 Dowling, 511; *Portland Bank* v. *Brown*, 22 Maine, 295; see *Bayley* v. *Wynkoop*, 5 Gilman, 449, 452. The law will apply payment only to those demands which are debts certain, or capable of being rendered so, and not for uncertain and unliquidated damages; *Ramsour* v. *Thomas*, 10 Iredell, 165, 168. According to some cases, the action of the court is essentially discretionary, proceeding upon the justice of the particular case, in view of all the circumstances attending it, and no general rule as to preferring the interest of one party or the other can be laid down; *Smith* v. *Lloyd*, 11 Leigh, 512, 517; but most of the authorities agree that the presumed intention, or the interest, of either the debtor or the creditor, is to guide the court, and the only question is as to whose interests are to have the control. By the civil law, that application shall be made, which is most beneficial to the debtor. It is believed that the rule of the common law is directly the reverse; and that the general and predominant principle is, that that application will be made by the law, which it is to be presumed that the creditor would have made, or, which it is his interest to have made. The general principle of preferring the debtor's interest is denied by Tindal, C. J., in *Mills* v. *Fowkes*, 5 Bingham, N. C., 455, 461, and Harper, Ch., in *Heilbron* v. *Bissell & Warner*, 1 Bailey's Equity, 430, 435, to be the rule in our law.

If it be true, that the court in making its appropriation, proceeds upon a presumption of intention, then, the principle which devolves on the creditor the right to apply a general payment, and the cases which carry forward the exercise of the right to the very moment of judicial decision, seem to determine the question in favour of the creditor: and indeed in *Mills* v. *Fowkes*, *Chitty* v. *Naish*, *Bosanquet* v. *Wray*, and several other cases cited above, the application in favour of the creditor seems to have been the act of the court. The application of a payment by a creditor is an act of the mind, and a matter of inten-

tion: the entry or declaration of it by word or act, is but the manifestation and evidence of it; if, after the payment, up to the moment when the appropriation passes to the law, the creditor has the exclusive right to apply, which is agreed by all, the presumption by the law that he did appropriate it accordingly, is a plain conclusion of sense. The relative equities of the parties cannot vary with the different distances of time after the payment, no act to alter their rights or equities having been done by either; if it be just to delegate the application to the creditor, during the period which elapses before the appropriation vests in the law, it cannot be just after that to prefer the interest of the debtor. To give the creditor the right to apply at discretion for a certain time, is to adopt the principle of consulting his interests. It would be contradictory, for a judicial tribunal after the payment, first to explore and obey the indication of the creditor's intention, as a matter of fact, and then to seek and follow a presumption of the debtor's intention as a matter of law. The civil law, consistently, required the creditor, in exercising his right of application, to consult the interest of the debtor: the decisions which eliminate that rule from our law, seem, by inevitable force of common sense, to extinguish the other, which requires the court to follow the debtor's interests. In fact, the rules in the civil and common law, are distinct and opposed: the former empowers the debtor, in effect, to control the application of his payment, indefinitely; the latter vests the appropriation of a general payment in the creditor, absolutely. The true principle is believed to be that adopted in *Field* v. *Holland;* that when the determination of the application devolves on the court, it shall be referred to that debt which is the least secured; to a simple contract debt or open account, for example, rather than to a mortgage, judgment, bond, or bond with sureties.

Supposing the court to be guided merely by its own notions of equity and justice, the equity in all these cases seems to be entirely and powerfully in favour of the creditor. Where one debt is by simple contract, and the other by a higher security, as both are equally and continually due in conscience, it is equity that the application should be such as to save the operation of the Statute of Limitations. If, besides this, the simple contract is an open account, on which interest is not given, it is equity that the payment should be ascribed to that debt for the non-payment of which there is no compensation to the creditor, in preference to a bond debt for the detention of which he is compensated. But the case where one debt is secured by mortgage or judgment, and the other is unsecured, is that in which the equity of the creditor is least questionable. One foundation of the creditor's equities on the subject, is the principle that he is not bound to receive a partial payment or tender. It is just, therefore, that when he has accepted it, it should be intended that he accepted it on his own terms. In proportion as one security is better than the other, the presumption strengthens that the payment was received on account of the most precarious debt; and when one of the securities is of so high and absolute a kind, as to be, not only perfectly satisfactory, but even desirable as an investment, the presumption becomes irresistible. No creditor on mortgage, would, in ordinary cases, consent to accept a partial payment on account; and if the mortgagor, indebted at the same time, on simple contract, make a general payment, it would be inequitable to apply it in a way, which had it been expressed to the creditor at the time, he would have rejected the payment altogether. Security for a debt is an appropriation of that specific property to that particular debt, and it becomes a natural presumption that other payments were intended on other accounts. It is difficult to see how an

equity can arise to a defaulter from the non-performance of his obligations. On the contrary it is the moral duty of the debtor, as his breach of promise, necessarily, to some extent injures the creditor, to see that when he does perform, out of time, a part of what he ought to have done, in whole, before, he shall do it in a manner to diminish as far as possible, or at least not increase, the loss of the creditor. The taking of security for a debt proves that the personal security of the debtor was insufficient to procure the loan, or the indulgence in the payment, and shows that a favour has been conferred by the creditor, who certainly acquires an equity that his indulgence shall not prove an injury to him, and that his rights shall be protected in the debtor's provision for obligations that are equally due in conscience. The authorities are all but unanimous in establishing the principle that the law will apply a payment to the debt which is least secured.

As to the case, where one debt is by bond, or bond with sureties, and the other by simple contract. In *Hammer's Ad'r* v. *Rochester*, 2 J. J. Marshall, 144, the court, below, had applied general payments to the discharge of specialty debts which bore interest, in preference to simple contract liabilities which were earlier in time; but the court above, reversed the appropriation; saying, "In case of litigation, the chancellor would see that the payments were applied so as to effectuate justice. Thus, the chancellor should not apply the credits to the specialty debts, and leave unpaid a simple contract, which would thereafter be barred by the Statute of Limitations. The payment of debts, likewise, in the order of time they become due, is a circumstance which should not be without its influence." In *Blanton* v. *Rice*, 5 Monroe, 253, the complainant had undertaken to pay the defendants certain claims due to them by a third person: one of these was due by a replevin bond, in which the complainant was surety, and the others by a simple undertaking not yet settled by judgment: a general payment having been made, the court said, "It is evident that the demand which the complainant insists upon to be first extinguished, is best secured, and in such a case it is deemed equitable, to apply the credit to the debt, the security of which is most precarious,—according to the case of *Field* v. *Holland*, 6 Cranch, 8."—See also *Plomer and others* v. *Long*, 1 Starkie, 122; and *Smith* v. *Loyd*, 11 Leigh, 512, 517. The recent case of the *Stamford Bank* v. *Benedict*, 15 Connecticut, 438, 443, 445, is a strong authority to the point that a surety has no equity whatever to control for his advantage, an application of a payment when made by a court of equity; but that on the contrary, a court of equity will direct an unappropriated application to that debt for which the surety is not bound, upon the principle of discharging the most precarious debt. See, also, *Chester* v. *Wheelwright*, Id. 562, 568. *Vance* v. *Monroe*, 4 Grattan, 53, appears to be to the same effect. See, also, *Upham and others* v. *Lefavour*, 11 Metcalf, 174, 185; *The Ordinary* v. *M'Collum*, 3 Strobhart, 494, and *Backhouse and others* v. *Patton and others*, 5 Peters, 161, 168.

Upon the case where one debt is a charge on the property of the debtor, as, by mortgage or judgment, the authorities are numerous. *Anonymous*, 8 Modern, 236, is in point. A judgment debtor, who owed other debts also, sought to apply to the judgment a sum of money which he had paid indefinitely, on account. The court said, that "where it appears that money is paid indefinitely, the creditor has election to declare on what account he received it. Therefore, if the debtor in the principal case would have this payment applied to the judgment, upon equitable terms, he should likewise pay or tender all the money due to the plaintiff on simple contract, or otherwise, as far as the penalty of the judg-

ment covers such debts: for this court will not compel a creditor by judgment to accept a less sum than is due on the judgment, upon the account of any former indefinite payments, when there were other accounts depending between the parties, unless the defendant will consent to bring in all that is due to the plaintiff." See, also, *Wilkinson* v. *Sterne*, 9 Id. 299, where Lord Hardwicke said, that "a creditor on security, and at the same time a tenant of an estate, shall not be obliged, unless there is a particular agreement to that purpose, to take his debt by driblets: *id est*, to take the overplus of the rent in his hands in part of payment to reduce the principal after deduction of the interest due on his debt." In *Chitty* v. *Naish*, 2 Dowling, 511, a general payment having been made, where one debt was due by judgment on a bond with warrant, and others, by simple contract, the master, on a reference to him, decided that the payment should be applied so as to leave the judgment security in force, and this was sustained by the court, upon the ground that the creditor, after a general payment, had a right to apply as he pleased. See, also, *Brazier* v. *Bryant*, Id. 477. This was the case of *Field* v. *Holland;* there, general payments were made, and debts were due by judgment, and by instruments on which there were no judgments; and, the application devolving on the court, it was decided that the money should first be appropriated to the demands on which there was no judgment: "It being equitable," said Chief Justice Marshall, "that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious." Mr. Justice Cowen, in *Pattison* v. *Hull*, 9 Cowen, 771, had satisfied himself that he had consigned to insignificance this conclusive authority, by observing that, in this case, the books do not appear to have been consulted. It should be remembered, however, that there are some judges who consult more books than they quote, as there are others who quote more books than they understand. The authority of *Field* v. *Holland*, has been generally sustained in this country. In *Planters' Bank* v. *Stockman*, 1 Freeman's Chancery (Mississippi), 502, 504, the question was as to a set-off; the defendant seeking to set off a debt due to him by complainant. The court observed that the bill showed that the complainant had another claim, separate from the mortgage, equal to the set-off. "That," said the court, "is a complete answer to the defendant's claim of set-off against the mortgage. It is a well-settled rule, that where a creditor has two claims against the same debtor, one well secured and the other not, upon a payment being made, the court will apply the same to the debt for which no security was taken; and, by analogy of principle, the court will make the same application of a set-off." — "If neither party elect," said the court in *Briggs* v. *Williams et als.*, 2 Vermont, 283, 286, "the law will make the application, which requires that the debts which have the most precarious security should be first extinguished. And the court are bound to carry into effect the object of the law, that is, so to apply the payment that the creditor may obtain satisfaction of his debt." See also *Emery* v. *Tichout*, 13 Id. 15. "When no express appropriation is made by the creditor or debtor," said Woodbury, J., in *Hilton* v. *Burley*, 2 New Hampspire, 193, 196, "the court, at the trial, if more than one debt exists, should direct the payment to be applied to the debt not secured, if one of them be secured." In *Blackstone Bank* v. *Hill*, 10 Pickering, 129, 133, this principle is expressly admitted as applicable to a case where the payment is voluntary by the debtor. See, also, *Capen* v. *Alden and Trustee*, 5 Metcalf, 268. In like manner, in the recent case of *Jones* v. *Kilgore*, 2 Richardson's Equity, 64, 65, the dictum of Johnston, Ch., is, that "if neither party has fixed

the application, it devolves upon the court, and will be made *pro rata*, to the demands held by him who receives the money against him who paid it: or if one of the demands be less secured than the other, the application will be made to it in the first instance." In North Carolina, it is fully settled that the law will apply a general payment to that debt of which the security is most precarious; *Moss* v. *Adams*, 4 Iredells' Equity, 42; *Ramsour* v. *Thomas*, 10 Iredell, 165, 168.

There are, however, two reported cases to a contrary effect, deciding that where one debt is by mortgage or judgment, and another by simple contract, the appropriation, if referred to the law, shall be made to the former as being the more burdensome to the debtor. These cases are, *Dorsey* v. *Gassaway*, 2 Harris & Johnson, 402, 412, and *Pattison* v. *Hull*, 9 Cowen, 747, 764, 772. There is a dictum to the same effect in *Gwinn* v. *Whitaker*, 1 Harris & Johnson, 754, 755; which is approved of by Redfield, J., in *Robinson & Wiggin* v. *Doolittle et al.*, 12 Vermont, 246. See also *Anonymous*, 12 Modern, 559. These opinions appear to have been grounded on the civil law; and being opposed to so great a weight of authority on the other side, must be considered erroneous. The case of *Dent et al.* v. *The State Bank*, 12 Alabama, 275, which gives the debtor the right of determining the application, even upon the trial, rests upon no foundation of principle, and is wholly erroneous: the creditor, there, had undoubtedly made an application, by bringing suit.

There may be a distinction, perhaps, in equity, between the cases where a partial payment is made, and where the whole sum due is paid, without appropriation. In all cases, perhaps, it may be presumed that the debtor intended to pay upon the debt which was most burdensome to him; but the creditor has a paramount equity in the case of a partial payment made in silence, founded on the circumstance that he is not required to receive such a payment. But when the whole sum due is paid, as the creditor is obliged to receive it, equity, perhaps, might presume that he received it on the debtor's terms, and might supply the want of an express declaration of intention by the debtor at the time. And this appears to be the purpose of the case of *Anonymous*, 12 Modern, 559, which consists of this *dictum:* "If one owes forty pounds by bond, for the payment of twenty at such a day, and twenty pounds by contract to the same person, payable at the same day; and at the day he pays twenty pounds, without telling for which it is, it shall be a payment in equity upon the bond, because that is most penal to him;" and the dictum in *Prowse* v. *Worthinge*, 2 Brownlow, 107, that "If debt be due by obligation, and another debt be due by the same debtor to the same debtee of equal sum, and the debtor pay one sum generally, this shall be intended payment upon the obligation," appears to be the same thing, by the case being part of two debts equal in amount. We might therefore perhaps, take the distinction, that where the debts are burdensome in unequal degrees, a general payment to the exact amount of the debts, if they are for the same sum, or to the amount of the more burdensome one, that is, such a payment as would be a good tender upon the more burdensome debt, shall by the court be presumed to be appropriated according to the debtor's interests, but, in case of a partial payment, according to the creditor's; and thus the cases may be reconciled. But it cannot at present be said that such a distinction is established; and the adoption of such subtle differences tends to little else than perplexity and confusion.

There are some *dicta* to be found, suggesting that if one debt carries interest and the other does not, the appropriation of an unapplied payment, shall be to the debt which

carries interest, because it is the most burdensome to the debtor; *dicta* in *Gwinn* v. *Whitaker*, 1 Harris & Johnson, 754, 755, and in *Bacon* v. *Brown*, 1 Bibb, 334, 335, and in *Blanton* v. *Rice*, 5 Monroe, 253; though the last case proves that this equity or presumption in favour of the debtor will yield to the antagonist one in favour of the creditor arising from the interest-bearing debt being better secured; which appears to be an inconsistency. All these dicta seem to be derived from *Heyward* v. *Lomax*, 1 Vernon, 24. This case itself consists merely of a dictum, how, when, or by whom, does not appear, that "where a man owes money on a mortgage, and other moneys to the same person on account, for which he is not to pay any interest, and he makes a general payment, without mentioning it to be in discharge of the mortgage, or of the moneys due upon the account; it shall be taken to have been paid towards discharge of the money due on the mortgage; because it is natural to suppose, that a man would rather elect to pay off the money, for which interest was to be paid, than the money due on account, for which no interest is payable." It is to be observed that the author of 1 Equity Cases Abridged, in copying this decision, 147 D. pl. 1, has subjoined "but *Q.*," as if either the report or the opinion was of doubtful correctness; and Vernon, where not fortified by the Register, as he is not in this case, enjoys no character for accuracy, while Equity Cases Abridged is a book of high authority; (Wallace's Reporters, 74, 75.) However, whatever support this principle might be thought to derive from *Heyward* v. *Lomax*, is conclusively destroyed by *Manning* v. *Westerne*, 2 Vernon, 606, decided twenty-six years later, the accuracy and authority of which, as appears by the decree in the Register's Book, are unquestionable. In this case, there were two contracts or debts for iron furnished by the defendant, an ironmonger, to the plaintiff, an iron manufacturer; the first *without*, the second *with* interest; the former, as would appear by the printed report, being by simple contract, on a running account, and the latter by speciality: a general payment had been made, which the payor had entered in his books as paid on the second account, and claimed now to have so applied; but the Lord Chancellor said, that the rule of law, *quicquid solvitur, solvitur secundum modum solventis* is to be understood, when at the time of payment he that pays the money declares upon what account he pays it; but if the payment is general, the application is in the party, who receives the money, and the entries in the defendant's books, are not sufficient to make the application: and accordingly decreed that the payments were to be applied to the debts in the order of time. This case establishes that the presumption of intention afforded by the matter of interest, even when fortified by the evidence of a private entry, is not sufficient to countervail, either the creditor's right, or the natural propriety, of applying a payment to debts in the order of time, or to the debt that is least secured. There seems never to have been in England or America, an adjudged case, in which the principle of appropriating a general payment to a debt carrying interest, rather than to one without interest, has been applied; for *Heyward* v. *Lomax* seems to be nothing but a *dictum*.

It may be observed, also, that the author of the work called "The Grounds and Rudiments of Law and Equity," which is a book of considerable research and discrimination, in citing (at p. 282) the case in 1 Vern. 24, adds "*Quære sur cest case;*" and, afterwards (p. 283), citing 1 Vern. 34, 45, and 2 Vern. 606, 607, adds, after the last, the following remark: "See the two next foregoing cases, (viz. 1 Vern. 24, and 1 Id. 34, 35,) and quære, though this, (viz. 2 Vern. 606, 607,) I conceive, is the more

equitable resolution, that where the payment is general, the application should be in the receiver; for else the payer might defer the debt which carries interest, and, so ease himself of that charge against both the interest and intention of the debtee; and besides, this resolution, according to my apprehension, squares with the rule, That every man's act is to be construed most strongly against the actor."

There is, however, a general rule in the law, which might be confused with this, but which is in principle directly opposed to it, and the existence of which necessarily overthrows the other; that is, the general rule of applying a payment to interest rather than principal. For example, if there be but one debt and interest due upon it, a general payment will be applied to the interest first (as is more fully stated presently;) and, if there be several debts of the same degree all carrying interest, a payment will be applied to extinguish the interest of all the debts, before reducing the principal of any one; *Steele* v. *Taylor*, 4 Dana, 445, 450; and, upon the same ground, if one debt carries interest and the other does not, *probably* the court would direct the interest due to be discharged before the principal of either was reduced, that is, the interest-bearing debt would attract the payment to itself, to the extent of the interest. But this general rule really proceeds upon a preference of the *creditor's* claims: and the same reason which induces the law first to reduce the interest of an interest-bearing debt, would incline it to discharge the *principal* of a debt which did not carry interest in preference to that of one which did bear interest. This is illustrated by *Steele* v. *Taylor*, where it was decided, that in case of several judgments bearing interest, a payment was properly applied to the interest due upon all of them. "When a debtor fails to make prompt payment of his debt," said the court in that case, "the law has fixed a rate of interest that he shall pay, as a reasonable compensation to the creditor for the delay. And, as interest will not bear interest, though it be as justly due as the principal, the creditor is deprived of the use of the interest without compensation for it. It is, therefore, just and equitable, when the credit is left to be applied by the chancellor, that it should be first applied to the extinguishment of the whole interest, or that portion of the fund, which is withheld by the debtor, that draws no interest." The case of a single debt bearing interest, brings to a conclusive test, the comparative claims of a debt with interest, and a debt without interest, to have a general payment applied: for the *interest* is a debt not carrying interest, and the principal is a debt carrying interest, and no rule in the law is settled by a greater weight of authority, than that which determines that a partial payment is first to be applied to the interest.

This rule, and that relating to an open account, have now become fixed principles of law, upon which, payments are to be applied. In regard to the former, "The rule for casting interest, when partial payments have been made," said Chancellor Kent in *Connecticut* v. *Jackson*, 1 Johnson's Chancery, 13, 17, "is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal; and interest is to be computed on the balance of principal as aforesaid."

Acc. French v. *Kennedy*, 7 Barbour's S. Ct., 452; *Story* v. *Livingston*, 13 Peters, 360, 371; *The U. S.* v. *McLemore*, 4 Howard's Supreme Court, 286, 288; *Dean* v. *Williams*, 17 Massachusetts, 417; *The Commonwealth* v. *Miller's administrators*, 8 Sergeant & Rawle, 452, 458; *Spires* v. *Hamot*, 8 Watts & Sergeant, 17; *Smith* v. *The Administratrix of Shaw*, 2 Washington C. C., 167; *Gwinn* v. *Whitaker*, 1 Harris & Johnson, 754, 757; *Frazier* v. *Hyland*, Id. 98; *Jones* v. *Ward*, 10 Yerger, 161, 170; *Guthrie & Cox* v. *Wickliffe*, 1 Marshall, 584; *Hart* v. *Dorman*, 2 Florida, 445, 447; *The Union Bank of Louisiana* v. *Kindrick*, 10 Robinson's La., 51; and other cases collected in note to *Williams* v. *Houghtaling*, 3 Cowen, 87. Where the payment is made on a debt on which interest is accruing, but before either interest or principal is payable, the rule adopted in some cases, has been to apply it rateably, so as to discharge a part of the principal, and the interest on such part as is thus discharged; *Williams* v. *Houghtaling*, 3 Cowen, 86; *Stone* v. *Seymour*, 15 Wendell, 19, 24; *Jencks* v. *Alexander*, 11 Paige, 620, 625; *French* v. *Kennedy*, 7 Barbour's S. Ct., 452, 456; see, however, *De Bruhl* v. *Neuffer*, 1 Strobhart, 426, 431; though, when a payment is made on a note or other debt, before maturity, or before the time when interest has begun to accrue, the debtor is not entitled to interest on the amount paid, to the time the note is due or interest begins, without an agreement to that effect, and the payment will extinguish its own amount, and no more; *Handley* v. *Dobson's Adm'r*, 7 Alabama, 359, 361. However, it is in the power of the debtor at the time he makes a partial payment to direct that it be applied to the principal and not the interest; and the creditor, if he accepts the payment, is bound by the terms on which it is made; *Pindall's Ex'x, &c.* v. *Bank of Marietta*, 10 Leigh, 481, 484; *Miller* v. *Trevilian, &c.*, 2 Robinson's Virginia, 2, 27. Moreover, the course of dealing, or the express or implied understanding, between the parties, may give sanction to another mode of making up accounts, which is the usual mercantile practice, viz., of keeping an interest account upon the payments; and when mutual accounts have been kept between merchants in this way, a court is reluctant to change the method of computation, which they have agreed to observe between themselves, although the principle of it is one by which a debt will in the course of time, be extinguished by payments of interest only; *Stoughton* v. Lynch, 2 Johnson's Chancery, 210, 214; *Hart* v. *Dewey*, 2 Paige, 207. See *Dunshee* v. *Parmela, Adm'r.*, 19 Vermont, 173, 175.

The rule with regard to an open, current account, the items of which do not form distinct debts, but are blended together in one account, is, that the payments shall be applied, as they are paid, to the charges in the order of time in which they accrue. This case, in fact, does not fall within the principle of the application of payments to distinct debts, because not the items, but only the balance of an account is considered as a debt, but falls under the rules upon which mutual accounts are cast and settled by the law; *Clayton's Case*, 1 Merivale, 608; *Bodenham* v. *Purchas*, 2 Barnewall & Alderson, 39; *Brooke* v. *Enderby*, 2 Broderip & Bingham, 70; *Smith* v. *Wigley*, 3 Moore & Scott, 174; *U. States* v. *Kirkpatrick*, 9 Wheaton, 720, 737; *Jones* v. *The U. S.*, 7 Howard, 681, 692; *The U. S.* v. *Bradbury et al.*, Daveis, 146, 148; *Boody et al.* v. *The U. S.*, 1 Woodbury & Minot, 151, 168; *Postmaster-General* v. *Furber, &c.*, 4 Mason, 333; *United States* v. *Wardwell et al.*, 5 Id. 82, 87; *Gass* v. *Stinson*, 3 Sumner, 99, 110; *McKenzie* v. *Nevius*, 22 Maine, 138, 148; *Miller* v. *Miller*, 23 Id. 22, 24; *Smith* v. *Loyd*, 11 Leigh, 512, 518; *Fairchild* v. *Holly*, 10 Connecticut,

176; *Allen* v. *Culver*, 3 Denio, 285, 291. And this rule will apply to accounts with a partnership, of which there is some change in the members, provided the account goes on as one continuous, open, and current account, as several of the preceding cases show; but if the continuity of the account be broken, that is, if a new account be opened by or with the firm, upon the coming in or going out of a member, distinct from the old account, the creditor may apply a general payment to the new account if he pleases; *Simson* v. *Ingham*, 2 Barnewall & Cresswell, 65; *Logan* v. *Mason*, 6 Watts & Sergeant, 9. And this rule, allowing or requiring a payment to be applied to the earliest item in an account, will not prevail, where a different intention in both parties, or on the debtor's part, is expressly shown, or is to be inferred from the course of dealing, or from the particular circumstances of the case; *Taylor* v. *Kymer*, 3 Barnewall & Adolphus, 320, 333; *Henniker* v. *Wigg*, 4 Queen's Bench, 792; *Capen* v. *Alden and Trustee*, 5 Metcalf, 268, 272; *Dulles* v. *De Forest*, 19 Connecticut, 191, 304; nor will it prevail against the principle that the fund from which the payment is made, will control the application; for if one indebted individually, enter afterwards into partnership, a payment from the partnership funds could not be applied to his individual account; *Thompson and another* v. *Brown and Weston*, 1 Moody & Malkin, 40. See *Fairchild* v. *Holly*, 10 Connecticut, 176. Nor will it apply to those cases in which the relations between the creditor, and other parties to be affected, are such as to make it part of the contract that there shall be a different application. Thus, where a collecting or receiving officer has given bonds with different sureties, for successive periods, and becomes a defaulter, payments accruing due and paid during the period to which the second bond applies, are not as against the sureties to be considered as applied in the order of time so as to relieve the sureties in the first bond, at the expense of those in the second bond, but must be credited to the obligation for which the second set of sureties are bound; for the contract of the sureties is, that each set is to be liable only for actual defaults during the period for which they are bound; and, however the accounts may be made up, and the payments applied, between the officer or principal debtor and the government, or creditor, the amount of default for which any set of sureties are to be made liable, is to be ascertained by the difference between the moneys received, and the moneys paid over, during the period for which they are sureties; *U. S.* v. *January and Patterson*, 7 Cranch, 572; *Jones* v. *The United States*, 7 Howard, 681, 688; *Seymour* v. *Van Slyck*, 8 Wendell, 404; *Stone* v. *Seymour*, 15 Id. 19; *Postmaster-General* v. *Norvell*, Gilpin, 107, 126; *Boring et als.* v. *Williams, Treas'r*, 17 Alabama, 511, 525; and see *Parr and others* v. *Howlin*, Alcock and Napier, 197; *Williams* v. *Rawlinson*, 10 Moore, 362, 371.

2. The other instance of application by the law, is where the payment is made by the law; in this case, the general rule is to appropriate the payment to all the debts ratcably. It is, however, very difficult to determine when this principle becomes properly applicable. In *Blackstone Bank* v. *Hill*, 10 Pickering, 129, 133, while the court held the general principle of the creditor's right to appropriate money, paid generally by the debtor, to be clear, where it could be applied, they said that it had place only in cases of voluntary payments, and did not apply to a payment by process of law, or *in invitum;* and decided, accordingly, that where judgment had been recovered on several notes, which thus became consolidated into one debt, and a part of the judgment was satisfied by execution, the creditor had no right to apply the money raised by the execution to one note, but that all the notes must be considered as satis-

fied proportionably: see also *Merrimack Co. Bank* v. *Brown*, 12 New Hampshire, 321, 327; and see *Waller* v. *Lacy*, 1 Manning & Granger, 54, 65; and *Perris* v. *Roberts*, 1 Vernon, 34; S. C. 2 Chan. Ca. 84. In like manner, in *Commercial Bank* v. *Cunningham*, 24 Pickering, 270, 276, it was decided, that, where an insolvent debtor assigned his property for the benefit of creditors, and a payment was received under it by a creditor, some of whose debts were secured, the creditor had no right to apply the money to the debt which is not secured, "for, the application is made by law according to the circumstances and justice of the case;" and accordingly, the money was ordered to be applied to all the debts rateably. In Maine, however, this distinction does not appear to have been adverted to. In a case where a judgment was recovered on two securities, one of which was absolute, and the other but collateral security, and money was raised by execution, it was held that the creditor might have applied it to either debt, and that in the absence of any actual application by him, it should be applied according to a presumption of his intention, and therefore to the debt due absolutely, rather than to that due as surety; *Bank of Portland* v. *Brown*, 22 Maine, 295: see also *Starrett* v. *Barber*, 20 Id. 457; and *The Stamford Bank* v. *Benedict*, 15 Connecticut, 438, 443.— In some courts, it has been decided that in case of a mortgage, or deed of trust, to secure several notes, due at different times, the application of the money made under the instrument, shall be to all the notes rateably, if all are due at the time the money is made; *Parker, Appellant* v. *Mercer*, 6 Howard's Mississippi, 320; *Cage* v. *Iler et al.*, 5 Smedes & Marshall, 410: but in *The Bank of the United States* v. *Singer & others*, 13 Ohio, 240, it was held, that if a mortgage be given to secure several notes due at successive times, or a sum due by instalments, the earliest due are to be first paid in full out of the proceeds of the mortgage, because the obligation to pay the first might have been enforced against the property before any default in the later payments. If there were liens attaching successively, it would no doubt be so; see *Newton* v. *Nunnally*, 4 Georgia, 356: but where the lien accrues at one time for successive debts, it ought generally to be considered as for the equal benefit of all the debts existing at the time the security becomes productive in money. In *Stamford Bank* v. *Benedict*, 15 Connecticut, 438, this doctrine of rateable application in a case of this kind, seems not to have been attended to, but the application of moneys made under a mortgage given to secure several debts, was made according to the creditor's will or interest.

With great deference to the learning and acuteness of Sir Wm. Grant in *Devaynes* v. *Noble, &c.,—Clayton's Case*, 1 Merivale, 605,—the opinion is ventured, that the rules by which the application of indefinite payments is to be governed, in the common law, are not borrowed from the civil law, but are of native origin and growth. They seem to be a simple application of principles which have long been settled with regard to election. One of these principles, as stated by Lord Coke, is, that, "In case election be given of two several things, always he who is the first agent, and who ought to do the first act, shall have the election." Another is, "When a thing passeth to the donee, or grantee, and the donee or grantee hath election in what manner or degree he will take it, there the interest passeth presently, and the party, his heirs or executors, may make election when they will:" 2 Reports, 37 *a*; Co. Litt. 145 *a*. The second of these points, is more fully explained in the fourth resolution in *Heyward's Case*, 2 Reports, 36 *a*; that, "where the things are several, nothing passes before election, and the election ought to be precedent; . . . . but when one only thing is granted,

and the party *hath election to take it in one manner or another*, there the interest vests presently, and it shall be always in the election of the grantee or his executors *at any time* to elect in what manner or degree he will claim it." By the first of these maxims, the payor having the first act to do, has the right to determine upon which account the payment shall be made: and the payor's right is put upon this ground in *Stracy* v. *Saunders*, 7 Modern, 123, where it is said, if "A man owes money by bond, and also by award, suppose twenty pounds by each, and he pays one twenty pounds, it shall be upon which of both he pleases; for he, and not the receivers, is the first agent." But after the act is done, and the ownership of the money has vested absolutely in the creditor, his election as to the manner in which he will take the payment, is, according to the second maxim, continuing and indefinite, the surrender of the election as to manner, being after the interest has past, absolute and total. Courts of equity appear to proceed upon the principle of following the common law, as far as it is applicable; and when the common law rule cannot be applied, they go upon the principle that it is equity, that all debts should be paid, and will apply a general payment to that debt of which the security is most precarious.

The principle adopted by the common law appears to be the reasonable one, *that the ownership of the money determines the right of appropriation*. Before the money is paid, that is, while it belongs to the debtor, he may direct any application that he pleases; and any application, directed by him, during that period, will prevail. But if he pays the money without directing any appropriation, the money becomes absolutely the property of the creditor; and being his own, he may do with it what he will. The fine equities supposed to exist in favour of the debtor, even after he has paid unconditionally, can never countervail the gross equity which a man has to use his own property as he chooses. To allow a debtor to follow and control the application of money of which the entire ownership is in another, would be inconsistent with the reason and analogies of the common law.

If the foregoing opinions be sound, the views expressed in the note to *Pattison* v. *Hull*, 9 Cowen, 773, and in the case of *Gass* v. *Stinson*, 3 Sumner, 99, 110, and in the article "On the application of Payments," in the American Law Magazine, vol. 1, p. 31, cannot be considered as well founded. The law of the case where the application of a voluntary payment is made by the parties, and of the case where it devolves on the court, appears to be conceived and defined with absolute precision in *Mayor, &c., of Alexandria* v. *Patten & others*, and *Field* v. *Holland*.

The annotator has much satisfaction in referring to the able opinion of Ruffin, C. J., in *Moss* v. *Adams*, 4 Iredell's Equity, 42, which, though pronounced before the publication of the first edition of the present work, was not published until after it, and was overlooked when the second edition was prepared. The views expressed in that opinion will be found to agree in their general character with those upon which the preceding note is founded. The chief justice, in that case, distinctly recognises, that, in some important particulars on this subject, the rules of the common law are directly opposite to those of the civil law. "Although the common law," he remarks, "may be indebted to the civil law for the leading rule, which gives the option first to the debtor, and then, in succession, to the creditor, and to the law; yet it is certain, that the Roman law has not been followed throughout, but the English and American courts have departed from it in several instances, and, indeed, reversed it, and allowed the creditor to make his election long posterior to the payment, and after material

changes of the circumstances of the parties; and, in other instances, the law has applied the payments according to the interest and presumed intention of the creditor, as, for example, to the debt not bearing interest, or to the one more precariously secured, or one barred by the statute of limitations, or the like."

Negotiability of Instruments.

OVERTON *v.* TYLER ET AL.

In the Supreme Court of Pennsylvania.

SUNBURY, JULY TERM, 1846.

[REPORTED, 3 BARR, 346–348.]

An instrument having the usual words of a note payable to bearer, and in addition an authority to any attorney to enter a judgment in favour of the holder for the amount of the note with costs, coupled with a release of errors and a waiver of stay of execution, and of the right to an inquisition and appraisement, is not a negotiable note, *and consequently an execution may issue on a judgment (previously confessed) on the day after the day fixed for payment—the drawer not being entitled to the days of grace.*

IN error from the Common Pleas of Bradford County.

July 15. This was a feigned issue directed to test the right of the parties to the proceeds of a sheriff's sale of the personal property of L. Smith, in which a special verdict was found, in substance, as follows: L. Smith drew a promissory note, falling due June 30th, 1845, for discount at bank, which was endorsed for him by Tyler et al., as sureties. While this note was maturing, he gave to Tyler the following instrument:

"$1000. *Athens, February* 15, 1845.

"For value received, I promise to pay Francis Tyler and Levi Westbrook, or bearer, one thousand dollars, with interest, by the first day of June next. And I do hereby authorize any attorney of any court of

record in Pennsylvania, to appear for me and confess judgment for the above sum to the holder of this single bill, with costs of suit, hereby releasing all errors and waiving stay of execution and the right of inquisition on real estate; also waiving the right of having any of my property appraised which may be levied upon, by virtue of any execution issued for the above sum.

"L. SMITH."

This was to secure them, as endorsers of the above-mentioned note.

On this, a judgment was entered on the 10th of March, and an execution was left with the sheriff on the 2d of June. Under this, the money was paid into court arising from the sale of personal property. Prior to the sale, which was on the 2d and 3d of July, Overton left with the sheriff an execution on a judgment in his favour. The jury found that Tyler had paid the first-mentioned note, after protest, and on or before the 3d of July.

The court (CONYNGHAM, P. J.) gave judgment for Tyler, and this writ of error issued.

Case and *Overton*, for plaintiff in error. The days of grace are part of the contract. 1 Pet. S. C. Rep. 25; Thomas v. Shoemaker, 6 Watts. & Serg. 179; nor will the fact, that a warrant of attorney is attached, alter or in any way affect that right—it is to be construed as if the note and the warrant were distinct instruments. A suit, then, not being maintainable before the 5th of June, of course no execution could issue for the same debt at an earlier period.

Elwell and *Williston*, contra, contended that by the agreement the judgment was to be entered as for an amount due on the 1st of June, and that the character of the note, if such it was, merged in that contract. But there never was a privilege of the days of grace; the judgment could not pass from hand to hand; and subsequent holders would certainly be bound to defalk any payments made on account of the judgment. These are principles irreconcilable with the rules regulating commercial paper. 3 Penna. Rep. 374; 1 Watts, 135; 1 Miles, 162; 6 Johns. Ch. Rep. 281; 2 Term Rep. 640.

GIBSON, C. J. No case like the present, nor anything from which a principle applicable to it can be drawn, is found in the books. The note is for the payment of money; it is payable to bearer; and it is payable absolutely; yet it is obvious that it was not intended to be negotiable in a commercial sense, and that the maker was not to have the usual days of grace. The debt is still between the original parties;

and the contract by which it was created is to be interpreted, like any other, by their actual meaning. If they meant to make, not a promissory note, within the statute of Anne, but a special agreement with power to enter up judgment on it, they are bound by the result as they themselves viewed it. Such is one of the principles of Patterson v. Poindexter, and Boker v. Hazard, 6 Watts & Serg. 221, in which, however, there was no express promise. Nor would a subsequent holder take the paper on any other terms than those expressed in it. It has in it all the parts of a promissory note; but it has more; it contains not only a warrant to confess judgment with a release of errors, but an agreement to waive appraisement and stay of execution. But a negotiable bill or note is a courier without luggage. It is requisite that it be framed in the fewest possible words, and those importing the most certain and precise contract; and though this requisite be a minor one, it is entitled to weight in determining a question of intention. To be within the statute, it must be free from contingencies or conditions that would embarrass it in its course; for a memorandum to control it, though endorsed on it, would be incorporated with it and destroy it. But a memorandum which is merely directory or collateral, will not affect it. The warrant and stipulations incorporated with this note evince that the object of the parties was not a general, but a special one. Payment was to be made, not as is usual at so many days after date, but at a distant day certain; yet the negotiability of the note, if it had any, as well as its separate existence, was instantly liable to be merged in a judgment, and its circulation arrested by the debt being attached, as an encumbrance to the maker's land; and it was actually merged when it had nearly three months to run. Now it is hard to conceive how the commercial properties of a bill or note can be extinguished before it has come to maturity. That is not all. A warrant to confess judgment, not being a mercantile instrument, or a legitimate part of one, but a thing collateral, would not pass by endorsement or delivery to a subsequent holder; and a curious question would be, whether it would survive as an accessory separated from its principal, in the hands of the payee for the benefit of his transferee. I am unable to see how it could authorize him to enter up judgment, for the use of another, on a note with which he had parted. But it may be said that his transfer would be a waiver of the warrant as a security for himself or any else; and that subsequent holders would take the note without it. The principle is certainly applicable to a memorandum endorsed after signing, or one written on a separate paper. But the appearance of paper with such unusual stipulations incorporated with it, would be apt to startle commercial men as to their effect on the contract of endorsement, and make them reluctant to touch it. All this shows that these parties could not have intended to impress a commer-

cial character on the note, dragging after it, as it would, a train of special provisions which would materially impede its circulation. As it was not a negotiable note within the statute, the usual days of grace could not be added to the ostensible day of payment; and as the judgment was ripe at the expiration of that day, the execution was sustained by it, and being prior in delivery to the sheriff, was entitled to priority of satisfaction.

Judgment affirmed.

M'CORMICK AGAINST TROTTER, ENDORSEE OF LYNN.

In the Supreme Court of Pennsylvania.

LANCASTER, JULY, 1823.

[REPORTED, 10 SERGEANT AND RAWLE, 94–96.]

A note promising to pay A. B. or order, 500 dollars, in notes of the chartered banks of Pennsylvania, *is not a negotiable note, on which the endorsee can sue in his own name.*

ERROR to the Court of Common Pleas of Dauphin County.

This was an action brought by Nathan Trotter, endorsee of John Lynn, against Barnabas M'Cormick, as the maker of a promissory note, by which he promised, two months after date, to pay to John Lynn, or order, at the Harrisburg Bank, and in bank notes of the chartered banks in Pennsylvania, 500 dollars, without defalcation, for value received.

On the trial, several exceptions were taken to the admission of evidence, and also to the charge of the court. The court below instructed the jury, that the plaintiff was not bound to prove the handwriting of John Lynn, the endorser. The jury gave a verdict for the plaintiff, and judgment was rendered accordingly.

Errors were now assigned in the statement, and its amendment in the court below, and also in the charge of the court.

Douglass, for the plaintiff in error.

Elder, contra.

The opinion of the court was delivered by

DUNCAN, J. It is impossible to sustain this judgment. Without considering the minute objections to the original or amended statement, there are two material objections. The first strikes at the foundation of the action. The instrument was not assignable, nor the subject of the endorsement, so as to enable the assignee or endorsee, to sue the maker in his own name.

Though courts of law are now in the constant habit of taking notice of the assignment of choses in action, and of giving effect to them, yet they always adhere to the formal objection, that the action should be brought in the name of the assignor, and not of the assignee.

The common law relaxed the rule at a very early period as to foreign bills of exchange, and afterwards, as to inland bills of exchange, and the statute law enables the assignee or endorsee of a promissory note to maintain an action in his own name.

At a very early period of the province, 28th May, 1715, an act passed for assigning bonds, specialties, and promissory notes, and enabling the assignee to sue in his own name. But this is confined to obligations, or promises to pay to any person or persons, their assigns or order, any sum of money. So is the stat. of Anne. It is the legal definition of a promissory note, that it is a promise or engagement to pay a specific sum at a time therein limited, or on demand, or at sight, to a person there named, or his order, or to bearer. No precise form of words is necessary. It is sufficient if the note amounts to an absolute promise to pay money.

Stock contracts for delivering of six per cents., are not negotiable, though they may be rendered so by express stipulation. Reed v. Ingraham, 3 Dall. 505.

Now the value of six per cents. is less precarious and fluctuating than the value of the notes of some chartered banks, at the time this note was given. The contract was for a specific matter, 500 dollars, to be paid in bank notes of the chartered banks of Pennsylvania. It is not payable in money.

There is a case in 3 Johns. 120, Keith v. Jones, in which it was held, that a note payable to A. or bearer, in state bills or specie, is a negotiable one, and may be declared on as such. It is but an imperfect sketch without much argument, and one short reason assigned. Payable in state bills or specie, is, however, different from payment in notes of any chartered bank, because there the contract shows the view of the parties, that state bills, which was intended to mean bank notes, and specie, were precisely the same, and of the same value, that the parties had current money in view. The reason assigned, that in that

state, bank notes and current money were considered the same thing, is not satisfactory to my mind, for they have not always been so considered. Notes of some banks in that state have depreciated as well as in our own state. They may not, at the time this note was given, and when this decision was made. They are not in contemplation of law the same thing as money. They are not a legal tender. But on a promise to pay in bank notes, tender and refusal of bank notes, and bringing them into court with a *tout temps prist*, would avail the defendant. 8 Mass. 260. And it appears to me that a contract to pay in bank notes, however certain the value, is not a contract for payment of money: for if it were, the holder of the note might refuse to receive anything but specie, contrary to the special agreement of the parties. But when the present note was given, in 1817, bank notes were very far from being considered as money, and passing as such. Many of the chartered bank notes had greatly depreciated, and some of them have since sunk in value below 50 per cent. This note, so far from being payable in money, is payable in more than 40 kinds of paper, of different value. To declare on this as on a note for the payment of 500 dollars, would have been a fatal variance. So much satisfied was the plaintiff below of this, that he amended his statement, by adding, payable in bank notes of the chartered banks in Pennsylvania. Thus showing his own opinion, that this was not a promissory note for payment of money. I am, therefore, for these reasons, of opinion, that this is not a negotiable or transferable note for payment of money, so as to enable the assignee or endorsee to sustain an action in his own name. It was not a promise to pay money either in legal contemplation, or in the contemplation of the parties when they contracted. It is an unanswerable objection to the action, that the defendant might, according to this contract, have tendered the 500 dollars in the notes of any chartered bank, however depreciated their paper might be. In a note for money, nothing but current coin would be a tender.

But, if the endorsee could maintain the action, he must show that he is the endorsee. It is not a note passing by delivery, payable to bearer. The maker of it did not promise to pay to the bearer, but to the order of payee. Strike out the endorsement, and what is the right of the plaintiff below. He must claim by and through the endorsement. It is his authority to call for the money. Blank endorsement transfers the legal right, because the holder may fill it up; he is allowed so to do by the payee. But he cannot make an endorsement. The bona fide holder of a note, payable to bearer, may recover on his possession, but where payable to order, he must prove the order, which can only be done by proving the endorsement by the payee. There is no necessity to set out an endorsement in the first case, but if it is done, then it must be

proved. Wayman v. Bend, 1 Campb. 175. In arguing this case, it was assimilated to that to which it bears no resemblance, an action on a bill of exchange, where it is not necessary to prove the handwriting of the drawer, in an action by the endorsee against the acceptor. The reason is very obvious, for there the acceptor is liable though the bill is forged.

So in an action by the endorsee against the endorser, it may not be necessary to prove the handwriting of the drawer, because the endorsement is in the nature of a new note, and if the drawer's name was forged still the endorser would be liable. But here it was necessary to set out the endorsement, and to prove it. The averment of endorsement could not, as the court supposed, be struck out, without destroying the plaintiff's right of action. It was a material, necessary averment, the very foundation of the action, a necessary allegation, traversed by the defendant's plea of non assumpsit, and without proof of which, the plaintiff had no standing in court. For both these reasons, the judgment is reversed.

Judgment reversed.

GERARD *v.* LA COSTE ET AL.

In the Court of Common Pleas of Philadelphia County.

JUNE TERM, 1787.

[REPORTED, 1 DALLAS, 194–196.]

A bill of exchange, payable to a particular person, without the words "or order," or "assigns," or other such words, is not negotiable.

THIS case came before the Court on a special verdict, and after argument, the following judgment was pronounced by the President.

SHIPPEN, President. This action is brought against the acceptors of an inland bill of exchange, made payable to Bass and Soyer and endorsed by them, *after the acceptance*, to the plaintiff for a valuable consideration. The bill is payable to Bass and Soyer, without the usual words "or order," "or assigns," or any other words of negotiability.

The question is, whether this is a bill of exchange, which, by the law merchant, is endorsable over, so as to enable the endorsee to maintain an action on it against the acceptors, in his own name.

The court has taken some time to consider the case, not so much from their own doubts, as because, it is said, eminent lawyers, as well as judges, in America, have entertained different opinions concerning it. There is certainly no precise form of words necessary to constitute a bill of exchange, yet from the earliest time to the present, merchants have agreed upon nearly the same form, which contains few or no superfluous words, terms of negotiability usually appearing to make a part of it. It is indeed generally for the benefit of trade that bills of exchange, especially foreign ones, should be assignable; but when they are so, it must appear to be a part of the contract, and the power to assign must be contained in the bill itself. The drawer is the lawgiver, and directs the payment as he pleases; the receiver knows the terms, acquiesces in them, and must conform.

There have doubtless been many drafts made payable to the party himself, without more, generally perhaps to prevent their negotiability: —Whether these drafts can properly be called bills of exchange, even between the parties themselves, seems to have been left in some doubt by the modern judges. Certainly there are drafts, in the nature of bills of exchange, which are not strictly such, as those issuing out of a contingent fund; these (say the Judges in 2 Black. Rep. 1140) do not operate as bills of exchange, but, when accepted, are binding between the parties. The question, however, here, is not whether this would be a good bill of exchange between the drawer, payee, and acceptor, but whether it is endorsable.

Marius's Advice is an old book of good authority; in page 141, he mentions expressly such a bill of exchange as the present, and the effect of it, and he says, that the bill not being payable to a man *or his assigns, or order*, an assignment of it will not avail, but the money must be paid to the man himself. In 1 Salkeld, 125, it is said, that it is by force of the words "or order" in the bill itself, that authority is given to the party to assign it by endorsement. In 3 Salk. 67, it is ruled, that where a bill is drawn payable to a man, "or order," it is within the custom of merchants; and such a bill may be negotiated and assigned by custom *and the contract of the parties.* And in 1 Salk. 133, it is expressly said by the court, that the words "or to his order," give the authority to assign the bill by endorsement, and that without those words the *drawer* was not answerable to the endorsee, although the *endorser* might.

An argument of some plausibility is drawn in favour of the plaintiff from the similarity of promissory notes to bills of exchange. The statute of 3 & 4 of Anne appears to have two objects;—one to enable

the person to whom the note is made payable, to sue the drawer *upon the note* as an instrument (which he could not do before that act) and the other to enable the *endorsee* to maintain an action in his own name against the drawer. The words in this act which describe the note on which an action will lie for the *payee*, are said to be the same as those on which the action will lie for the endorsee, namely, that it shall be a note payable to any person, *or his order;* and it appearing by adjudged cases, that an action will lie for the *payee* although the words "or order" are not in the note, it follows (it is contended) that an action will also lie for the *endorsee*, without those words. If the *letter* of the act was strictly adhered to, certainly neither the *payee*, nor *endorsee*, could support an action on a note, which did not contain such words of negotiability as are mentioned in the act; yet the construction of the judges has been, that the original payee may support an action on a note not made assignable in terms. The foundation of this construction does not fully appear in the cases, but it was probably thought consonant to the *spirit* of the act, as the words "or order" could have no effect, and might be supposed immaterial, in a suit brought by the payee himself against the maker of the note. But to extend this construction to the case of an *endorsement*, without any authority to make it appearing on the face of the note, would have been to violate not only the *letter* but the *spirit* of the act. Consequently no such case anywhere appears. On the contrary, wherever the judges speak of the effect of an endorsement, they always suppose the note itself to have been originally made endorsable. The case of Moore versus Manning, in Com. Rep. 311, was the case of a promissory note originally payable to one *and his order;* it was assigned without the words "or order" in the endorsement; the question was, whether the assignee could assign it again. The Chief Justice, at first, inclined that he could not, but it was afterwards resolved by the whole court, that if the bill was originally assignable, "as it will be (say the court) if it be payable to one and *his order*, then to whomsoever it is assigned, *he* has all the interest in the bill, and may assign it as he pleases. Here the whole stress of the determination is laid upon what were the original terms of the bill, if it was made payable to one *and his order*, it was assignable, even by an endorsee without the word "order" in the endorsement; it follows, therefore, that if the bill was not originally payable to order, it was not assignable at all. The same point is determined, for the same reasons, in the case of Edie & Laird v. The East India Company, in 1 Black. R. 295, where Lord Mansfield says, "the main foundation is to consider what the bill was in its origin;" if in its original creation it was a *negotiable draft*, "it carries the power to assign it." In a similar case, cited in Buller's Nisi Prius, 390, the Court held, that as the note was in its original

creation *endorsable*, it would be so in the hands of the endorsee, though not so expressed in the endorsement.

These cases leave no room to doubt what have been the sentiments of the courts in England upon the subject. To make bills, or notes, assignable, the power to assign them must appear in the instruments themselves; and then, the custom of merchants, in the case of bills of exchange, and the act of Parliament, in the case of notes, operating upon *the contract of the parties*, will make them assignable.

In the case before us, no such contract appears in the bill. The acceptance was an engagement to pay according to the terms of the bill to Bass and Soyer; a *subsequent* endorsement, not authorized by the bill, cannot vary or enlarge that engagement, so as to subject the acceptor, by the law merchant, to an action at the suit of the endorsee.

Judgment for the Defendant.

It is proposed to consider, here, 1. The requisites of a negotiable promissory note or bill of exchange; and 2. Whether any other instruments or contracts are capable of being negotiable.

1. The general requisites of a negotiable note or bill.

The first requisite to be mentioned of a promissory note, is, that it import, simply, a promise to pay. No particular form of words is necessary, and there need not be a promise in express language: but an undertaking to pay must be implied upon the face of the note; and the engagement, in its legal character and effect, must be, a simple, general, and mere, promise to pay. The case of *Overton* v. *Tyler*, illustrates the important principle, that an instrument is not a promissory note within the statute, if the parties have used such language, or attached such incidents to the contract, as show that they did not *intend* it to be a promissory note. The substantive ground of the decision in that case, appears to have been, that the liability of the instrument, by the express agreement, to be merged, at any time, and before maturity, in a judgment, was necessarily repugnant both to negotiability, and to the character of promissory note. And this general principle is recognised and sustained by the opinion of Pollock, C. B., in the late case of *Sibree* v. *Tripp*, 15 Meeson & Welsby, 23, more fully stated hereafter. "It is difficult," said the Chief Baron, "to lay down a rule which shall be applicable to all cases; but it seems to me that a *promissory note*, whether referred to in the statute of Anne or in the text books, means something which the parties *intend* to be a promissory note. We cannot suppose that the legislature intended to prevent parties from making written contracts relating to the payment of money, other than bills and notes." Accordingly, the cases both in England and in this country, go upon the distinctions, between an acknowledgment and a promise to pay: and between a special agreement and a simple promise to pay: and in some instances, the presence or absence of negotiable words 'or order' or 'bearer,' seems to have had some effect in determining the character of the engagement. The

principle applicable to bills of exchange is similar: the instrument, when accepted, must amount to a promise to pay money.—An ordinary due-bill is a promissory note: thus, the forms, "Due M. B. $204.91, for value received, May 28th, 1837, H. C.;" *Brenzer* v. *Wightman*, 7 Watts & Sergeant, 264; "Due K. & K. $325, payable on demand, October 20, 1821," and signed; *Kimball* v. *Huntington*, 10 Wendell, 675; "Due James J., or bearer, the sum of $315, money borrowed this the 20th of April, 1822. John J.;" *Johnson* v. *Johnson*, Minor, 263; "Due J. J. F. $200 borrowed, October 21, 1836; C. W. C.;" *Cummings* v. *Freeman*, 2 Humphreys, 143; and "Due L. R., or bearer, one day from date, $200.26, for value received; as witness my hand, this, &c.;" *Russell* v. *Whipple*, 2 Cowen, 536; have been decided to be promissory notes; and see *Finney* v. *Shirley & Hoffman*, 7 Missouri, 42, and *Luqueer* v. *Prosser*, 1 Hill's N. Y., 256, 259; S. C. 4 Id. 420. In like manner, "Oct. 19, 1830. Good to R. C., or order, for $30, borrowed money. J. W. M.," is a negotiable promissory note; *Franklin* v. *March*, 6 New Hampshire, 364. An instrument acknowledged before a notary public, and signed with the mark of G. C., acknowledging a debt to I. H., to the amount of a certain sum, "which sum of, &c., the said G. C. obliges himself to pay the said I. H. or to his order or attorney, on his first demand, with interest from the day of the date hereof," was decided to be a promissory note; *Hitchcock* v. *Cloutier*, 7 Vermont, 22; and see *Chadwick* v. *Allen*, 2 Strange, 706, and *Wheatley* v. *Williams*, 1 Meeson & Welsby, 533. But in *Read & others* v. *Wheeler*, 2 Yerger, 50, 53, it was held that though language merely implying a promise to pay would be sufficient, as, a promise to account to the payee or order, or, an acknowledgment of a debt, to be paid to the payee, yet that a mere written acknowledgment of a debt due is not equivalent to the terms "to be paid," and is not such an implication as will be sufficient to make a promissory note; in that case, the declaration was on the contract as an acknowledgment, and the form of it is not set out: see also, *Fisher* v. *Leslie*, 1 Espinasse, 426, and *Tomkins* v. *Ashby*, 6 Barnewall & Cresswell, 541; and as to the difference between an acknowledgment and a promise, compare *Gray* v. *Bowden*, 23 Pickering, 282, with *Comwonwealth Insurance Company* v. *Whitney*, 1 Metcalf, 21, 23. However, in *Cummings* v. *Freeman*, 2 Humphreys, 143, the case of *Read & others* v. *Wheeler* is professed to be overruled, and it is said by the court that the acknowledgment of indebtedness implies a promise to pay, and constitutes the writing containing such acknowledgment, a promissory note; and in *Fleming, Linn & Co.* v. *Burge*, 6 Alabama, 373, it was decided that an instrument in writing by which the defendants acknowledged to be due to the plaintiff by them, a certain sum, for keeping stage-horses, was a promissory note, and might be declared on as such. With regard to the legal character of a Certificate of Deposit, there has been some difference of opinion. In *Bank of Orleans* v. *Merrill*, 2 Hill's N. Y., 295, a certificate of deposit payable to the order of S. B. at six months with interest, was said to be a negotiable promissory note; and in *Kilgore* v. *Bulkley*, 14 Connecticut, 363, 383, a certificate in this form, "I do hereby certify that W. T., & B., have deposited in this bank, the sum of $10,608.75, payable on the first day of December next, to their order, and the return of this certificate," was held to be a negotiable promissory note, the endorser of which incurred all the liabilities of the drawer of a bill of exchange; but in *Patterson* v. *Poindexter*, 6 Watts & Sergeant, 227, (confirmed in *Charnley* v. *Dulles*, 8 Id. 353, 361,) a certificate of deposit in this form, "I hereby certify that C. S. T. has deposited in this bank, payable twelve months from 1st May, 1839, with

5 per cent. interest till due, per annum, $3691.63, for the use of R. P. & Co. and payable only to their order, upon the return of this certificate," was decided to be not a negotiable promissory note, but "a special agreement to pay the deposit to any one who should present the certificate and the depositor's order." In determining between these conflicting decisions, the test perhaps consists in the inquiry, whether the transaction is a deposit, or an immediate debt, and engagement to pay. A deposit does not create a present debt, but is in the nature of a bailment, upon which there must be a demand and refusal, or something equivalent to it, before a right of action exists; *Downes* v. *The Phœnix Bank of Charlestown*, 6 Hill, 297; *Watson* v. *Phœnix Bank*, 8 Metcalf, 217, 221; *Johnson* v. *Farmers' Bank*, 1 Harrington, 117, 119; see, however, *Pott* v. *Clegg*, 16 Meeson & Welsby, 321; and *Foley* v. *Hill*, 2 H. of L. Cases, 28: of course, therefore, an instrument merely acknowledging a deposit, upon whatsoever special terms, cannot be a promissory note; and the case is one of construction, depending on the question, whether upon the terms of the special contract, the matter continues to deposit, or is converted into a loan, or other contract creating a present debt, accompanied with an undertaking to pay. The court, in *Kilgore* v. *Bulkley*, probably, took the latter view: in *Patterson* v. *Poindexter*, it must have been considered that, notwithstanding the words "till due" and "payable," the transaction continued to be a deposit, though upon special terms, and subject to a particular stipulation as to the manner and time of payment, and accompanied with a collateral engagement to allow interest; and this latter view is supposed to be correct, and in accordance with commercial understanding. *Patterson* v. *Poindexter* is, to some extent, sustained by *Sibree* v. *Tripp*, 15 Meeson & Welsby, 23. There, an instrument in this form was offered in evidence:

"Bristol, August 14th, 1843.

"Memorandum.—Mr. Sibree has this day deposited with me £500, on the sale of £10,300, 3*l.* per cent. Spanish, to be returned on demand. James T. Tripp:" and it was objected by the defendant, that it was a promissory note, and required a stamp accordingly. But the court of Exchequer were unanimously of opinion, that it was not a promissory note. Pollock, C. B., after the remark above cited, that in order to be a promissory note, it must appear that the parties intended a promissory note, and that the statute of Anne was not designed to prevent other agreements than promissory notes being made in relation to the payment of money, said, "this appears to me to be merely an instrument recording the agreement of the parties in respect of a certain deposit of money, the consideration of which is stated in the memorandum itself, and to be rather an agreement than a promissory note." Parke, B., with whom agreed Alderson, B., said, "This is not a contract to pay money, but a *deposit* of money, and the identical money is to be returned:" and Platt, B., said that it was "quite clear, on the face of the instrument itself, that it is an agreement to return a deposit of money in a particular event. It is, therefore, not a promissory note." However, if there be a direct promise to pay a certain sum of money, which is acknowledged in the instrument to have been deposited, there is no doubt it is a promissory note; *Southern Loan Co.* v. *Morris*, 2 Barr, 175. See *Shenton* v. *James*, 5 Q. B. 199.—In determining between a special agreement and a general promise, there are cases in which the use or omission of words of general negotiability, as, "order," appears to be entitled to have a controlling influence upon the construction of the contract; from the English cases, it seems that an engagement to "account" to one *or order* is a promissory note, but an engagement to account only with the party himself is not necessarily so.

In *Horne* v. *Redfearn*, 4 Bingham's N. C. 433, a letter in this form, "Sir, I have received the sum of £20, which I have borrowed of you, and I have to be accountable for the said sum, with legal interest. I am, &c., P. R.," was decided to be a special agreement, under the stamp act of 55 Geo. 3, c. 184, and not a promissory note; and Bosanquet, J., said, that the fair and reasonable interpretation of the words "I have to be accountable," is, that the party will give credit in account, and pay the balance, and that that is a special agreement and not a promissory note; on the other hand, in *Morris* v. *Lee*, Strange, 629, a note whereby the defendant promised to be accountable to the plaintiff or order for £100, value received, was decided to be a promissory note within the statute of Anne; and the Court said, "this is for value received, and he makes himself accountable to the order; a fourth or fifth endorsee can settle no account with him, therefore we must take the word *accountable* as much as if it had been *pay*." In one case, the undertaking must have contemplated a *payment;* in the other, it might have been satisfied by an allowance in account. In *Woolley* v. *Sergeant*, 3 Halsted, 262, an order, which, in the statement of the case is set out in this form, "Please to credit J. W. or bearer thirty dollars, and I will pay you, &c.," was held not to be negotiable; because, as the court said, it does not require the drawee to pay money, "but only to give credit on a book account, and it confines this request of credit to W. *himself;*" from which it might be thought that in reality, or at least in the opinion of the court, the order was not in favour of *bearer*. An instrument in this form, "Six months from date I guaranty to pay J. K. A., or his order, $180 without interest," and signed, was decided to be a promissory note, in *Bruce* v. *Westcott*, 3 Barbour's Supreme Court, 374, 379. For cases in which an endorsed *guaranty*, with negotiable words, of the *payment* of a promissory note, as distinguished from a guaranty of its collection, has been held to be a promissory note, see *Ketchell* v. *Burns*, 24 Wendell, 456; *Manrow* v. *Durham*, 3 Hill's N. Y., 584; S. C. *Durham* v. *Manrow*, 2 Comstock, 534; *Hunt* v. *Brown*, 5 Hill, 145. See also, *Tuttle* v. *Bartholomew*, 12 Metcalf, 452; *Partridge* v. *Davis*, 20 Vermont, 500.

Another requisite of a promissory note or bill of exchange is, that the liability to pay be personal and absolute; the instrument must be payable at all events, and at some time which must certainly come, and if the payment be dependent on any contingency, the bill or note is not negotiable. Accordingly, the following instruments have been held to be not negotiable; a note payable "when a certain suit is determined pending between S. and M., if said S. should gain the suit;" *Shelton* v. *Bruce*, 9 Yerger, 24; a note payable to bearer "provided the ship M. arrives at an European port of discharge free from capture and condemnation by the British;" *Coolidge* v. *Ruggles*, 15 Massachusetts, 387; a bill payable to order of payee whenever the drawee had sold certain carriages to the amount of the order; *De Forest* v. *Frary*, 6 Cowen, 151, 155; and one in this form, "Please pay to J. H., $130 in specie, or its equivalent, as soon as you receive the amount of my acc't of the government, from Capt. W. A.;" *Henry* v. *Hazen*, 5 Pike, 401; a note payable on demand, with interest, "but no demand to be made as long as the interest is paid;" *Seacord* v. *Burling*, 5 Denio, 444: a note in this form given by two partners in a particular transaction to a third, "Due G. C. on settlement of canal operations on sec. No. 10, Hocking Canal, $1748, which we promise to pay him or order, *on final estimate of said section;*" *Weidler & Carpenter* v. *Kauffman*, 14 Ohio, 455; a bill in which the drawers ordered the defendant to pay to the plaintiff or bearer $400, and take up their note given to the plaintiff and

another for that amount, which was construed as payable on the contingency of that note being given up by the holder at the time of receiving payment; *Cook* v. *Satterlee*, 6 Cowen, 108; and a note in this form, "I agree to take of B. M. & Co., a fifty saw gin, to be delivered at my house by the 1st September next; the said B. M. & Co. warrant the gin to perform well in every respect, or they will make it do so at their own expense—for which I promise to pay B. M. & Co. or bearer one hundred dollars by 1st of January, 1847;" which certainly involved the contingency of the gin being duly delivered, and perhaps that of its working well; *Hodges* v. *Hall*, 5 Georgia, 163. See also *Drury* v. *Macaulay*, 16 Meeson & Welsby, 146. On the other hand, instruments, in the following forms, have been held not to be payable on a contingency, and therefore to be negotiable: where the plaintiff held a promissory note of N. L., and N. L. wrote under it, "L. M., Esq., (defendant) please pay the above note, and hold against me in our settlement. N. L.;" and the defendant accepted; which was distinguished from *Cook* v. *Satterlee*, on the ground that here the drawee is to pay a note which is referred to merely to ascertain the amount, and that the returning of the note as a voucher is no more the performance of another act besides the payment of money, than the retaining of the order itself for the same purpose would be: *Leonard* v. *Mason*, 1 Wendell, 522; a note promising to pay S. S. or order a certain sum "by the 20th of May, or when he completes the building according to contract," which was decided to be payable absolutely and on a day certain; *Stevens* v. *Blunt*, 7 Massachusetts, 240; *Goodloe v. Taylor*, 3 Hawks, 458: and a note in this form, "For value received, I promise to pay J. P., or bearer, $570.50, it being for property I purchased of him in value at this date, as being payable as soon as can be realized of the above amount for the said property I have this day purchased of said P., which is to be paid in the course of the season now coming; B. B.;" which was held to mean that the party promised to pay the sum as soon as the termination of the season, and sooner if the amount could be sooner realized out of the fund; the undertaking to pay being absolute, and the reference to the sale of the property being only to indicate how soon the payment might be made; and as to the time of payment, whatever "the coming season" might mean, it must expire by mere lapse of time; so that the instrument answered the test of a promissory note, in being payable at all events, and within a certain limited time which must certainly come; *Cota* v. *Buck*, 7 Metcalf, 588. In *Pinkham, executrix* v. *Macy*, 9 Metcalf, 174, it appears to have been taken for granted that a note payable to order "at the termination of the ship O. M.'s present voyage," was negotiable. In *Henschel* v. *Mahler*, 3 Hill's N. Y. 132, a bill of exchange in this form, "For fr's 8755.60, payable in Paris, on the 31st Dec'ber, 1839. On the 31st October of this year, pay for this first of exchange, to the order of ourselves, 8755 frs., 60 cts., payable in Paris the 31st December of this year, &c.," was objected to on account of the uncertainty of the time of payment; but the Court said that the meaning to be collected from the whole was, that the time of payment was the 31st December, and that "the 31st October of this year" should be rejected as repugnant and absurd; and Nelson, C. J., said that the great commercial advantages growing out of the general use of negotiable instruments, have induced courts to adopt a most liberal mode of construing them: and this decision was affirmed by the Court of Errors, 3 Denio, 428. A note payable by instalments, may be a good promissory note; *Tucker* v. *Randall*, 2 Massachusetts, 283; *Heywood* v. *Perrin*, 10 Pickering, 228; *Oridge* v. *Sherborne*, 11 Meeson & Welsby, 374; and if it contain a condition that

on default in paying the first instalment, the whole shall become due, it is still a good promissory note, and on default by the maker in paying the first instalment, the maker, or an endorser becomes liable for the whole amount; *Carlon* v. *Kenealy*, 12 Id. 139.

Where a condition or contingeney, is endorsed on the back of the note, it has been held in some of the courts in this country, that the endorsement is not a part of the note, and that though it operates to give notice of the consideration, it does not affect the negotiability; *Sanders* v. *Bacon*, 8 Johnson, 485; *Tappan* v. *Ely*, 15 Wendell, 362; and so where the memorandum is subjoined to the foot of the note; *Pool* v. *Mc Crary et al.*, 1 Kelly, 319; in others, in accordance with the English decisions, that the contingeney becomes a part of the note; *Barnard and others* v. *Cushing and others*, 4 Metcalf, 230; every memorandum annexed to a note of hand, though introduced by a *nota bene*, being regarded as a constituent part of the contract; *Shaw* v. *Methodist Episcopal Society in Lowell*, 8 Metcalf, 223, 226.

Upon the ground, apparently, of the payment being contingent, the circumstance that the note or bill is made payable out of a particular fund, prevents its being negotiable; *Carlisle* v. *Dubree*, 3 J. J. Marshall, 542; *Strader &c.* v. *Batchelor*, 7 B. Monroe, 168; *Blevins* v. *Blevins*, 4 Pike, 441. A promise to pay "as soon as I am in possession of funds to do so from the estate of B." is not a promissory note; *Wiggins* v. *Vaught*, Cheves' Law, 91; nor is an order to an executor or heirs to pay a certain share or sum of money due to the drawer out of the estate, a bill of exchange; *Mills* v. *Kuykendall*, 2 Blackford, 48; *Mershon* v. *Withers*, 1 Bibb, 503, 505: a promise to pay "out of a bond, when it shall be collected on J. D.:" *Stamps* v. *Graves*, 4 Hawks, 102, 112; or "out of the net proceeds after paying the costs and expenses of ore to be raised" from a certain bed; *Worden* v. *Dodge*, 4 Denio, 159; and an order to pay out "of the money received on my account from the Insurance Office, when collected;" *Hamilton* v. *Myrick and Williamson*, 3 Pike, 541; is not a note or bill: an order directing a certain sum to be paid out of notes or other demands left in the hands of the drawee to be collected, or other property left to be disposed of, is not a bill of exchange; *Van Vacter* v. *Flack*, 1 Smedes & Marshall, 393; *Crawford* v. *Cully*, Wright, 453; *Curle* v. *Beers*, 3 J. J. Marshall, 170, 174; nor is an order to pay quarterly rents as they might become due during the year, not merely as being out of a special fund, but as not payable necessarily in money; *Morton* v. *Naylor*, 1 Hill's N. Y., 583; and orders, in this form, "Messrs. C. and R., please pay J. P. the sum of 100 dollars, ou account of my share of rent for Gloucester Fishery, which will be due June 1st;" *Rice* v. *Porter's Adm'rs*, 1 Harrison, 440; and in this, "when in funds, after reimbursing your advances, &c., please pay to E. S. or order, ten thousand dollars, or as much thereof as may remain in your hands after reimbursing yourself, &c." *Smith et al.* v. *Wood*, Saxton, 76, 89; and this, "when in funds from the sales of produce in your hands, pay," &c.; *Gillespie* v. *Mather*, 10 Barr 28; have been held not to be negotiable bills of exchange, on account of the contingency of being payable out of a particular fund. But a direction, in a bill, to charge the payment to a particular account or fund, will not interfere with the negotiableness of the instrument, where it is intended not to prevent the liability from being personal to the drawee, but merely to indicate the account to which the transaction is to be carried, or the fund from which the payer is to reimburse himself. Therefore, an order to pay a certain sum, "and charge to Bedford Road Assessment, &c.;" *Kelley* v. *Mayor, &c., of Brooklyn*, 4 Hill's N. Y. 263; and an order in this form, "Pay to A. & S.,

or order, $215, and I will credit your note to me for that amount, due on the 25th instant—value received;" *Early* v. *M' Cart*, 2 Dana, 414; have been held not to be conditional or restricted to a particular fund, but merely as designating the mode of reimbursement or indemnity, and therefore negotiable bills of exchange. In *Bank of Kentucky* v. *Sanders et al.*, 3 Marshall, 184, an order on the pay-master of the U. S. Army by a district pay-master, directing the payment of a certain sum to payee or order, "on account of the subsistence of the army of the U. S. for the year 1814: For this sum I am to be charged and held accountable, as per advice of equal date with this," was held to be a bill of exchange, the fund being mentioned only as directory to the drawee out of what fund he was to reimburse himself. In *Reeside* v. *Knox*, 2 Wharton, 233, however, in the case of an order drawn by a mail-contractor on the Postmaster-General, it was decided that every bill on government is in contemplation of law drawn on a fund, and that its acceptance is merely a recognition of the instrument as a transfer of credit, or an assignment of funds in its hands, and that such orders are not negotiable. And this is confirmed by the recent case of *The United States* v. *The Bank of the United States*, 5 Howard's Supreme Court, 382, 397, at least to the extent of deciding that an instrument in the form of a bill of exchange, drawn by one government or nation on another government or nation, cannot be a commercial bill subject to protest, or on which the drawer will be liable to the holder for re-exchange, or damages in lieu of it, in case of protest. In this case, a bill was drawn and signed by the Secre- of the Treasury of the United States, on a minister of the French government, payable to order, for a certain sum, "which includes the sum of ——, being the amount of the first instalment to be paid to the United States under the convention concluded, &c." The Supreme Court, reviewing their previous opinion in S. C. 2 Id. 711, 734, decided that this was not a bill subject to commercial law and usage, or on which the drawer was responsible for re-exchange. A bill of exchange, said Mr. Justice Catron, in pronouncing the judgment of the Court, must carry on its face its authority to command the money drawn for; so that the holder, or the notary, acting as his agent, may receive the money, and give a discharge on presenting the bill and receiving payment; or, if payment is refused, enter a protest, from which follows the incident of damages; but if no demand can be made on the bill standing alone, and it depends on the other papers or documents to give it force and effect, and these must necessarily accompany the bill and be presented with it, it cannot be a simple bill of exchange, that circulates from hand to hand as the representative of current cash.—In this case, the mere signature of our Secretary of the Treasury could not be recognised by the French government as conferring authority on the holder to demand payment: the transaction being one of nation with nation, he who demanded payment must have had not only the authority of this nation before he could have approached the French government, but that authority must have been communicated by the head of this government through the proper department carrying on our national intercourse, which was the state department; until the French government was thus officially advised, the bill was valueless in the hands of the holder, as against France; and, accordingly, it was held to follow, from the character of the drawer and the drawee, and the nature of the fund drawn upon, that this transaction could not be governed by the commercial law. This reasoning has the appearance of being somewhat constrained, for the purpose of avoiding a direct contradiction of the opinion expressed in S. C., 2 Howard, 734; the simple principle laid down in *Reeside* v.

Knox, appears to be well founded in reason and analogy, and to be the controlling principle in cases of this kind.

It is probably upon the same ground, of the payment being, as to amount, at least, dependent on a contingency, that it has been held that a note is not negotiable unless it be for the payment of a *sum certain:* a promise to account to A. or bearer, for the proceeds of certain notes; and an acceptance of an order directing payment to one or order of $1000, or what might be due after deducting all advances and expenses, have been decided not to be negotiable; *Fiske* v. *Witt & Tr.* 22 Pickering, 83; *Cushman* v. *Haynes & Trs.* 20 Id. 132.

In some courts it appears to be a practice to allow a note payable on a contingency, or out of a particular fund, to be declared upon as a promissory note between the parties to it, at least where it contains an admission of "value received," or sets forth on its face such circumstances as constitute a consideration; *Odiorne et a.* v. *Odiorne*, 5 New Hampshire, 315; *Congregational Society in Troy* v. *Goddard*, 7 Id. 430, 435; and see *Joliffe* v. *Higgins*, 6 Munford, 3; but in *Stamps* v. *Graves*, 4 Hawks, 102, 113, it is decided that a conditional promise to pay on a contingency, of itself, raises no presumption of a consideration received. In Connecticut and Vermont, instruments in the form of promissory notes, but payable in specific articles, or otherwise defective in negotiability, are allowed to be declared on, between the parties, as specialties; *Brooks* v. *Page*, Chipman, 340; *Dewey* v. *Washburn*, 12 Vermont, 580; *Deneson* v. *Tyson*, 17 Id. 550; *Chaplin* v. *Canada*, 8 Connecticut, 286; yet that is only where the instrument contains an admission of "value received;" *Edgerton* v. *Edgerton*, Id. 6.

To be negotiable, another requisite is, that the bill or note be payable in money, and not in commodities; *Peay* v. *Pickett*, 1 Nott & M'Cord, 255; *Coyle's Executrix* v. *Satterwhite's adm'r*, 4 Monroe, 124; *May* v. *Lansdown*, 6 J. J. Marshall, 165; *Carleton* v. *Brooks*, 14 New Hampshire, 149; *Tindall's Executors* v. *Johnston*, 1 Haywood, 372; *Hodges* v. *Clinton*, 1 Martin, 76; *Bradley et al.* v. *Morris*, 3 Scammon, 182; *Gwinn* v. *Roberts*, 3 Pike, 72; *Pitman* v. *Breckenridge & Crawford*, 3 Grattan, 127; *Reynolds* v. *Richards*, 2 Harris, 206. Moreover, as decided in *M' Cormick* v. *Trotter*, they must be payable in money and not in bank notes; and in *Ex parte Imeson*, 2 Rose, 225, this was applied in the case of a note payable in Bank of England notes. It has repeatedly been decided that a bill or note is not negotiable if it be payable in *current bank notes; Gray* v. *Donahoe*, 3 Watts, 400; *Little* v. *Phenix Bank*, 2 Hill's N. Y. 425; S. C. on Error, 7 Id. 359; *Kirkpatrick* v. *McCullough*, 3 Humphreys, 171 (overruling *Childress* v. *Stuart*, Peck, 276, and *dicta* in *Deberry* v. *Darnell*, 5 Yerger, 451); *Whiteman* v. *Childress*, 6 Humphreys, 303; *State* v. *Corpening*, 10 Iredell, 58, 61; or "in office notes" of a particular bank; *Irvine* v. *Lowry*, 14 Peters, 293; or in state money of a particular bank; *Hawkins* v. *Watkins*, 5 Pike, 481; or in *paper medium; Lange* v. *Kohne*, 1 McCord, 115; or in *current bills; Collins* v. *Lincoln*, 11 Vermont, 268; or in *foreign bills; Jones* v. *Fales*, 4 Massachusetts, 245, 252; *Young* v. *Adams*, 6 Id. 182, 188; or in *Canada money* (the note being made and payable in New York); *Thompson* v. *Sloan*, 23 Wendell, 71; or in a *sight check* on a bank; *Bank* v. *Johnson*, 3 Richardson, 42. The cases of *Keith* v. *Jones*, 9 Johnson, 120, and *Judah* v. *Harris*, 19 Id. 144, in which notes payable "in York State bills or specie;" and "in bank notes current in the city of New York," were held to be negotiable, went upon the ground that the court might take judicial notice that such bills and notes were considered at the time as equivalent to specie: but those cases stand alone in the law, and are

discredited if not entirely overruled, in *Thompson* v. *Sloan* and *Little* v. *Phœnix Bank*. The case of *Swetland* v. *Creigh & others*, 15 Ohio, 118, which held a note payable "in current Ohio Bank notes" to be negotiable, proceeded in part upon the construction of a statute of the state. In some of the Western States, they have refined upon these expressions very acutely. It appears to be conceded that if an instrument be payable in bank notes, it is not a good note or bill of exchange, but whether it is payable in money, or in bank notes, is a question of construction; and they hold that a note or bill payable in 'current money,' or 'current money of the State,' is payable in gold or silver coin, as that is the only *money* current, by the constitution; *M' Chord* v. *Ford, &c.*, 3 Monroe, 166; *Bainbridge* v. *Owen*, 2 J. J. Marshall, 463, 464; *Cockrill* v. *Kirkpatrick*, 9 Missouri, 697; *Williams* v. *Moseley*, 2 Florida, 304, 331; and so of 'Arkansas money,' in that state; *Wilburn* v. *Greer*, 1 English, 255, 258; so of "lawful funds of the United States;" *Ogden* v. *Slade*, 1 Texas, 13; and that the words 'currency,' and 'currency of the State,' as a medium of payment, are to be interpreted according to the state of facts, and the popular understanding of the terms, at the time the note is given, of which the courts will judicially take notice, and therefore, if the banks have at the time suspended the payment of specie, and the actual currency is a depreciated circulation, and the note, on its face, obviously has reference to such depreciated circulation, it will not be payable in money; *Chambers* v. *George*, 5 Littell, 335 (where 'money' in the note is misprinted for 'currency'); *Farwell* v. *Kennett*, 7 Missouri, 595; *Dillard* v. *Evans*, 4 Pike, 175; but if this state of facts do not appear, it will be considered that 'currency,' means the constitutional currency, gold or silver, and a note payable in currency of the State will be deemed to be payable in cash; *Lampton* v. *Haggard*, 3 Monroe, 149; *Cockrill* v. *Kirkpatrick*, 9 Missouri, 697, 702; *Mitchell* v. *Hewitt*, 5 Smedes & Marshall, 361, 366. See *Fleming* v. *Nall, Adm'r.*, 1 Texas, 246, 249, and *Roberts* v. *Short*, Id. 373.

Some cases have occurred of promissory notes, with an agreement at the bottom, by way of memorandum, that work or materials will be accepted in discharge of the note, if done or given within a certain time: it was held in *Tindall's Executors* v. *Johnston*, 1 Haywood, 372, and *Campbell* v. *Mumford*, Id. 398, that in such cases, at the time it is made, the instrument is not negotiable; and therefore can never become so by any subsequent circumstances; and as it is not negotiable, a consideration must be proved, even between the parties; *Thompson* v. *Gaylard*, 2 Id. 150. But see *Moody* v. *Leavitt*, 2 New Hampshire, 171; *Odiorne* v. *Sargent*, 6 Id. 401; *Sexton* v. *Wood*, 17 Pickering, 110.

Moreover, to be negotiable, a bill or note must be for the payment of money *only*, and not for the payment of money and the performance of some other acts; *Wallace* v. *Dyson*, 1 Spears, 127; *Jamieson* v. *Farr*, 1 Haywood, 182; because, as is said in *Boyd* v. *Rumsey, &c.*, 5 J. J. Marshall, 42, a contract has a unity in law. And it must not be in the alternative, for the payment of money *or* commodities, or bank notes; *Ex parte Imeson*, 2 Rose, 225.

Another requisite of a promissory note, or bill of exchange, is said to be, that it must express a payee. It has been decided, however, in England, that a note in the form, "Received of A. B. £—, which I promise to pay on demand," sufficiently expresses that A. B. is the payee; *Green* v. *Davies*, 4 Barnewall & Cresswell, 235, 239; *Ashby* v. *Ashby*, 3 Moore & Payne, 186. And there are many forms of indicating the payee which, though apparently uncertain or unmeaning, are good as payable to bearer. A bill payable to blank or order, is not, while the blank remains, such

a legal bill of exchange or order for the payment of money, as to be the subject of an indictment for the forgery of such instruments; *Rex* v. *Richards*, and *Rex* v. *Randall*, Russell & Ryan, 193, 195: but a blank for the name of the payee is an authority to any *bona fide* holder to fill the blank with his own name, and when so filled, the instrument will be deemed payable to him *ab initio: Cruchley* v. *Clarance*, 2 Maule & Selwyn, 90; *United States* v. *White*, 2 Hill's N. Y., 59, 61; *Bank of Kentucky* v. *Garey, &c.*, 6 B. Monroe, 626; *Close* v. *Fields*, 2 Texas, 232; see *Mitchell* v. *Culver*, 7 Cowen, 336, and 337 *note*. A bill payable to a fictitious payee or order, and endorsed in his name by concert between the drawer and acceptor, may be treated by a *bona fide* holder, as payable to bearer, in a suit against the drawer or acceptor; *Gibson* v. *Minet*, 1 H. Blackstone, 569 (*diss.* Eyre, C. J., and Thurlow, Ch.); and a note made payable to the order of a fictitious payee and negotiated by the maker, is a note payable to bearer; *Plets* v. *Johnson*, 3 Hill's N. Y., 113, 115; *Coggill* v. *The American Exchange Bank*, 1 Comstock, 113, 117: and see *Hortsman* v. *Henshaw et al.*, 11 Howard's S. Ct., 177; and a payee is deemed fictitious, when the name of some person is used, who has not any interest, and is not intended to become a party, in the transaction, whether a person of such a name is known to exist or not; *Foster* v. *Shattuck et al.*, 2 New Hampshire, 446 (where the principle of *Gibson* v. *Minet*, seems to be doubted). In like manner, it has been decided, that a note "payable to the order of the person who should thereafter endorse it," or "to the order of the endorser's name," may be sued by any endorsee or any *bona fide* holder; *U. S.* v. *White*, 2 Hill's N. Y., 59. It has been held, however, that where a writing is complete, and yet expresses no payee, it is not a good promissory note or bill of exchange; and accordingly, a writing in these words, "Boston, 15 May, 1810; good, for $126 on demand," and signed, is not a promissory note; and that an endorsement, "Mr. O. pay on within $750, S. W." is not a negotiable bill; or at least that possession of such instruments is not sufficient title to sue upon them; *Brown* v. *Gilman et al.*, 13 Massachusetts, 158; *Douglass* v. *Wilkenson*, 6 Wendell, 637, 644; and in *Prewitt* v. *Chapman*, 6 Alabama, 86, 89, upon a bill of exchange, otherwise formal, which however expressed no payee, but merely said, "Pay this, my first and only exchange, &c.," it was held that the person, for whose benefit the bill was drawn, and from whom the consideration moved, could, on proof, recover on the bill, but that it could not be sued by bearer; and see *Mayo* v. *Chenoweth*, Breese, 155.

A bill or note payable to the order of A., is the same as if payable to A. or order, and may be sued by A. without being endorsed by him; *Huling* v. *Hugg*, 1 Watts & Sergeant, 418, 420; and a note payable to A. or bearer, is a direct promise to pay any bearer, and may be sued upon by any *bona fide* holder without endorsement; *Bullard* v. *Bell*, 1 Mason, 243, 252; *Matthews* v. *Hall*, 1 Vermont, 317; *Hutchings* v. *Low*, 1 Green, 246; *Tillman et al.* v. *Ailles*, 5 Smedes & Marshall, 373, 378.

Besides these requisites, it is conclusively settled, that a bill or note is not negotiable, unless it contain words of negotiability, such as, "or order," or "bearer," or some word of like effect; *Backus* v. *Danforth*, 10 Connecticut, 298; *Parker* v. *Riddle*, 11 Ohio, 102; *Bush* v. *Peckard*, 3 Harrington, 385, 387; *Broughton* v. *Badgett*, 1 Kelly, 75, 77; *Reed* v. *Murphy*, Id. 236; except where made so by a local statute; *Whiteman* v. *Childress*, 6 Humphreys, 303, 307. Without those words, a note, otherwise sufficient, will be a good promissory note between the parties: but in respect to

its transfer, it stands on the footing of an ordinary chose in action. It may be declared on as a promissory note within the statute of Anne; *Downing* v. *Backenstoes*, 3 Caines, 137; *Goshen Turnpike Co.* v. *Hurtin*, 9 Johnson, 217; *Noland* v. *Ringgold*, 3 Harris & Johnson, 216, 218; and so of a bill of exchange without negotiable words; *Kendall* v. *Galvin*, 15 Maine, 131: such a note, also, is entitled to days of grace; *Smith* v. *Kendall*, 6 Term, 123; *Duncan* v. *Maryland Savings Institution*, 10 Gill & Johnson, 300, 310; *Contra*, *Backus* v. *Danforth*: and it has been held to be within a penal statute against the forgery of promissory notes; *The King* v. *Box*, 6 Taunton, 325: but if a note or bill, without such words, be transferred by endorsement, the endorsee cannot sue the maker in his own name; *Gerard* v. *La Coste*; *Barriere* v. *Nairac*, 2 Dallas, 249; *Noland* v. *Ringgold*, 3 Harris & Johnson, 216; *Matlack* v. *Hendrickson*, 1 Green, 263; *Fernon* v. *Farmer's Adm'r*, 1 Harrington, 32; *Pratt & Moore* v. *Thomas*, 2 Hill's So. Car. 654; *Reed* v. *Murphy*, 1 Kelly, 236; and the endorsee for a valuable consideration does not hold the note discharged of equities and set-offs; *Sanborn* v. *Little*, 3 New Hampshire, 539; *Wiggin* v. *Damrell*, 4 Id. 69; *Dyer* v. *Homer*, 22 Pickering, 253.

As to the liability incurred by an endorsement by the payee, of a note not containing the words "or order," or "or bearer," or, for other cause, not negotiable, there is some conflict in the decisions. The cases in South Carolina proceed upon what is believed to be the true principle, that no liability is incurred upon a simple endorsement by the payee of an instrument without negotiable words; *Wilson* v. *Mullen*, 3 M'Cord, 236; *Benton* v. *Gibson*, 1 Hill's So. Car., 56, 58; *Pratt & Moore* v. *Thomas*, 2 Id. 654, 656; see, also, *Carleton* v. *Brooks*, 14 New Hampshire, 149; and in Tennessee, it has been decided, that the endorser of a note not negotiable by reason of being payable in bank-notes, incurs no liability except by express agreement, or by being guilty of fraud, and that then the liability is not upon the endorsement; *Whiteman* v. *Childress*, 6 Humphreys, 303. Elsewhere, the subject has been strangely confused. In Connecticut, the general rule is laid down, that the endorsement, by the payee or by a stranger, of a promissory note not negotiable, *prima facie* implies a warranty by the endorser, that the maker shall be of ability to pay it when it comes to maturity, and that it is collectible by the use of due diligence; *Prentiss* v. *Danielson*, 5 Connecticut, 176; *Perkins* v. *Catlin*, 11 Id. 213; *Castle* v. *Candee*, 16 Id. 224, 234. In *Seymour* v. *Van Slyck*, 8 Wendell, 404, 421, the Court, per Sutherland, J., was of opinion, that an endorsement by the payee, of a note not containing the words "or order, or bearer," was equivalent to the making of a new note, being an absolute guaranty of payment, or a direct and positive undertaking by the endorser that the note shall be paid to the endorsee; and that the endorser is not entitled to the usual privilege of an endorser of negotiable paper, as he stands in the relation of a principal and not a surety, to the endorsee, and has no right to insist upon a previous demand of the maker, and notice of non-payment. In Ohio, in *Parker* v. *Riddle*, 11 Ohio, 102, there was much diversity of opinion among the judges as to the liability created by an endorsement by the payee of a note without the words "or order," or "bearer:" of the four judges, one thought that it might be declared on as an original promissory note; a majority, however, held it to be collateral, and subject, in some degree, to the usages of mercantile law, as applied to the endorsement of negotiable paper. In Vermont, the endorsement of a non-negotiable note is followed by all the consequences of the endorsement of a negotiable note; *Aldis et al.* v. *Johnson*, 1 Vermont, 136. There is a dictum, also, in

Dean v. *Hall*, 17 Wendell, 214, 221, by Cowen J., grounded on Chitty on Bills, 218, 219, that the endorsement of a note without words of negotiability is fully equivalent to the drawing of a new bill: and in Pennsylvania, the same thing has been decided. In *Leidy* v. *Tammany*, 9 Watts, 353, indeed, it was said by Kennedy, J., that the endorsement of a note without negotiable words, might be treated, either as the making of a new note, or the drawing of a new bill: a singular suggestion, since no two contracts can be more unlike, than the liability of a maker, and of an endorser, one being absolute and the other contingent; and if it is one, it cannot be the other. See *Gwinnell* v. *Herbert*, 5 A. & E. 436. In *Patterson* v. *Poindexter*, 6 Watts & Sergeant, 227, 234, it was said by the Chief Justice, that the endorser of a note without negotiable words, was responsible on the contract, by reason that the endorsement is a new drawing: and in *Brenzer* v. *Wightman*, 7 Id. 264, it is decided that a note made without the words "or order," or "bearer," is not, as originally made, a negotiable note; but that the payee, by endorsing it payable to order, makes it negotiable; and after that, it becomes, as between the endorser and the holder, an inland bill of exchange, in which the endorser stands in the light of a new drawer of a bill payable to the order of the endorsee; and the holder, by taking it in this character, takes it subject to all the rules that regulate the relation between endorser and endorsee in negotiable instruments. Of course, it cannot be meant by this, that by the endorsement, the note becomes negotiable as against the maker: but this decision, by requiring legal demand and notice, seems of necessity to imply that such a note is a perfect negotiable instrument, as well against the maker as the endorser: for unless the maker had engaged to pay any endorsee, and upon endorsement had become a principal debtor to the endorsee, no reason can be given why demand and notice should be necessary, and the strict requirement of them would be in derogation of justice. If it be said that such an endorsement is a non-accepted bill drawn upon the maker, which requires presentment for acceptance, the answer would be, that the maker having given one promissory note, the legal title to which remains in the payee, could not be expected to accept another bill of exchange upon the same consideration, and therefore the endorser is in the situation of one drawing without funds, and not entitled to notice. As against the maker, the endorsement of a non-negotiable note is certainly merely an assignment in equity of the beneficial interest in the note, or an authority to receive the proceeds to the endorsee's use, and to employ the endorser's name for the purpose: the endorsee has no legal right of action against the maker, and therefore can have no legal right of demand: he could not make a demand in his own right, or have the note protested in his own name, but must do both in the name and as the agent of the endorser; and how can legal notice be required between those who stand in the relation, not of endorser and endorsee, but of principal and agent, or trustee and cestui que trust? Can a principal contract be negotiable for the purpose of giving to the dependent and accessory contract of endorsement, all the qualities of an endorsement of a negotiable instrument, and yet not be negotiable in itself? How is it, that the original note can act upon an endorsement so as to transform an equitable assignment into a negotiable instrument, and yet that this negotiable endorsement, when it comes to act upon the original note, finds it wanting the very quality which it is continually deriving from it? The very fine distinction, apparently intended to be suggested in *Patterson* v. *Poindexter*, 6 Watts & Sergeant, 227, 234, 235, between a "contingent guaranty of payment" and "a transfer of

the title," does not suggest what quality it is, that distinguishes, *as regards assignment or transfer*, "commercial paper" from ordinary choses in action on the one hand, and negotiable instruments on the other, nor what reason or authority exists for construing, in the case of one particular kind of non-negotiable instruments, that which would otherwise be a mere equitable assignment without liability, into a guaranty, and a guaranty affected by that peculiar contingency which is otherwise applicable only to the endorsement of negotiable instruments. With regard to the English authorities cited in *Leidy* v. *Tammany*, and in Chitty on Bills, there is none in which it appears that the instrument, in regard to which it has been said that endorsement is equivalent to the drawing of a new bill, was without the words "or order," or, "or bearer," unless it may be *Hill et al.* v. *Lewis*, cited from 1 Salkeld, 132. A dictum in that case seems, indeed, to have been the origin of the whole doctrine which is here opposed; and an examination of that case, as reported by Salkeld, may perhaps show that that dictum has been misunderstood, and the true bearing and authority of the case misapprehended. (1.) The declaration in *Hill et al.* v. *Lewis*, 1 Salk. 132, contained counts against the endorser on the bills, and on a *mutuatus*, and on an *indebitatus assumpsit* for money laid out for the use of the defendant. After a finding by the jury for the plaintiff, the latter prayed to take the verdict upon the indebitatus assumpsit, and because the person to whom the note was given by the defendant, "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" the deliveree, the verdict was taken on the indebitatus count for money laid down for the defendant's use: and this agrees with the statement in the report of the same case in Skinner, 410, and Holt, 116, that the person to whom the note was endorsed, paid "on the account," or "by the order, and on the account" of the endorser. The recovery, therefore, was not on the endorsement, but upon the payment to the endorser's use. Not only, therefore, is the case no authority for the position for which it has so often been cited, but it is obvious that the counsel of both parties were of opinion, that a verdict could not have been sustained upon the instrument itself, the plaintiff's anticipating the objection of the want of the words "or order," before it was made, and the defendant's actually making it, but after it was too late. (2.) With regard to the *dictum* of Lord Holt, that if a note be made payable to one without the words "or to his order," an endorsement of it, renders the endorser, but not the drawer, liable to the endorsee, it must be observed, that according to Skinner, and Cases temp. Holt, the dictum of the Chief Justice was that, though a note payable to one *or bearer*, be not endorsable (to render the maker liable to an endorsee), yet that if it is endorsed, the endorser shall be charged; and the remark so qualified, agrees precisely with what had been recently determined in *Hodges* v. *Steward*, 1 Salk. 125, and afterwards in *Nicholson* v. *Sedgwick*, 1 Lord Raymond, 180 (and see *Bank of England* v. *Newman*, Id. 442), and was the prevailing doctrine before the statute of Anne, and the case of *Grant* v. *Vaughan*, 3 Burrow, 1516; but that doctrine did not put notes payable to *bearer*, on a footing with notes payable to one person only; and it apparently admitted such notes to be *negotiable* in all respects except that the maker of them must be sued in the name of the original payee, which was a restriction imposed for the prevention of fraud. This view of the dictum in *Hill et al.* v. *Lewis* is also taken in *Stoney* v. *Beaubien*, 2 McMullan, 313, 322; and in *Hall* v. *Newcomb*, 7 Hill, 416, 421. (3.) The

case of *Duckmanee* v. *Keckwith*, Comb. 176, renders it improbable that Lord Holt would, in *Hill et al.* v. *Lewis*, confidently assert what, but two years before, he would not admit, and shows that his opinion inclined against the liability of the endorser of a note containing no negotiable words whatever. That case is as follows. "A bill of exchange,—is drawn payable to J. S. (not saying, or order), J. S. assigns this bill by endorsement and the action is brought against J. S.—Holt, Ch. J. If this be a bill, which is assignable, then clearly the action lieth; here the question is, whether this will amount to a new bill to charge the endorser? I agree, if it were payable to J. S., or order, there it is assignable, and you may have your action against the endorser, or resort to the first drawer." And after some conversation between Holt and Dolben on another point, the case "adjournatur."—There is one recent English case, which may be taken notice of, that of *Plimley* v. *Westley*, 2 Bing. N. C. 249. There, the defendant had endorsed and given to the plaintiff, on account of a debt for goods sold and delivered, a note made by A., payable to B. without the words "or order," and endorsed by B. and C., from the latter of whom the defendant had received it for a valuable consideration; the note was presented several days after it was due, and was not paid, and no notice was given to the endorser: in assumpsit on the note, with a count for goods sold and delivered, the question was, whether the defendant was liable on the note, or was liable on the consideration, or was discharged altogether; and Tindal, C. J., said, that he was not liable on the note, but that he was liable for the original consideration, and that as the note was without negotiable words, the holder could not sue the endorser, nor the endorser, the maker, and therefore that no prejudice could arise from the neglect to give notice: and although he remarked that if there had been a new stamp, the endorsement *might* have operated as the making of a new note, yet this was a passing admission grounded on *Hill* v. *Lewis*, which had just been cited from Salkeld by the counsel; and the principle decided in this case, that in regard to such a note, an endorsement is not a dependent and accessory contract, seems necessarily to deprive it of the liabilities of an endorsement of a negotiable instrument.

The true statement of the law upon this point is believed to be, that the endorsement by the payee of a note without negotiable words, does not render the endorser liable upon the instrument, as the maker of a new note or the drawer of a new bill; that the question whether any, and what, liability is incurred by the delivery of a note so endorsed, will depend upon the intention of the parties and the circumstances of the transaction, which may make the endorsement a guaranty of the maker's solvency, or a guaranty of punctual payment, or an engagement for anything else; but prima facie such endorsement and delivery is but a transfer of the beneficial interest in the note, without recourse in regard to anything but the genuineness of the instrument, and that only, where there has been an absolute transfer for a valuable consideration. See *Gillespie* v. *Mather*, 10 Barr, 28, 31.

The effect of an endorsement, by a third person, not the payee, of a negotiable note, appears also to depend upon the intention of the parties, to be ascertained by parol evidence; and according to the time when the endorsement is made, and the acts and declarations of the parties, and other circumstances, it will be construed either as an original promise, or an endorsement, or a guaranty of the maker's solvency: but the decisions on this point are unsettled and perplexed. See *Dean* v. *Hall*, 17 Wendell, 214; *Oakley* v. *Boorman*, 21 Id. 588; *Seabury* v. *Hungerford*, 2 Hill's N. Y., 80; *Hall* v. *Newcomb*, 3 Id.

233; S. C. on error, 7 Id. 416; *Ellis* v. *Brown*, 6 Barbour's S. Ct., 283; *Spies* v. *Gilmore*, 1 Comstock, 322; *Wylie* v. *Lewis*, 7 Connecticut, 301; *Perkins* v. *Catlin*, 11 Id. 213; *Laflin* v. *Pomeroy*, 11 Id. 440; *Austin* v. *Boyd*, 24 Pickering, 64; *Richardson* v. *Lincoln*, 5 Metcalf, 201, 203; *Union Bank of Weymouth & Braintree* v. *Willis*, 8 Id. 504; *Benthall* v. *Judkins and others*, 13 Id. 266; *Colburn* v. *Averill*, 30 Maine, 310, 318; *Sandford* v. *Norton*, 14 Vermont, 228; *Sylvester, Ex'r* v. *Downer*, 20 Id. 356; *Leech* v. *Hill*, 4 Watts, 448; *Taylor* v. *M'Cune*, 1 Jones, 461; *Amsbaugh* v. *Gearhart*, Id. 482; *Campbell* v. *Knapp*, 3 Harris, 27, 30; *Stoney* v. *Beaubien*, 2 McMullan, 313; *Tuten* v. *Ryan*, 1 Speers, 240; *Garrett* v. *Butler*, 2 Strobhart, 193, 195; *Devore* v. *Mundy*, 4 Id. 15; *Nesbit* v. *Bradford*, 6 Alabama, 747, 749; *Thomas et al.* v. *Jennings et al.*, 5 Smedes & Marshall, 627; *Fitzhugh et al.* v. *Love's Ex'or*, 6 Call, 5; *Watson* v. *Hurt*, 6 Grattan, 633; *Champion & Lathrop* v. *Griffith*, 13 Ohio, 228; *Robinson* v. *Abell et al.*, 17 Id. 36; *Fear* v. *Dunlap*, 1 Iowa, 331; *Powells* v. *Thomas*, 7 Missouri, 440; *Cox* v. *Adams*, 2 Kelly, 158; *Collins* v. *Everett*, 3 Id. 266.

2. Whether any other instruments than promissory notes and bills of exchange are capable of being negotiable.

An instrument under seal, though in the form of a negotiable promissory note, is not negotiable; *Foster* v. *Floyd*, 4 McCord, 159; the endorser of such an instrument is not liable upon his endorsement; *Frevall* v. *Fitch*, 5 Wharton, 325, 331; *Patterson* v. *Poindexter*, 6 Watts & Sergeant, 227, 234; *Force* v. *Craig*, 2 Halsted, 272, 275; *Parker* v. *Kennedy*, 1 Bay, 398; *Parks* v. *Duke*, 2 McCord, 381; *Pratt & Moore* v. *Thomas*, 2 Hill's So. Car. 654, in which *Bay* v. *Freazer*, 1 Bay, 66, is declared to have been overruled; *Tucker* v. *English*, 2 Speers, 673; *Lewis* v. *Wilson*, 5 Blackford, 370; nor can the assignee of such an instrument sue the obligor in his own name; *Clark* v. *Farmers' Manufacturing Co.*, 15 Wendell, 256; *Sayre* v. *Lucas*, 2 Stewart, 259; and he takes it subject to the equities between the original parties; *Hopkins* v. *The Railroad Company*, 3 Watts & Sergeant, 410.

By statutes, in some of the States, this rule is altered. In North Carolina, bonds, bills, and notes with or without seal, have, from an early period, been negotiable; Act of 1786; Rev. St. of 1836–37, vol. 1, p. 94. In Georgia, under a statute, all sealed and unsealed instruments for a definite sum of money or for specific articles, payable to order, assigns, or bearer, are negotiable by endorsement; *Broughton* v. *Badgett*, 1 Kelly, 75; *Reed* v. *Murphy*, Id. 236. In Ohio, sealed instruments payable to one, or order or bearer, and in Alabama, such as are payable to one or bearer are negotiable by endorsement, but not without endorsement, even though payable to bearer; *Avery* v. *Latimer & Fell*, 14 Ohio, 542; *Carew & Coates* v. *Northrup*, 5 Alabama, 367; and the Ohio statute rendering bonds and notes drawn for any sum or sums of money certain, negotiable by endorsement, has been decided to apply to notes payable in current bank notes; *Swetland* v. *Creigh & others*, 15 Ohio, 118. In Kentucky, Missouri, Illinois, and Arkansas, bonds, bills, and notes for money or property, but not for personal services, or work, are assignable at law; *Marcum et al.* v. *Hereford*, 8 Dana, 1; *Bothick's Adm'rs* v. *Purdy*, 3 Missouri, 82; *Beatty* v. *Anderson*, 5 Id. 447; *Jeffers* v. *Oliver*, Id. 433; *Prather* v. *McEvoy*, 8 Id. 661; *Hawkins* v. *Watkins*, 5 Pike, 481; *Buckner* v. *Greedwood*, 1 English, 201, 207; *Sappington* v. *Pulliam*, 3 Scammon, 385; *Buckmaster* v. *Eddy*, Breese, 300.

A bill of lading is sometimes spoken of as *quasi* negotiable. An endorsement and delivery of it, vest the title to the goods while in *transitu* in the endorsee; but the instrument is not

negotiable, and suit cannot be brought upon it in the name of the endorsee; *Thompson* v. *Dominy*, 14 Meeson & Welsby, 403.

Letters of credit and commercial guaranties are not negotiable; *Birckhead* v. *Brown*, 5 Hill's N. Y., 635, 646. It is a different question, whether a general guaranty to any one who shall give credit to a particular person, does not become an available contract in favour of any one who on the faith of it gives credit according to its tenor; see *Russell et al.* v. *Wiggin et al.*, 2 Story, 214; *Carnegie & another* v. *Morrison & another*, 2 Metcalf, 381.

A guaranty, endorsed or underwritten, on a negotiable promissory note, is not negotiable, and cannot be sued on by a subsequent holder in his own name; *Lamourieux* v. *Hewit*, 5 Wendell, 307; *Hall* v. *Farmer*, 5 Denio, 484; *True* v. *Fuller*, 21 Pickering, 140; *M'Doal* v. *Yeomans*, 8 Watts, 361; *Sneveley* v. *Ekel*, 1 Watts & Sergeant, 203; though it may operate as an endorsement of the note; *Myrick* v. *Hasey*, 27 Maine, 9: see, however, *Tuttle* v. *Bartholomew*, 12 Metcalf, 452. In New York, attempts have been made to distinguish between an independent guaranty and a guaranty endorsed on a note; and to treat the latter, according to circumstances, as an endorsement, or a new note, or an endorsement with a waiver of demand and notice; but these distinctions have tended only to confusion and discord; *Watson's Executors* v. *McLaren*, 19 Wendell, 558; S. C. on error, 26 Id. 425; *Luqueer* v. *Prosser*, 1 Hill's N. Y., 256; S. C. on error, 4 Id. 420; *Miller* v. *Gaston*, 2 Id. 189; but in all the cases it seems to be agreed that as a guaranty, it is not negotiable: and see *Barber* v. *Ketchum*, 7 Hill, 444, 449. A power of attorney to confess judgment, attached to a note, was thought in *Osborn* v. *Hawley*, 19 Ohio, 130, contrary to *Overton* v. *Tyler*, not to interfere with its negotiability; but the power itself would not become negotiable.

Upon the whole, the opinion expressed in *Birckhead* v. *Brown*, 5 Hill's N. Y., 635, 646, that in this country, no instruments are negotiable but regular promissory notes and bills of exchange, appears to be entirely correct.

Negotiation of Bills and Notes.

SWIFT *v.* TYSON.

In the Supreme Court of the United States.

JANUARY TERM, 1842.

[REPORTED, 16 PETERS, 1–24.]

The holder of a negotiable instrument, who has taken it bona fide, *for a valuable consideration in the ordinary course of business, when it was not over-due, and without notice of facts which impeach its validity as between antecedent parties, has a title unaffected by those facts, and may recover on the instrument, although it may be without any legal validity as between the antecedent parties.*

A pre-existing debt may constitute a valuable consideration within the meaning of the foregoing rule.

Mr. Justice STORY delivered the opinion of the Court.*

This cause comes before us from the Circuit Court of the southern district of New York, upon a certificate of division of the judges of that Court.

The action was brought by the plaintiff, Swift, as endorsee, against the defendant, Tyson, as acceptor, upon a bill of exchange dated at Portland, Maine, on the first day of May, 1836, for the sum of one thousand five hundred and forty dollars, and thirty cents, payable six months after date and grace, drawn by one Nathaniel Norton and one Jarius S. Keith upon and accepted by Tyson, at the city of New York, in favour of the order of Nathaniel Norton, and by Norton endorsed to the plaintiff. The bill was dishonoured at maturity.

At the trial the acceptance and endorsement of the bill were admitted, and the plaintiff there rested his case. The defendant then introduced in evidence the answer of Swift to a bill of discovery, by which it appeared that Swift took the bill before it became due, in payment of a promissory note due to him by Norton and Keith; that he understood that the bill was accepted in part payment of some lands sold by Nor-

* The Reporter's statement has been omitted. The facts are sufficiently stated in the opinion of the Court.

ton to a company in New York; that Swift was a bona fide holder of the bill, not having any notice of anything in the sale or title to the lands, or otherwise, impeaching the transaction, and with the full belief that the bill was justly due. The particular circumstances are fully set forth in the answer in the record; but it does not seem necessary farther to state them. The defendant then offered to prove, that the bill was accepted by the defendant as part consideration for the purchase of certain lands in the state of Maine, which Norton and Keith represented themselves to be the owners of, and also represented to be of great value, and contracted to convey a good title thereto; and that the representations were in every respect fraudulent and false, and Norton and Keith had no title to the lands, and that the same were of little or no value. The plaintiff objected to the admission of such testimony, or of any testimony, as against him, impeaching or showing a failure of the consideration, on which the bill was accepted, under the facts admitted by the defendant, and those proved by him, by reading the answer of the plaintiff to the bill of discovery. The judges of the Circuit Court thereupon divided in opinion upon the following point or question of law: Whether, under the facts last mentioned, the defendant was entitled to the same defence to the action, as if the suit was between the original parties to the bill, that is to say, Norton, or Norton and Keith, and the defendant; and whether the evidence so offered was admissible as against the plaintiff in the action. And this is the question certified to us for our decision.

There is no doubt, that a bona fide holder of a negotiable instrument for a valuable consideration, without any notice of facts, which impeach its validity as between the antecedent parties, if he takes it under an endorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support. As little doubt is there, that the holder of any negotiable paper, before it is due, is not bound to prove that he is a bona fide holder for a valuable consideration, without notice; for the law will presume that, in the absence of all rebutting proofs, and therefore it is incumbent upon the defendant to establish by way of defence satisfactory proofs of the contrary, and thus to overcome the prima facie title of the plaintiff.

In the present case, the plaintiff is a bona fide holder without notice, for what the law deems a good and valid consideration, that is, for a pre-existing debt; and the only real question in the cause is, whether,

under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. We say, under the circumstances of the present case, for the acceptance having been made in New York, the argument on behalf of the defendant is, that the contract is to be treated as a New York contract, and therefore to be governed by the laws of New York, as expounded by its courts, as well upon general principles, as by the express provisions of the thirty-fourth section of the judiciary act of 1789, ch. 20. And then it is further contended, that by the law of New York, as thus expounded by its courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments.

In the first place, then, let us examine into the decisions of the courts of New York upon this subject. In the earliest case, Warren v. Lynch, 5 Johns. R. 289, the Supreme Court of New York appear to have held, that a pre-existing debt was a sufficient consideration to entitle a bona fide holder without notice to recover the amount of a note endorsed to him, which might not, as between the original parties, be valid. The same doctrine was affirmed by Mr. Chancellor Kent in Bay v. Coddington, 5 Johns. Chan. Rep. 54. Upon that occasion he said, that negotiable paper can be assigned or transferred by an agent or factor, or by another person, fraudulently, so as to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud. But he added, that the holders in that case were not entitled to the benefit of the rule, because it was not negotiated to them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash, or property advanced, debt created, or responsibility incurred, on the strength and credit of the notes; thus directly affirming, that a pre-existing debt was a fair and valuable consideration within the protection of the general rule. And he has since affirmed the same doctrine, upon a full review of it, in his Commentaries, 3 Kent. Comm. sect. 44, p. 81. The decision in the case of Bay v. Coddington, was afterwards affirmed in the Court of Errors, 20 Johns. R. 637, and the general reasoning of the chancellor was fully sustained. There were, indeed, peculiar circumstances in that case, which the Court seem to have considered as entitling it to be treated as an exception to the general rule, upon the ground, either because the receipt of the note was under suspicious circumstances, the transfer having been made after the known insolvency of the endorser, or because the holder had received it as a mere security for contingent responsibilities, with which the holder had not then become charged. There was however a considerable diversity of opinion among the members of the Court upon that occa-

sion, several of them holding that the decree ought to be reversed, others affirming that a pre-existing debt was a valuable consideration sufficient to protect the holders, and others again insisting, that a pre-existent debt was not sufficient. From that period, however, for a series of years, it seems to have been held by the Supreme Court of the state, that a pre-existing debt was not a sufficient consideration to shut out the equities of the original parties in favour of the holders. But no case to that effect has ever been decided in the Court of Errors. The cases cited at the bar, and especially Rosa v. Brotherson, 10 Wend. R. 85; The Ontario Bank v. Worthington, 12 Wend. R. 593, and Payne v. Cutler, 13 Wend. R. 605, are directly in point. But the more recent cases, The Bank of Salina v. Babcock, 21 Wend. R. 490, and the Bank of Sandusky v. Scoville, 24 Wend. R. 115, have greatly shaken if they have not entirely overthrown those decisions, and seem to have brought back the doctrine to that promulgated in the earliest cases. So that, to say the least of it, it admits of serious doubt, whether any doctrine upon this question can at the present time be treated as finally established; and it is certain, that the Court of Errors have not pronounced any positive opinion upon it.

But, admitting the doctrine to be fully settled in New York, it remains to be considered, whether it is obligatory upon this Court, if it differs from the principles established in the general commercial law. It is observable that the Courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed or ancient local usage: but they deduce the doctrine from the general principles of commercial law. It is, however, contended, that the thirty-fourth section of the judiciary act of 1789, ch. 20, furnishes a rule obligatory upon this Court to follow the decisions of the state tribunals in all cases to which they apply. That section provides "that the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, in cases where they apply." In order to maintain the argument, it is essential, therefore, to hold, that the words "laws," in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the

various cases, which have hitherto come before us for decision, this Court have uniformly supposed, that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.

It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying, that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language), that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes

due; we are prepared to say, that receiving it in payment of, or as security for pre-existing debt, is according to the known usual course of trade and business. And why upon principle should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuity to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine would become of that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts.

This question has been several times before this Court, and it has been uniformly held, that it makes no difference whatsoever as to the rights of the holder, whether the debt, for which the negotiable instrument is transferred to him, is a pre-existing debt, or is contracted at the time of the transfer. In each case he equally gives credit to the instrument. The cases of Coolidge v. Payson, 2 Wheaton, R. 66, 70, 73, and Townsley v. Sumrall, 2 Peters, R. 170, 182, are directly in point.

In England the same doctrine has been uniformly acted upon. As long ago as the case of Pillans and Rose v. Van Meirop and Hopkins, 3 Burr. 1664, the very point was made and the objection was overruled. That, indeed, was a case of far more stringency than the one now before us; for the bill of exchange, there drawn in discharge of a pre-existing debt, was held to bind the party as acceptor, upon a mere promise made by him to accept before the bill was actually drawn. Upon that occasion Lord Mansfield, likening the case to that of a letter of credit, said, that a letter of credit may be given for money already

advanced, as well as for money to be advanced in future: and the whole Court held the plaintiff entitled to recover. From that period downward there is not a single case to be found in England in which it has ever been held by the Court, that a pre-existing debt was not a valuable consideration, sufficient to protect the holder, within the meaning of the general rule, although incidental dicta have been sometimes relied on to establish the contrary, such as the dictum of Lord Chief Justice Abbot in Smith v. De Witt, 6 Dowl. & Ryland, 120, and De la Chaumette v. The Bank of England, 9 Barn. & Cres. 209, where, however, the decision turned upon very different considerations.

Mr. Justice Bayley, in his valuable work on bills of exchange and promissory notes, lays down the rule in the most general terms. "The want of consideration," says he, "in toto or in part, cannot be insisted on, if the plaintiff or any intermediate party between him and the defendant took the bill or note bona fide and upon a valid consideration." Bayley on Bills, p. 499, 500, 5th London edition, 1830. It is observable that he here uses the words "valid consideration," obviously intending to make the distinction, that it is not intended to apply solely to cases, where a present consideration for advances of money on goods or otherwise takes place at the time of the transfer and upon the credit thereof. And in this he is fully borne out by the authorities. They go farther, and establish, that a transfer as security for past, and even for future responsibilities, will, for this purpose, be a sufficient, valid and valuable consideration. Thus, in the case of Bosanquet v. Dudman, 1 Starkie, R. 1, it was held by Lord Ellenborough, that if a banker be under acceptances to an amount beyond the cash balance in his hands, every bill he holds of that customer's, bona fide, he is to be considered as holding for value; and it makes no difference, though he hold other collateral securities, more than sufficient to cover the excess of his acceptances. The same doctrine was affirmed by Lord Eldon in Ex parte Bloxham, 8 Ves. 531, as equally applicable to past and to future acceptances. The subsequent cases of Heywood v. Watson, 4 Bing. R. 496, and Bramah v. Roberts, 1 Bing. New. Ca. 469, and Percival v. Frampton, 2 Cromp. Mees. & Rosc. 180, are to the same effect. They directly establish that a bona fide holder, taking a negotiable note in payment of or as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties. And these are the latest decisions, which our researches have enabled us to ascertain to have been made in the English Courts upon this subject.

In the American Courts, so far as we have been able to trace the decisions, the same doctrine seems generally, but not universally to prevail. In Brush v. Scribner, 11 Conn. R. 388, the Supreme Court

of Connecticut, after an elaborate review of the English and New York adjudications, held, upon general principles of commercial law, that a pre-existing debt was a valuable consideration, sufficient to convey a valid title to a bona fide holder against all the antecedent parties to a negotiable note. There is no reason to doubt, that the same rule has been adopted and constantly adhered to in Massachusetts; and certainly there is no trace to be found to the contrary. In truth, in the silence of any adjudications upon the subject, in a case of such frequent and almost daily occurrence in the commercial states, it may fairly be presumed, that whatever constitutes a valid and valuable consideration, in other cases of contract, to support titles of the most solemn nature, is held a fortiori to be sufficient in cases of negotiable instruments, as indispensable to the security of holders, and the facility and safety of their circulation. Be this as it may, we entertain no doubt, that a bona fide holder, for a pre-existing debt, of a negotiable instrument, is not affected by any equities between the antecedent parties, where he has received the same before it became due, without notice of any such equities. We are all, therefore, of opinion, that the question on this point, propounded by the Circuit Court for our consideration, ought to be answered in the negative; and we shall accordingly direct it so to be certified to the Circuit Court.

Mr. Justice CATRON said:

Upon the point of difference between the judges below, I concur, that the extinguishment of a debt, and the giving a post consideration, such as the record presents, will protect the purchaser and assignee, of a negotiable note, from the infirmity affecting the instrument before it was negotiated. But I am unwilling to sanction the introduction into the opinion of this Court, a doctrine aside from the case made by the record, or argued by the counsel, assuming to maintain, that a negotiable note or bill pleaded as collateral security, for a previous debt, is taken by the creditor in the due course of trade; and that he stands on the foot of him who purchases in the market for money, or takes the instrument in extinguishment of a previous debt. State Courts of high authority on commercial questions have held otherwise; and that they will yield to a mere expression of opinion of this Court, or change their course of decision in conformity to the recent English cases referred to in the principal opinion, is improbable; whereas, if the question was permitted to rest until it fairly arose, the decision of it either way by this Court, probably, would, and I think ought to settle it. As such a result is not to be expected from the opinion in this cause, I am unwilling to embarrass myself with so much of it as treats of negotiable instruments taken as a pledge. I never heard this question spoken of as belonging to the

case, until the principal opinion was presented last evening; and therefore I am not prepared to give any opinion, even was it called for by the record.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the southern district of New York, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this Court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this Court, that the defendant was not, under the facts stated, entitled to the same defence to the action as if the suit was between the original parties to the bill; that is to say, the said Norton, or the said Norton and Keith and the defendant: and that the evidence offered in defence and objected to, was not admissible as against the plaintiff in this action. Whereupon it is now here ordered and adjudged by this Court, that an answer in the negative be certified to the said Circuit Court.

The endorsement and delivery of a negotiable instrument, transfer the title to the endorsee. And the negotiation of such an instrument, that is, a transfer, *bona fide*, in the usual course of business, for a valuable consideration and without notice, is a creation, in the endorsee, of an original and paramount right of action against the previous parties; and the instrument in his hands is discharged of all equitable and legal defences to which it may have been subject before it came to him; see *Wheeler* v. *Guild*, 20 Pickering, 545, 553; &c.

The only exception is, where the instrument originally was made upon a consideration which by positive statute renders the instrument void, such as usury, or money lost by gaming; for, unless the instrument is expressly declared to be void, mere illegality of consideration will not vitiate the instrument in the hands of a *bona fide* holder; *Vallett* v. *Parker*, 6 Wendell, 615; *Rockwell* v. *Charles*, 2 Hill's N. Y., 499; *Sauerwein* v. *Brunner*, 1 Harris & Gill, 477; *Henderson* v. *Shannon*, 1 Devereux, 147; *Early* v. *McCart*, 2 Dana, 414, 416; but even in such a case, the payee of a note thus made void for illegality of consideration, if he endorse and negotiate the note, is liable upon his endorsement to a *bona fide* holder without notice; for his endorsement is a new contract; *M'Knight* v. *Wheeler*, 6 Hill's N. Y. 492.

With regard to the question particularly discussed in *Swift* v. *Tyson*, the principle may now be considered as settled, that if the instrument is given merely as collateral security for an existing debt, the right of action on the original debt not being altered, it is not given for a valuable consideration, and is not discharged of equities; but if it is accepted in satisfaction and

discharge or extinguishment of the previous liability, or if a security be given up, or time be given, or other new consideration intervene, the person so receiving the instrument is a holder for value, and is not affected by previous equities; *Petrie* v. *Clark & others*, 11 Sergeant & Rawle, 377, 388; *Depeau* v. *Waddington*, 6 Wharton, 220, 232; *Brush* v. *Scribner*, 11 Connecticut, 388, 403; *Homes* v. *Smith*, 16 Maine, 177; *Norton* v. *Waite*, 20 Id., 175; *Williams* v. *Little*, 11 New Hampshire, 66, 70; *Clement* v. *Leverett*, 12 Id., 317, 318; *Blanchard and another* v. *Stevens*, 3 Cushing, 162; *Allaire* v. *Hartshorne*, 1 Zabriskie, 665; *Carlisle* v. *Wishart*, 11 Ohio, 172; *Breckinridge* v. *Moore, &c.*, 3 B. Monroe, 629, 636; *Russell* v. *Hadduck*, 3 Gilman, 233; *The Bank of Mobile, Hallet & als.* v. *Hall*, 6 Alabama, 639; *Pond et al.* v. *Lockwood et al.*, 8 Id., 669, 675; *Andrews & Brothers* v. *M'Coy*, Id. 921; *Barney* v. *Earle et al.*, 13 Id. 106, 112; *Saltmarsh* v. *Tuthill*, Id. 390, 399; *Bostwick* v. *Dodge*, 1 Douglass, 413; *Bush* v. *Peckard*, 3 Harrington, 385, 388; *Bond* v. *The Central Bank of Georgia*, 2 Kelly, 93, 102; (the courts in this last state, indeed, profess to consider a transfer by way of collateral security as a discharge of equities; *Gibson et al.* v. *Conner*, 3 Id. 47;) and notwithstanding the apparent or supposed hostility of the decisions in New York and Tennessee, to some of the foregoing, it is believed that an examination of the adjudged cases will show that the principle and distinction abovementioned, express the established law of both of those states; the real differenee, relating only to the question, what renders the receipt of a negotiable note an extinguishment or discharge of a debt; the point of the New York cases being, that accepting a note nominally in payment, is, if the note be not paid, no discharge of the debt, but leaves the creditor's rights and remedies undisturbed; see *Stalker* v. *M'Donald*, 6 Hill's N. Y. 93; *Williams* v. *Smith*, 2 Id. 301; *Mohawk Bank* v. *Corey*, 1 Id. 513; *White* v. *The Springfield Bank*, 1 Barbour's, S. Ct., Id., 225; *Spear* v. *Myers*, 6 445; *Nichol* v. *Bate*, 10 Yerger, 429; *Wormley* v. *Lowry*, 1 Humphreys, 468; *Van Wyck* v. *Norvell et al.*, 2 Id. 192; *Ingham* v. *Vaden et als.*, 3 Id. 51; *Ingram* v. *Morgan, Garrett et al.*, 4 Id. 66. That the satisfaction and discharge of a debt is a valuable consideration for the receipt of a note, is expressly decided in *Bank of St. Albans* v. *Gilliland*, 23 Wendell, 311; *Montross* v. *Clark*, 2 Sandford's S. Ct., 115; and is admitted in *Small* v. *Smith*, 1 Denio, 583; see, also, *Bank of Salina* v. *Babcock*, 21 Wendell, 499; and though the assistant Vice-Chancellor in *Clark* v. *Ely & others*, 2 Sandford's, S. Ct., 166, 171, declared that the *Bank of St. Albans* v. *Gilliland* is not law in New York, yet there is no judicial decision overruling it, or conflicting with it. To say, as the New York judges do, that giving up a security for a debt is a consideration, and yet to hold that giving up the debt itself, and all right of action upon it, is not a consideration, would be absurd. The only question that the subject admits of, is, whether the agreement of the parties was such, that, by the acceptance of the note, the debt was satisfied, discharged, released, or whether the right of action upon it remained unextinguished. See the distinctions on this subject in the American note to *Cumber* v. *Wane*, 1 Smith's Leading Cases. In the late case of *Fenby* v. *Pritchard*, 2 Sandford's S. Ct., 152, it was held that if the giving of notes as collateral security was one of the conditions of a sale, the vendor was a holder for value, discharged from equities.

But unless a note is taken in good faith, for a valuable consideration, and without notice, the holder is considered as being in privity with his endorser.

There are several circumstances which create this privity. One is

where the endorsement is colourable; *Ayer* v. *Hutchins et al.*, 4 Massachusetts, 370, 373; *Henderson & Dial* v. *Irby*, 1 Speers, 43, 47: another is where it is without consideration; *Lawrence* v. *Stonington Bank*, 6 Connecticut, 521; *Munson* v. *Cheesborough*, 6 Blackford, 17. A third is where the endorsee takes the instrument with actual notice; see *Small* v. *Smith*, 1 Denio, 583: and this distinction has been taken, that where the action is brought by an endorsee, or other third person who is not named in the note, it will be presumed till the contrary is shown, that he took it in the regular course of negotiating commercial paper, and, as a general rule, the maker cannot set up any equities existing between himself and the payee, until he has given evidence to impeach the plaintiff's title; but when the action is brought by the payee named in the note, although it may appear that in point of fact, he was not a party to the transaction upon which the note was made, there is no such presumption in his favour; in other words, being payee is a presumption of notice; *Nelson* v. *Cowing*, 6 Hill's N. Y. 337. Another case in which the endorsee is affected by the equities which existed against his endorser, is where the instrument is taken under suspicious circumstances, such as ought to have put him on his guard, and would have alarmed a man of ordinary prudence; *Beltzhoover* v. *Blackstock*, 3 Watts, 20, 25; *Cone* v. *Baldwin*, 12 Pickering, 545; *Hall* v. *Hale*, 8 Connecticut, 337; *Hunt* v. *Sandford*, 6 Yerger, 387; or where there is enough on the face of the instrument to create a suspicion, that it is issued against law; *Safford* v. *Wyckoff*, 4 Hill's N. Y. 442; *Smith* v. *Strong*, 2 Id., 241; *Thompson* v. *Hale*, 6 Pickering, 256. The rule is the same where a bill, upon its face, has been dishonoured by non-acceptance or non-payment; *Andrews* v. *Pond et al.*, 13 Peters, 66, 79; *Fowler* v. *Brantly et al.*, 14 Id. 318, 321; or where a note or bill is negotiated over-due, for in that case, it is considered as discredited upon its face. If it be payable at a time certain, it is of course over-due after the last day of grace is expired, and the endorsee after that time takes it subject to equities; *Mackay* v. *Holland*, 4 Metcalf, 69; *Howard* v. *Ames*, 3 Id. 303; *Potter* v. *Tyler & another*, 2 Id. 58; *De Mott* v. *Starkey*, 3 Barbour's Chancery, 403; *M'Neill* v. *M'Donald*, 1 Hill's So. Car. 1. A note which is payable on demand, or without fixed time, is considered as payable within a reasonable time, and if endorsed after a reasonable time, passes subject to equities, and reasonable time is a question of law; *Sylvester* v. *Craps*, 15 Pickering, 92; *Knowles* v. *Parker*, 7 Metcalf, 31; *Tucker* v. *Smith*, 4 Greenleaf, 415. No fixed measure of reasonable time has yet been determined; two days, and even one month, have been held to be within the limit; *Dennett* v. *Wymans et al.*, 13 Vermont, 485; *Ranger* v. *Cary & others*, 1 Metcalf, 369, 374; and eight months, and even two months, beyond it; *American Bank* v. *Jenness & others*, 2 Metcalf, 288; *Nevins* v. *Townsend*, 6 Connecticut, 5; *Camp* v. *Clark, Trustee*, 14 Vermont, 387. In *Wethey* v. *Andrews*, 3 Hill's N. Y. 582, a distinction was declared to exist, as to the length of time that will be reasonable, between a note payable on demand with interest, and one payable without interest, being longer in the former case, as it is to be understood that when a note is payable with interest, it would be contrary to the usual course of business to demand payment short of some proper point for computing interest, such as a quarter, or half a year, or a year; and it was decided that four or five weeks was not too long upon a note carrying interest, though it would have been if the note had been without interest; see *Thompson* v. *Hale*, 6 Pickering, 259. In a suit by the endorsee against the maker, when part of the defence is, that the

note was endorsed over-due, the burden of proving the time of the endorsement is on the defendant; an endorsement, in the absence of any evidence to the contrary, being always presumed to have been made at or about the date of the note; *Burnham* v. *Wood*, 8 New Hampshire, 334, 336; *Burnham* v. *Webster*, 19 Maine, 232; *Ranger* v. *Cary & others*, 1 Metcalf, 369, 373; *Cain* v. *Spann*, 1 McMullan, 258; *White* v. *Camp*, 1 Florida, 94, 101; *Hutchins* v. *Flintge et al.*, 2 Texas, 473: but this presumption of fairness is a slight one, and easily countervailed by suspicious circumstances; *Snyder* v. *Riley*, 6 Barr, 165, 168.—The principle, that a note payable on demand may become discredited by mere lapse of time, is not recognised in England; *Brooks* v. *Mitchell*, 9 Meeson & Welsby, 15; *Sylvester* v. *Crapo*, 15 Pickering, 92, 94. And in this country the principle is not considered applicable to bank notes or bank post notes; *The Fulton Bank* v. *The Phœnix Bank*, 1 Hall, 562, 577; see *Key* v. *Knott & wife*, 9 Gill & Johnson, 342, 364. An endorsement without recourse, or an assignment of the note on the back of it, without recourse, is not enough to make a holder for value, subject to the equities previously existing; *Epler* v. *Funk*, 8 Barr, 468; *Bisbing* v. *Graham*, 2 Harris, 14.

In the case of an ordinary assignment of a chose in action, where the suit must be brought in the name of the assignor, the assignee is usually, under statutes of set-off, subject to all set-offs existing between the parties, till the time of the assignment and notice: but in the case of an endorsement of a note, under circumstances to leave the endorsee in privity with his endorser, it is now settled in England, and in most courts in this country, that the endorsee is affected only by those defences that are connected with the note itself, and not by antagonist claims, or set-offs, that are wholly independent of the note; *Burrough* v. *Moss*, 10 Barnewall & Cresswell, 558; *Whitehead* v. *Walker*, 10 Meeson & Welsby, 696; *Hughes* v. *Large*, 2 Barr, 103; *Cumberland Bank* v. *Hann*, 3 Harrison, 223; *Chandler* v. *Drew*, 6 New Hampshire, 469; *Robinson* v. *Lyman*, 10 Connecticut, 31; *Stedman* v. *Jillson*, Id. 56; *Britton* v. *Bishop et al.* 11 Vermont, 70; *Robertson* v. *Breedlove*, 7 Porter, 541; *Tuscumbia, &c. R. R. Co. et. al.* v. *Rhodes*, 8 Alabama, 206, 224; *Tinsley* v. *Beall*, 2 Kelly, 134. In Massachusetts, however, general set-offs are admissible; *Saryent et. al.* v. *Southgate*, 5 Pickering, 312; up to the time of the transfer of the title, but not till notice of it to the maker; *Ranger* v. *Cary & others*, 1 Metcalf, 369, 376; *Baxter* v. *Little & Harris*, 6 Id. 7, 11. The decisions in Massachusetts have been followed in Maine; *Burnham* v. *Tucker*, 18 Maine, 179; *Wood* v. *Warren*, 19 Id. 23; *Bartlett* v. *Pearson*, 29 Id. 9, 15. In New York the point was considered doubtful in *Minon* v. *Hoyt*, 4 Hill's N. Y. 193, 197. In South Carolina, all set-offs between the original parties to the note existing at the time of the transfer, appear to be admitted in case of a note endorsed over-due; *Nixon* v. *English*, 3 McCord, 549; *Perry* v. *Mays*, 2 Bailey, 354; *Cain* v. *Spann*, 1 McMullan, 258. In Alabama, under a statute rendering notes assignable, it has been decided that set-offs between the maker and intermediate endorsees are not admissible: *Stocking* v. *Toulmin*, 3 Stewart & Porter, 35; *Kennedy* v. *Manship & others*, 1 Alabama, 43; *Pitts* v. *Shortridge's adm'r.*, 7 Id. 494. In Maine, it has been decided that if a note is negotiated before it is due to one who thereby acquires a perfect title, his endorsing it after it is due will not revive against the endorsee equities which could not have been enforced against the endorser; *Smith* v. *Hiscock*, 14 Maine, 449.

Of the presentment of a bill or note at the time of payment, in order to charge the endorser.

GEORGE M'GRUDER, PLAINTIFF IN ERROR *v.* THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF WASHINGTON, DEFENDANTS IN ERROR.

In the Supreme Court of the United States.

MARCH TERM, 1824.

[REPORTED, 9 WHEATON, 598–602.]

Where the maker of a note has removed into another state, or another jurisdiction, subsequent to the making of the note, a personal demand upon him is not necessary to charge the endorser.
Such a removal is an excuse from actual demand.

THE opinion of the Court was delivered by Mr. Justice JOHNSON.

This case comes up from the Circuit Court of the District of Columbia, in which a suit was instituted against the plaintiff here, as endorser of one Patrick M'Gruder.

The facts are exhibited in a stated case, upon which, by consent, an alternative judgment is to be entered. The judgment below was for the plaintiffs in the action, and the defendant brings this writ of error to have that judgment reversed, and a jugdment entered in his favour.

The leading facts in the cause are so much identified with those in the case of Renner v. The Bank of Columbia, ante, p. 581, decided at the present term, on the question relative to the days of grace, that the decision in that cause disposes of the principal question raised in this.

But there is another point presented in the present cause. There was no actual demand made on the drawer of this note, and the question intended to be presented was, whether the facts stated will excuse it.

At the time of drawing the note, and until within ten days of its falling due, the maker was a housekeeper in the District of Columbia. But he then removed to the State of Maryland, to a place within about nine miles of the District. The case admits, that neither the holder of the note, nor the notary knew of his removal or place of residence; but the circumstances of his removal had nothing in them to sanction its being

construed into an act of absconding. The words of the admission to this point are, that he "went to the house where the said Patrick had last resided, and from which he had removed as aforesaid, in order there to present the said note, and demand payment of the same; and not finding him there, and being ignorant of his place of residence, returned the said note under protest."

The alternative in which the judgment of the Court is to be rendered, is not very appropriately stated; but since the absurdity cannot have entered into the minds of the parties, that, not knowing of the removal or present abode of the drawer, the holder was still bound to follow him into Maryland, we will construe the submission with reference to the facts admitted; and then the question raised is,

Whether the holder had done all that he was bound to do, to excuse a personal demand upon the maker?

On this subject the law is clear: a demand on the maker is, in general, indispensable; and that demand must be made at his place of abode or place of business. That it should be strictly *personal*, in the language of the submission, is not required; it is enough if it is at his place of abode, or, generally, at the place where he ought to be found. But his actual removal is here a fact in the case, and in this, as well as every other case, it is incumbent upon the endorsee to show due diligence. Now, that the notary should not have found the maker at his late residence, was the necessary consequence of his removal, and is entirely consistent with the supposition of his not having made any one of those inquiries which would have led to a development of the cause why he did not find him there. *Non constat*, but he may have removed to the next door, and the first question would, most probably, have extracted information that would have put him on further inquiry. Had the house been shut up, he might, with equal correctness, have returned, "that he had not found him," and yet that clearly would not have excused the demand, unless followed by reasonable inquiries.

The party must, then, be considered as lying under the same obligations as if, having made inquiry, he had ascertained that the maker had removed to a distance of nine miles, and into another jurisdiction. This is the utmost his inquiries could have extracted, and marks, of course, the outlines of his legal duties.

Mere distance is, in itself, no excuse from demand; but, in general, the endorser takes upon himself the inconvenience resulting from that cause. Nor is the benefit of the post-office allowed him, as in the case of notice to the endorser.

But the question on the recent removal into another jurisdiction, is a new one, and one of some nicety. In a case of original residence in a State different from that of the endorser, at the time of taking the paper,

there can be no question; but how far, in case of subsequent and recent removal to another State, the holder shall be required to pursue the maker, is a question not without its difficulties.

We think that reason and convenience are in favour of sustaining the doctrine, that such a removal is an excuse from actual demand. Precision and certainty are often of more importance to the rules of law, than their abstract justice. On this point there is no other rule that can be laid down, which will not leave too much latitude as to place and distance. Besides which, it is consistent with analogy to other cases, that the endorser should stand committed, in this respect, by the conduct of the maker. For his absconding or removal out of the kingdom, the endorser is held, in England, to stand committed; and, although from the contiguity, and, in some instances, reduced size of the States, and their union under the general government, the analogy is not perfect, yet it is obvious, that a removal from the sea-board to the frontier States, or *vice versa*, would be attended with all the hardships to a holder, especially one of the same State with the maker, that could result from crossing the British channel.

With this view of the subject, we are of opinion that the judgment below, although rendered on a different ground, must be sustained.

Judgment affirmed.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF THE UNITED STATES AGAINST SMITH.

In the Supreme Court of the United States.

FEBRUARY TERM, 1826.

[REPORTED, 11 WHEATON, 171–183.]

As against the maker *of a promissory note or the* acceptor *of a bill of exchange*, payable at a particular place, *no averment in the declaration, or proof at the trial, of a demand at the place designated, is necessary.*

But, as against the endorser *of a bill or note, payable at a particular place, such averment and proof are, in general, necessary.*

Where a bill or note is payable at a particular bank, and the bank itself is the holder, averment and proof of a formal demand at that place, are unnecessary, even in a suit against the endorser. If the holder

neglects to appear there when the note falls due, a formal demand has become impracticable by his default: and all that can be required is, that the books of the bank should be examined, to ascertain whether the maker had any funds in their hands.

ERROR to the Circuit Court for the District of Columbia.

This cause was argued by Mr. *Lear*, for the plaintiffs,(*a*) and by Mr. *Taylor*, for the defendants.(*b*)

Mr. Justice THOMPSON delivered the judgment of the Court.

This case comes before the Court on a writ of error to the Circuit Court for the District of Columbia, and the questions presented for consideration grow out of a demurrer to the evidence, and out of exceptions taken to the declaration.

The action is by the plaintiffs, as endorsees, against the defendant, as endorser of a promissory note drawn by William Young. The note is made payable at the office of discount and deposit of the Bank of the United States, in the city of Washington. And the questions which have been raised and argued, relate, in the first place, to the sufficiency of the averment in the declaration of a demand of payment of the drawer of the note; and, secondly, to the sufficiency of the evidence to sustain the plaintiff's right of recovery. It is alleged, however, on the part of the plaintiffs, that this Court cannot look beyond the demurrer, to the evidence, and inquire into defects in the declaration. This position cannot be sustained. The doctrine of the King's Bench, in England, in the case of Cort v. Birkbeck, (Dougl. Rep. 208,) that, upon a demurrer to evidence, the party cannot take advantage of any objections of the pleadings, does not apply. By a demurrer to the evidence, the Court in which the cause is tried is substituted in the place of the jury. And the only question is, whether the evidence is sufficient to maintain the issue. And the judgment of the Court upon such evidence will stand in the place of the verdict of the jury. And, after that, the defendant may take advantage of defects in the declaration, by motion in arrest of judgment, or by writ of error. But, the present case being brought here on a writ of error, the whole record is under the consideration of the Court; and the defendant, having the judg-

(*a*) He cited 2 H. Bl. 509. 3 Mass. Rep. 403. 3 Mass. Rep. 524. 12 Mass. Rep. 403. 8 Mass. Rep. 480. 1 Wheat. Rep. 373. Dougl. Rep. 132, 218. 1 Johns. Rep. 241. 5 Johns. Rep. 1. 2 Wash. Rep. 253.

(*b*) He cited 2 Brod. & Bingh. 165. 17 Johns. Rep. 248. Chitty on Bills, 321.

ment of the Court below in his favour, may avail himself of all defects in the declaration, that are not deemed to be cured by the verdict.

The objection to the declaration is, that it does not contain an averment, that a demand of payment of the maker of the note was made at the place where it was made payable.

It is a general rule in pleading, that where any fact is necessary to be proved on the trial, in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact, in order to let in the proof. But the declaration need not contain any averment which it is not necessary to prove. For the purpose, therefore, of determining whether the declaration in this case is substantially defective, for want of an express averment that demand of payment of the maker was made at the office of discount and deposit of the Bank of the United States, in the city of Washington, it is proper to inquire whether proof of the fact was indispensably necessary to entitle the plaintiff to recover.

Whether, where the suit is against the *maker* of a promissory note, or the *acceptor* of a bill of exchange, payable at a particular place, it is necessary to aver a demand of payment at such a place, and, upon the trial, to prove such demand, is a question upon which conflicting opinions have been entertained in the Courts in Westminster Hall. But, that this question may, perhaps, be considered at rest in England, by the decision in the late case of Rowe v. Young, (2 Brod. & Bingh. 165,) in the House of Lords. It was there held, that if a bill of exchange be accepted, payable at a particular place, the declaration in an action on such bill against the *acceptor*, must aver presentment at that place, and the averment must be proved. A contrary opinion has been entertained by Courts in this country, that a demand on the maker of a note, or the acceptor of a bill payable at a specific place, need not be averred in the declaration, or proved on the trial. That it is not a condition precedent to the plaintiff's right of recovery. As matter of practice, application will generally be made at the place appointed, if it is believed that funds have been there placed to meet the note or bill. But, if the maker or acceptor has sustained any loss by the omission of the holder to make such application for payment at the place appointed, it is a matter of defence to be set up by plea and proof. (4 Johns. Rep. 183. 17 Johns. Rep. 248.)

This question, however, does not necessarily arise in the case now before the Court, and we do not mean to be understood as expressing any decided opinion upon it, although we are strongly inclined to think, that, as against the maker or acceptor of such a note or bill, no averment, or proof of demand of payment at the place designated, would be necessary.

But when recourse is had to the *endorser* of a promissory note, as in the present case, very different considerations arise. He is not the original and real debtor, but only surety. His undertaking is not general, like that of the maker, but conditional, that if, upon due diligence having been used against the maker, payment is not received, then the endorser becomes liable to pay. This due diligence is a condition precedent, and an indispensable part of the plaintiff's title, and right of recovery against the endorser. And when, in the body of the note, a place of payment is designated, the endorser has a right to presume that the maker has provided funds at such place to pay the note, and has a right to require of the holder to apply for payment at such place. And whenever a note is made payable at a bank, and the bank itself is not the holder, an averment, and proof of the demand at the place appointed in the note are indispensable. In the present case, the bank at which the note is made payable, is the holder, and the question arises, whether, in such case, averment and proof of a formal demand are necessary. If no such proof could be required, the averment would be immaterial, and the want of it could not be taken advantage of upon a writ of error.

In the case of Saunderson and others v. Judge (2 H. Bl. Rep. 509), the plaintiffs, at whose house the note was made payable, being themselves the holders of the note, it was held to be a sufficient demand for them to turn to their books, and see the maker's account with them, and it was deemed a sufficient refusal, to find that the maker had no effects in their hands. So, in the case of the Berkshire Bank v. Jones (6 Mass. Rep. 524), decided in the Supreme Judicial Court of Massachusetts, Chief Justice Parsons, in delivering the opinion of the Court, said, that "the plaintiffs being the holders of the note, we must presume it was in their bank, and there it was made payable. They were not bound to look up the maker, or to demand payment of him at any other place. The defendant, by his endorsement, guarantied, that on the day of payment the maker would be at the bank and pay the note, and if he did not pay it there, he agreed he would be answerable for it without previous notice of the default of the maker." The rule here laid down has received the sanction of that Court in subsequent cases (12 Mass. Rep. 404. 14 Mass. Rep. 556), and is founded in good sense and practical convenience, without in any manner prejudicing the rights of the maker, or the endorser of the note. The endorser, knowing that the maker has bound himself to pay the note at a place appointed, has a right to expect that he will provide funds at that place to take up the note; and he will be more likely to be exonerated from his liability, by having the demand made there, than upon the maker personally. But, if the bank where the note is made

payable is the holder, and the maker neglects to appear there when the note falls due, a formal demand is impracticable by the default of the maker. All that can in fitness be done, or ought to be required, is, that the books of the bank should be examined, to ascertain whether the maker had any funds in their hands; and, if not, there was a default, which gave to the holder a right to look to the endorser for payment. And even this examination of the books was not required in the cases cited from the Massachusetts Reports. The maker was deemed in default by not appearing at the bank to take up his note when it fell due. We should incline, however, to think, that the books of the bank ought to be examined, to ascertain, whether the maker had any balance standing to his credit; for, if he had, the bank would have a right to apply it to the payment of the note; and no default would be incurred by the maker, which would give a right of action against the endorser.

The declaration in this case does not contain an averment that the note was presented to the maker, that he refused to pay it, and that notice of the non-payment was given to the endorser. Whether this averment is broad enough to admit all the proof necessary to sustain the action against the endorser, is the question which arises upon the declaration. If, by reason that the bank where the note was made payable was the holder, no personal presentment or demand of the maker, could be required, the averment, so far as it asserts such presentment, is surplusage, and no proof was necessary to support it. What then, in such case, is a presentment of the note? It would be an idle ceremony to require the bank to take the note from its files, and lay it upon the counter, or make any other public exhibition of it. All that could be required is, that the note be there, ready to be delivered up if payment should be offered. When the note is held by a third person, it is practicable, and there is a fitness in requiring the holder to inquire at the bank for the maker, and whether he has provided any funds there to pay the note. But when the bank itself is the holder, it would be impracticable for it to make such inquiry in any other manner than by ascertaining that the note was there, and examining the books to see if the maker had any funds in the bank. If the note was there, it was a *presentment*, and if the maker had no funds in the bank, it was a *refusal* of payment, according to the legal acceptation of these terms under such circumstances.

The evidence upon the trial was introduced under this averment without objection, and if that is sufficient to entitle the plaintiff to recover, the Court ought not readily to yield to technical objections where the defendant has had the full benefit of whatever defence he had to make. Under this state of the case, we think, the exception taken to

the declaration cannot prevail. And, the next inquiry is, whether the evidence to which the defendant demurred was sufficient to sustain the action.

By this demurrer, the defendant has taken the questions of fact from the jury, where they properly belonged, and has substituted the Court in the place of the jury, and everything which the jury could reasonably infer from the evidence demurred to, is to be considered as admitted. The language of adjudged cases on this subject is very strong, to show that the Court will be extremely liberal in their inferences, where the party, by demurring, will take the question from the proper tribunal. It is a course of practice, generally speaking, that is not calculated to promote the ends of justice. If the objection to the sufficiency of the evidence is made by way of motion for a non-suit, it might be removed by testimony within the immediate command of the plaintiff. The deficiency very often arises from mere inadvertence, and omission to make inquiries, which the witnesses examined could probably answer.

In order to determine whether the evidence was sufficient to support the action, it is proper to state what proof was necessary.

The plaintiffs, to entitle them to recover, were bound to show that they were the endorsees and holders of the note; that the note was at the bank, where it was made payable at the time it fell due; that the maker had no funds there to pay the note; and that due notice of the default of the maker was given to the defendant.

The endorsement of the note to the plaintiffs, and that it was discounted in the office of discount and deposit of the Bank of the United States at Washington, where it was made payable, was fully proved. And the jury would have had a right to presume, that the note was then at the bank, where it was discounted; and the bank being the holder and owner of the note, the presumption, at least, *prima facie*, is, that it remained in the bank, to be delivered up when paid. This establishes the two first points; and to show that the maker had no funds in the bank, the book-keeper was examined as a witness, who swore, that on the 19th day of July, 1817, when the note fell due, there was no balance to the credit of the drawer, or either of the endorsers, on the books of the bank. And the remaining question is, whether due notice of the default of the maker was given to the defendant. The only objection to the sufficiency of the evidence on this point is, that the notice of non-payment was left at the post office in the city of Washington, addressed to the defendant at Alexandria, without any evidence that that was his place of residence. The testimony on this point is that of Michael Nourse, a notary public, who swore, that on the day the note fell due, he presented at the store of the defendant, and demanded payment of his clerk, who replied, that Mr. Young was not within, and he would

not pay it. And that, on the same day, he put in the post office notice of non-payment, addressed to the defendant at Alexandria. If the defendant's place of residence was Alexandria, it is not denied but that due and regular notice was given him. The notary was a sworn officer, officially employed to demand payment of this note, and it is no more than reasonable to presume that he was instructed to take all necessary steps to charge the endorsers. This must have been the object in view in demanding payment of the maker. And it is fair, also to presume, that he made inquiry for the residence of the defendant before he addressed a letter to him; for it is absurd to suppose he would direct to him at that place, without some knowledge or information that he lived there, this being the usual and ordinary course of such transactions, and with which the notary was, no doubt, acquainted. The jury would, undoubtedly, have been warranted to infer, from this evidence, that the defendant's residence was in Alexandria. If that was not the fact, this case was a striking example of the abuse which may grow out of demurrers to evidence. For, a single question to the witness would have put at rest that point, one way or the other, if the least intimation had been given of the objection. It was, manifestly, taken for granted by all parties, that the defendant lived at Alexandria. And if a party will upon trial, remain silent, and not suggest an inquiry, which was obviously a mere omission on the part of the plaintiff, a jury would be authorized to draw all inferences from the testimony given, that would not be against reason and probability; and the Court, upon a demurrer to the evidence, will draw the same conclusions that the jury might have drawn.

We are, accordingly, of opinion, that the evidence was sufficient to entitle the plaintiffs to recover. That the judgment of the Court below must be reversed, and the cause sent back, with directions to enter judgment for the plaintiffs, upon the demurrer to evidence, for the amount of the note, and interest.

JUDGMENT. This cause came on, &c. On consideration whereof, it is *ordered* and *adjudged*, that the judgment of the said Circuit Court, on the demurrer to evidence in the said cause, be reversed. And it is further *ordered* and *adjudged*, that the said cause be remanded to the said Circuit Court, with instructions that judgment be entered there on said demurrer, for the plaintiffs in the cause; and further, that the Court there do render judgment on the contingent verdict found for the plaintiffs, according to the tenor thereof, with costs, &c.

WILLIAM WALLACE, PLAINTIFF IN ERROR, *v.* CORRY M'CONNELL, DEFENDANT IN ERROR.

In the Supreme Court of the United States.

JANUARY TERM, 1839.

[REPORTED, 13 PETERS, 137–152.]

In an action against the maker or acceptor of a note or bill payable at a particular place, *it is not necessary to aver or prove a demand at that place upon the maturity of the note: but if the defendant was there at the time, ready to pay, it is a matter of defence to be shown by him.*

Mr. Justice THOMPSON delivered the opinion of the Court.*—

This case comes up on a writ of error from the District Court of the United States for the southern district of Alabama.

The action in the Court below was founded upon a note, which, although under seal, is considered in Tennessee a promissory note; and is in the words following:

"Three years and two months after date, I promise to pay to Corry M'Connell or order, at the office of discount and deposit of the Bank of the United States, at Nashville, four thousand, eight hundred and eighty dollars, ninety-nine cents, value received." The declaration sets out this note according to its terms, and alleges the promise to pay at the office of discount and deposit of the Bank of the United States, at Nashville; without averring that the note was presented at the bank, or demand of payment made there. The defendant pleaded payment and satisfaction of the note; and issue being joined thereupon, the cause was continued until the next term thereafter. At which time the defendant interposed a plea puis darrien continuance, alleging that the plaintiff, as to the sum of four thousand two hundred and four dollars, part and parcel of the sum demanded in the declaration, ought not further to have and maintain his action therefor against him, because that sum had been attached by Blocker and Co., by proceedings commenced by them against the plaintiff in this cause, under the attachment law of Alabama, in which he was summoned as garnishee. And setting

* The Reporter's statement has been omitted.

out the proceedings against him according to the requirements of that law, and under which he was examined on oath; and did declare, that he executed the note to the said M'Connell, the plaintiff in this cause, as set out in the declaration; that he had paid on the note three hundred and seventy-two dollars, and thirty-four cents, and that the remainder of the said note was due by him to the said M'Connell. And the plea further sets out, that under the proceedings on the attachment, the Court had given judgment against him for four thousand two hundred and four dollars and costs, but with a stay of all further proceedings until the further disposition of the case, and which remains yet undetermined.

To this plea the plaintiff demurred. And the Court sustained the demurrer, and gave judgment for the plaintiff for six hundred and seventy-five dollars and thirty-nine cents, the residue of the plaintiff's debt in his declaration mentioned, by default; and thereupon gave a final judgment for the plaintiff for the full amount of the note, four thousand eight hundred and eighty dollars, the debt aforesaid, and three hundred and ninety-four dollars, the interest assessed by the clerk, together with his cost. And the plaintiff remits upon the record the sum of three hundred and fifty-one dollars, and twenty-eight cents; and the questions arising upon this record have been made and argued under the following objections:

1. That the declaration is bad for want of an averment that the note was presented, and payment demanded at the office of discount and deposit of the Bank of the United States, at Nashville.

2. That the matters pleaded of the proceedings under the attachment laws of Alabama, were sufficient to bar the action, as to the amount of the sum so attached; and that the demurrer ought therefore to have been overruled.

3. That the judgment by nil dicit for the six hundred and seventy-five dollars and thirty-nine cents was erroneous.

The question raised as to the sufficiency of the declaration in a case where the suit is by the payee against the maker of a promissory note, never has received the direct decision of this court. In the case of the Bank of the United States v. Smith (11 Wheat. 172), the note upon which the action was founded, was made payable at the office of discount and deposit of the Bank of the United States, in the city of Washington; and the suit was against the endorser, and the question turned upon the sufficiency of the averment in the declaration of a demand of payment of the maker. And the Court said, when in the body of a note, the place of payment is designated, the endorser has a right to presume that the maker has provided funds at such a place to pay the note; and has a right to require the holder to apply at such place for

payment. In the opinion delivered in that case, the question now presented in the case before us is stated: and it said, whether where the suit against the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place, it is necessary to aver a demand of payment at such a place, and upon the trial to prove such demand; it is a question upon which conflicting opinions have been entertained in the Courts in Westminster Hall. But that the question in such case may, perhaps, be considered at rest in England, by the decision in the late case of Rowe v. Young (2 Brod. & Bing. 165), in the House of Lords; where it was held, that if a bill of exchange be accepted, payable at a particular place, the declaration of such bill, against the acceptor, must aver presentment at that place, and the averment must be proved. But it is there said a contrary opinion has been entertained by Courts in this country; that a demand on the maker of a note, or the acceptor of a bill payable at a specified place, need not be averred in the declaration or proved on the trial; that it is not a condition precedent to the plaintiff's right of recovery. As matter of practice, application will generally be made at the place appointed; if it is believed, that funds have been there placed to meet the note or bill. But if the maker or acceptor has sustained any loss by the omission of the holder to make such application for payment at the place appointed, it is matter of defence to set up plea and proof. But it is added, as this question does not necessarily arise in this case, we do not mean to be understood as expressing any decided opinion upon it, although we are strongly inclined to think, that as against the maker of a note or the acceptor of a bill, no averment or proof of a demand of payment at the place designated would be necessary. The question now before the Court cannot, certainly, be considered as decided by the case of the Bank of the United States v. Smith. But it cannot be viewed as the mere obiter opinion of the judge who delivered the judgment of the Court. The attention of the Court was drawn to the question now before the Court; and the remarks made upon it, and the authorities referred to, show that this Court was fully apprised of the conflicting opinions of the English Courts, on the question; and that opinions contrary to that of the House of Lords in the case of Rowe v. Young, had been entertained by some of the Courts in this country: and under this view of the question, the Court say they are strongly inclined to adopt the American decisions. As the precise question is now presented by this record, it becomes necessary to dispose of it.

It is not deemed necessary to go into a critical examination of the English authorities upon this point; a reference to the case in the House of Lords, which was decided in the year 1820, shows the great diversity of opinion entertained by the English judges upon this ques-

tion. It was, however, decided, that if a bill of exchange is accepted, payable at a particular place, the declaration in an action on such bill against the acceptor, must aver presentment at that place, and the averment must be proved. The Lord Chancellor, in stating the question, said this was a very fit question to be brought before the House of Lords, because the state of the law, as actually administered in the Courts, is such, that it would be infinitely better to settle it any way than to permit so controversial a state to exist any longer. That the Court of King's Bench has been of late years in the habit of holding, that such an acceptance as this is a general acceptance: and that it is not necessary to notice it as such in the declaration, or to prove presentment, but that it must be considered as matter of defence; and that the defendant must state himself ready to pay at the place, and bring the money into Court, and so bar the action by proving the truth of that defence. On the contrary, the Court of Common Pleas was in the habit of holding, that an acceptance like this was a qualified acceptance, and that the contract of the acceptor was to pay at the place; and that as matter of pleading, a presentment at the place stipulated must be averred, and that evidence must be given to sustain that averment; and that the holder of the bill has no cause of action unless such demand has been made. In that case the opinion of the twelve judges was taken and laid before the House of Lords, and will be found reported in an appendix to the report of the case of Rowe v. Young (2 Brod. & Bing. 180). In which opinions all the cases are referred to in which the question had been drawn into discussion; and the result appears to have been, that eight judges out of the twelve sustained the doctrine of the King's Bench on this question; notwithstanding which the judgment was reversed.

It is fairly to be inferred from an act of Parliament passed immediately thereafter, 1 and 2 G. 4, ch. 78, that this decision was not satisfactory. By that act it is declared that "after the 1st of August, 1821, if any person shall accept a bill of exchange payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill. But if the acceptor shall, in his acceptance, express that he accepts the bill payable at a banker's house or other place only, and not otherwise or elsewhere; such acceptance shall be a qualified acceptance of such bill; and the acceptor shall not be liable to pay the bill, except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place." Bayley on Bills, 200, note.

In most of the cases which have arisen in the English Courts, the suit has been against the acceptor of the bill; and in some cases a distinction

would seem to be made between such a case and that of a note when the action is against the maker, and the designated place is in the body of the note. But there can be no solid grounds upon which such a distinction can rest. The acceptor of a bill stands in the same relation to the drawee, as the maker of a note does to the payee; and the acceptor is the principal debtor, in the case of a bill, precisely like the maker of a note. The liability of the acceptor grows out of, and is to be governed by the terms of his acceptance, and the liability of the maker of a note grows out of, and is to be governed by the terms of his note; and the place of payment can be of no more importance in the one case than in the other. And in some of the cases where the point was made, the action was against the maker of a promissory note, and the place of payment designated in the body of the note. The case of Nichols v. Bowes, 2 Camp. 498, was one of that description decided in the year 1810; and it was contended on the trial, that the plaintiff was bound to show that the note was presented at the banking house where it was made payable. But Lord Ellenborough, before whom the case was tried, not only decided that no such proof was necessary, but would not suffer such evidence to be given; although the counsel for the plaintiff said he had a witness in Court to prove the note was presented at the banker's the day it became due; his Lordship alleging that he was afraid to admit such evidence, lest doubts should arise as to its necessity. And in the case of Wild v. Renwards, 1 Camp. 425, note, Mr. Justice Bayley, in the year 1809, ruled that if a promissory note is made payable at a particular place, in an action against the maker, there is no necessity for proving that it was presented there for payment.

The case of Saunderson v. Bowes, 14 East, 500, decided in the King's Bench in the year 1811, is sometimes referred to as containing a different rule of construction of the same words when used in the body of a promissory note, from that which is given to them when used in the acceptance of a bill of exchange. But it may be well questioned, whether this use warrants any such conclusion. That was an action on a promissory note by the bearer against the maker. The note, as set out in the declaration, was a promise to pay on demand at a specified place, and there was no averment that a demand of payment had been made at the place designated. To which declaration the defendant demurred; and the counsel in support of the demurrer referred to cases where the rule had been applied to acceptances on bills of exchange; but contended that the rule did not apply to a promissory note, when the place is designated in the body of the note. Lord Ellenborough, in the course of the argument, in answer to some cases referred to by counsel, observed; those are cases where money is to be paid, or something to be done at a particular time as well as place, therefore the party (defendant) may

readily make an averment, that he was ready at the time and place to pay, and that the other party was not ready to receive it; but here the time of payment depends entirely on the pleasure of the holder of the note. It is true Lord Ellenborough did not seem to place his opinion, in the ultimate decision of the cause, upon this ground. But the other judges did not allude to the distinction taken at the bar between that case, and the acceptance of a bill in like terms; but placed their opinions upon the terms of the note itself, being a promise to pay on demand, at a particular place. And there is certainly a manifest distinction between a promise to pay on demand, at a given place, and a promise to pay at a fixed time at such place. And it is hardly to be presumed that Lord Ellenborough intended to rest his judgment upon a distinction between a promissory note and a bill of exchange, as both he and Mr. Justice Bayley had a very short time before, in the case of Nichols v. Bowes, and Wild v. Renwards, above referred to, applied the same rule of construction to promissory notes where the promise was contained in the body of the note. Where the promise to pay on demand at a particular place, there is no cause of action until the demand is made; and the maker of the note cannot discharge himself by an offer of payment, the note not being due until demanded.

Thus we see that until the late decision in the House of Lords in the case of Rowe v. Young, and the act of parliament passed soon thereafter, the question was in a very unsettled state in the English Courts; and without undertaking to decide between those conflicting opinions, it may be well to look at the light in which this question has been viewed in the Courts in this country.

This question came before the Supreme Court of the State of New York, in the year 1809, in the case of Foden and Slater v. Sharp, 4 John. Rep. 183; and the Court said the holder of a bill of exchange need not show a demand of payment of the acceptor, any more than of the maker of a note. It is the business of the acceptor to show that he was ready at the day and place appointed, but that no one came to receive the money; and that he was always ready afterwards to pay. This case shows that the acceptor of a bill, and the maker of a note were considered as standing on the same footing with respect to a demand of payment at the place designated. And in the case of Wolcott v. Van Santvoort, 17 Johns. Rep. 248, which came before the same Court in the year 1819, the same question arose. The action was against the acceptor of a bill, payable five months after date at the Bank of Utica, and the declaration contained no averment of a demand at the Bank of Utica; and upon a demurrer to the declaration, the Court gave judgment for the plaintiff. Chief Justice Spencer, in delivering the opinion of the Court, observed that the question has been already de-

cided in the case of Foden v. Sharp: but considering the great diversity of opinion among the judges in the English Courts on the question, he took occasion critically to review the cases which had come before those Courts, and shows very satisfactorily, that the weight of authority is in conformity to that decision, and the demurrer was accordingly overruled; and the law in that state for the last thirty years, has been considered as settled upon this point. And although the action was against the acceptor of a bill of exchange, it is very evident that this circumstance had no influence upon the decision; for the Court say that in this respect the acceptor stands in the same relation to the payee, as the maker of a note does to the endorsee. He is the principal, and not a collateral debtor.

And in the case of Caldwell v. Cassady, 8 Cowen, 271, decided in the same Court in the year 1828, the suit was on a promissory note payable sixty days after date at the Franklin Bank in New York; and the note had not been presented or payment demanded at the Bank: the Court said, this case has been already decided by this Court in the case of Wolcott v. Van Santvoord. And after noticing some of the cases in the English Courts, and alluding to the confusion that seemed to exist there upon the question, they add: that whatever be the rule in other Courts, the rule in this Court must be considered settled, that where a promissory note is made payable at a particular place on a day certain, the holder of the note is not bound to make a demand at the time and place by way of a condition precedent to the bringing an action against the maker. But if the maker was ready to pay at the time and place, he may plead it, as he would plead a tender in bar of damages and costs by bringing the money into Court.

It is not deemed necessary to notice very much at length the various cases that have arisen in the American Courts upon this question; but barely to refer to such as have fallen under the observation of the Court, and we briefly state the point and decision thereupon, and the result will show a uniform course of adjudication, that in actions on promissory notes against the maker, or on bills of exchange, where the suit is against the maker in the one case, and acceptor in the other, and the note or bill made payable at a specified time and place, it is not necessary to aver in the declaration, or prove on the trial, that a demand of payment was made in order to maintain the action. But that if the maker or acceptor was at the place at the time designated, and was ready and offered to pay the money, it was matter of defence to be pleaded and proved on his part.

The case of Watkins v. Crouch and Co., in the Court of Appeals of Virginia, 5 Leigh, 522, was a suit against the maker and endorser,

jointly, as is the course in that state upon a promissory note like the one in suit. The note was made payable at a specified time, at the Farmers' Bank, at Richmond, and the Court of Appeals, in the year 1834, decided, that it was not necessary to aver and prove a presentation at the bank and demand of payment in order to entitle the plaintiff to recover against the maker; but that it was necessary in order to entitle him to recover against the endorser: and the President of the Court went into a very elaborate consideration of the decisions of the English Courts upon the question; and to show, that upon common law principles, applicable to bonds, notes, and other contracts for the payment of money, no previous demand was necessary, in order to sustain the action, but that a tender and readiness to pay must come by way of defence from the defendant; and that looking upon the note as commercial paper, the principles of the common law were clearly against the necessity of such demand and proof, where the time and place were specified, though it would be otherwise where the place, but not the time was specified; a demand in such a case ought to be made: and he examined the case of Sanderson v. Bowes, to show that it turned upon that distinction, the note being payable on demand at a specified place. The same doctrine was held by the Court of Appeals of Maryland in the case of Bowie v. Duvall, 1 Gill & Johnson, 175; and the New York cases, as well as that of the Bank of the United States v. Smith, 11 Wheat. 171, are cited with approbation, and fully adopted; and the Court puts the case upon the broad ground, that when the suit is against the maker of a promissory note, payable at a specified time and place, no demand is necessary to be averred, upon the principle that the money to be paid is a debt from the defendant, that it is due generally and universally, and will continue due, though there be a neglect on the part of the creditor to attend at the time and place to receive or demand it. That it is matter of defence on the part of the defendant to show that he was in attendance to pay, but that the plaintiff was not there to receive it; which defence generally will be in bar of damages only, and not in bar of the debt. The case of Ruggles v. Patton, 8 Mass. Rep. 480, sanctions the same rule of construction. The action was on a promissory note for the payment of money, at a day and place specified; and the defendant pleaded that he was present at the time and place, and ready and willing to pay according to the tenor of his promises, in the second count of the declaration mentioned, and avers that the plaintiff was not then ready or present at the bank to receive payment, and did not demand the same of the defendant, as the plaintiff in his declaration had alleged: the Court said this was an immaterial issue and no bar to an action or promise to pay money.

So also in the State of New Jersey the same rule is adopted. In the

case of Weed v. Houten, 4 Halst. N. J. Rep. 189, the Chief Justice says: "The question is whether in an action by the payee of a promissory note payable at a particular place and not on demand, but at time, it is necessary to aver a presentment of the note and demand of payment by the holder at that place, at the maturity of the note. And upon this question he says, I have no hesitation in expressing my entire concurrence in the American decisions, so far as is necessary for the present occasion; that a special averment of presentment at the place, is not necessary to the validity of the declaration, nor is proof of it necessary upon the trial. This rule, I am satisfied, is most conformable to sound reason, most conducive to public convenience, best supported by the general principles and doctrines of the law, and most assimilated to the decisions, which bear analogy more or less directly to the subject."

The same rule has been fully established by the Supreme Court of Tennessee, in the cases of M'Nairy v. Bell, and Mulhovin v. Hannum, 1 Yerger, Rep. 502, and 2 Yerger, Rep. 81, and the rule sustained and enforced upon the same principles and course of reasoning upon which the other cases referred to have been placed. And no case, in an American Court, has fallen under our notice, where a contrary doctrine has been asserted and maintained. And it is to be observed, that most of the cases which have arisen in this country, where this question has been drawn into discussion, were upon promissory notes, where the place of payment was, of course, in the body of the note. After such a uniform course of decisions for at least thirty years, it would be inexpedient to change the rule, even if the grounds upon which it was originally established might be questionable; which, however, we do not mean to intimate. It is of the utmost importance, that all rules relating to commercial law should be stable and uniform. They are adopted for practical purposes, to regulate the course of business in commercial transactions; and the rule here established is well calculated for the convenience and safety of all parties.

The place of payment in a promissory note, or in an acceptance of a bill of exchange, is always a matter of arrangement between the parties for their mutual accommodation, and may be stipulated in any manner that may best suit their convenience. And when a note or bill is made payable at a bank, as is generally the case, it is well known that, according to the usual course of business, the note or bill is lodged at the bank for collection; and if the maker or acceptor calls to take it up when it falls due, it will be delivered to him, and the business is closed. But should he not find his note or bill at the bank, he can deposit his money to meet the note when presented, and should he be afterwards prosecuted, he would be exonerated from all costs and damages, upon proving such tender and deposit. Or should the note or bill be made

payable at some place other than a bank, and no deposite could be made, or he should choose to retain his money in his own possession, an offer to pay at the time and place would protect him against interest and costs, on bringing the money into Court; so that no practical inconvenience or hazard can result from the establishment of this rule, to the maker or acceptor. But, on the other hand, if a presentment of the note and demand of payment at the time and place, are indispensable to the right of action, the holder might hazard the entire loss of his whole debt.

The next point presents the question as to the effect and operation of the proceedings under the attachment law of Alabama, as disclosed by the plea puis darien continuance. The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the District Court of the United States, and the right of the plaintiff to prosecute his suit in that Court, having attached, that right could not be arrested or taken away by any proceedings in another Court. This would produce a collision in the jurisdiction of Courts, that would extremely embarrass the administration of justice. If the attachment had been conducted to a conclusion, and the money recovered of the defendant before the commencement of the present suit, there can be no doubt that it might have been set up as a payment upon the note in question. And if the defendant would have been protected *pro tanto*, under a recovery had by virtue of the attachment, and could not have pleaded such recovery, in bar, the same principle would support a plea in abatement, of an attachment pending prior to the commencement of the present suit. The attachment of the debt, in such case, in the hands of the defendant, would fix it there in favour of the attaching creditor, and the defendant could not afterwards pay it over to the plaintiff. The attaching creditor would, in such case, require a lien upon the debt, binding upon the defendant, and which the Courts of all other governments, if they recognise such proceedings at all, could not fail to regard. If this doctrine be well founded, the priority of suit will determine the right. The rule must be reciprocal; and where the suit in one Court is commenced prior to the institution of proceedings under attachment in another Court, such proceedings cannot arrest the suit; and the maxim qui prior est tempore, potior est jure, must govern the case. This is the doctrine of this court in the case of Renner and Bussard v. Marshall, 1 Wheat. 216, and also in the case of Beaston v. The Farmers' Bank of Maryland, 12 Peters, 102; and is in conformity with the rule that prevails in other Courts in this country, as well as in the English Courts; and is essential to the protection of the rights of the garnishee; and will avoid all collisions in the proceedings of different Courts, having the same subject-matter

before them. 5 John. Rep. 100. 9 John. Rep. 221, and the cases there cited. In the case now before the Court, the suit was commenced prior to the institution of proceedings under the attachment. The plea was therefore, bad, and the demurrer properly sustained.

The remaining inquiry is, whether the judgment, by nil dicit, for the $675, was properly given, after overruling the plea, puis darien continuance. The argument at the bar was, that as the attachment went only to a part of the debt, the case stood as to the residue upon the original plea of payment. The facts disclosed in the plea, puis darien continuance, do not raise the question intended to be presented; for the defence set up in the plea puis darien continuance goes to the whole cause of action, and leaves no part unanswered. And it may be well questioned, whether such pleading ought to be sanctioned, even if the plea, puis darien continuance, went only to a part of the cause of action. It would introduce great confusion on the record in the state of the pleadings.

It is laid down in Bacon's Abridgment (6 Bac. Ab. by Gwillim, 377), that if after a plea in bar, the defendant pleads a plea puis darien continuance, this is a waiver of his bar; and no advantage shall be taken of anything in the bar. And it is added, that it seems dangerous to plead any matter puis darien continuance unless you be well advised, because, if that matter be determined against you, it is a confession of the matter in issue. This rule was adopted in Kimball v. Huntington, 10 Wendell, 679. The Court say, the plea puis darien continuance waived all previous pleas, and on the record, the cause of action was admitted to the same extent as if no other defence had been urged than that contained in this plea.

In the case now before the Court, the oath of the defendant taken in the proceedings on the attachment, is made a part of the plea puis darien continuance. And he admits that he executed the note on which this suit is brought, for $4880. That he had paid on the note $372.34; and that the remainder of the note was due by him to the plaintiff. And if the $4204 attached could not be deducted, the whole debt, according to his own admission, was due, except the $372.34, set up by him to have been paid; and the plaintiff remits upon the record $351.28, and the judgment will stand within a few dollars for the amount admitted by the defendant to be due. And this difference must arise from some error in the mere calculation, and may easily be corrected.

The judgment of the Court below is accordingly affirmed, with costs.

This cause came on to be heard on the transcript of the record from the District Court of the United States, for the Southern District of Alabama, and was argued by counsel. On consideration whereof, it is

ordered and adjudged by this court, that the judgment of the said District Court, in this cause be, and the same is hereby, affirmed, with costs and damages at the rate of six per cent. per annum.

It is a general principle, that to fix the liability of the drawer of a bill or endorser of a bill or note, there must be a legal presentment of the instrument to the acceptor or maker, or demaud of payment from him, on the day on which the instrument is payable: see *Magruder* v. *The Union Bank of Georgetown*, 3 Peters, 87; *The Juniata Bank* v. *Hale and another*, 16 Sergeant & Rawle, 157; &c. But the principle is now well established, of substituting *due diligence*, as a legal presumption, in the place of an actual demand; *Roberts* v. *Mason*, 1 Judges' Alabama, 374, 377. And what constitutes *due diligence*, under the circumstauces of the case, is a question of law; *Davis* v. *Herrick*, 6 Ohio, 55, 66; *Wheeler and another* v. *Field*, 6 Metcalf, 290, 295.

Although a note or bill has been endorsed long after it was due, there must still be a demand, and notice of default, in order to charge the endorser, because a note or bill though over-due continues to be negotiable; *Dwight* v. *Emerson*, 2 New Hampshire, 159; *Berry* v. *Robinson*, 9 Johnson, 121; *Greely* v. *Hunt*, 21 Maine, 455; *Kirkpatrick* v. *McCullough*, 3 Humphreys, 171; *Adams's Admr.* v. *Torbert*, 6 Alabama, 865, 867; and see *Sturtevant* v. *Ford*, 4 M. & Gr. 101. The endorsement of a note or bill over-due is a new bill drawn at sight, and demand must be made within a reasonable time; *Bishop* v. *Dexter*, 2 Connecticut, 419; *Colt* v. *Barnard*, 18 Pickering, 260; *Branch Bank at Montgomery, use, &c.*, v. *Gaffney*, 9 Alabama, 153, 160. In South Carolina, however, the rules as to due diligence, applied to notes and bills endorsed when over-due, are not quite the same as those applicable in ordinary cases: demand and notice are not dispensed with, but only such diligence is necessary, according to the circumstances of the case, that the endorser suffers no injury through the neglect; in other words, the only penalty of neglect, is a responsibility for the injury which it actually occasions to the endorser, and the question of reasonable diligence is always a fact for the jury; *Chadwick* v. *Jeffers*, 1 Richardson, 397; *Gray* v. *Bell*, 2 Id. 67; 3 Id. 71. Where a note is made, jointly and severally, by two or more, not co-partners, a demand upon all was held to be necessary, in *Union Bank of Weymouth & Braintree* v. *Willis*, 8 Metcalf, 504, 511, and held not to be neeessary, in *Harris* v. *Clark and another*, 10 Ohio, 5, 9. There is probably a difference between a joint, and a joint and several, note; upon the former no doubt a demand must be made on all; but in the case of the latter, the refusal of any one to pay, on presentment, is a default.

There are some circumstances which excuse a presentment, altogether, being themselves, in law, equivalent to a default. One of them is where the maker or drawee has absconded before the maturity of the instrument; in which case, notice of that fact is equivalent to notice of demand and refusal; *Putnam et al.* v. *Sullivan et al.*, 4 Massachusetts, 45; *Gilbert* v. *Dennis*, 3 Metcalf, 495, 499; *Duncan* v. *M'Cullough*, 4 Sergeant & Rawle, 480; *Lehman* v. *Jones*, 1 Watts & Sergeant, 126. Another exception is that established in *Magruder* v. *Bank of Washington*; which is, that if the

maker or drawee has moved his residence into another jurisdiction after making, or acceding to, the instrument; that is to say, has moved his residence out of the state or kingdom in which it was at the time when he became a party to the instrument, the necessity of a presentment is excused; and this is confirmed in *Reül* v. *Morrison*, 2 Watts & Sergeant, 401, 406; *Wheeler and another* v. *Field*, 6 Metcalf, 290; and *Gist* v. *Lybrand*, 3 Ohio, 307, 319. But in *Wheeler and another* v. *Field*, it is doubted whether if the maker's new residence in another state be adjoining or near to his former residence, demand should not be made at the new residence; and the rule in *Magruder* v. *Bank of Washington*, is there qualified by the important condition, that, in the case of a removal out of the state, there must still be a demand at the maker's last place of residence, or due diligence to find it; and see *Central Bank* v. *Allen*, 16 Maine, 41, 44. In *Gist* v. *Lybrand*, however, it is said to be a clear consequence of the decision in *Magruder* v. *Bank of Washington*, that a demand at any other place is dispensed with, and that the fact of removal commits the endorser, and dispenses with all demand, unless a particular place be appointed for the payment of the note, in the note itself: and this is supposed to be the true view of the rule in *Magruder* v. *Bank of Washington*. It is to be understood, however, that that rule relates only to a removal of the *residence* of the party out of the jurisdiction, and that a mere personal absence, however protracted, does not fall within it; if therefore, the maker of a note has gone upon a sea-voyage, but the residence of his family continues to be in the state, a demand at his usual place of business, or at the family residence, is necessary; *Dennie* v. *Walker*, 7 New Hampshire, 199; *Whittier* v. *Graffam*, 3 Greenleaf, 82. But if the maker of a note is a seafaring man, who has no residence or place of business in the state, and is at sea, when payment becomes due, no demand is required; *Moore* v. *Coffield*, 1 Devereux, 247. But where the holder was told at the time the endorsement was given, that the maker was a transient person, and his residence unknown, this was held not to be enough to dispense with an effort to find him and make a demand; *Otis* v. *Hussey*, 3 New Hampshire, 346. If the maker or acceptor is dead before the instrument becomes payable, the holder should make inquiry for his personal representative, if there is one, and present the instrument to him at maturity for payment; *Gower* v. *Moore*, 25 Maine, 16, 17.

Some general rules have been laid down for determining the sufficiency of a presentment.

With regard to the day on which demand must be made; a note or bill payable at a time certain must be presented on the last day of grace; a demand either before or after that day is insufficient to charge the endorser; *Howe* v. *Bradley*, 19 Maine, 31, 34; *Leavitt* v. *Simes*, 3 New Hampshire, 14, 16; *Farmers' Bank of Maryland* v. *Duvall*, 7 Gill & Johnson, 79, 89; *Piatt* v. *Eads*, 1 Blackford, 81; *The Montgomery co. Bank* v. *The Albany City Bank*, 8 Barbour's S. Ct., 397. When days of grace are allowed, and the last of them is Sunday, the fourth of July, or other public holiday, the note or bill is payable the day before; although an instrument without days of grace, if the day on which the debt falls due is a holiday, is not payable until the next day; *Salter* v. *Burt*, 20 Wendell, 205; *Staples and another* v. *Franklin Bank*, 1 Metcalf, 43, 47; *Lewis* v. *Burr*, 2 Caines's Cases, 195; *Ransom* v. *Mack*, 2 Hill's N. Y. 588, 592; *Anonymous, note*, Id. 378; *Sheldon* v. *Benham*, 4 Id. 129, 132; *Barlow et al.* v. *The Planters' Bank*, 7 Howard's Mississippi, 129; *Offut* v. *Stout's Ad'rs.*, 4 J. J. Marshall, 332. If, however, the nominal day of maturity should be Sunday, or a

holiday, the days of grace are not thereby diminished; the instrument is due on the third day after; *Wooley* v. *Clements*, 11 Alabama, 220. By the general law merchant, a bill or note is demandable on the third day of grace, but if the established usage of the place where the instrument is payable, or of the bank at which it is payable, or deposited for collection, be to make demand on the fourth or other day, the parties to the note will be bound by such an usage; see 1 Smith's L. C. 417; *Cookendorfer* v. *Preston*, 4 Howard's Supreme Court, 317; see *Dabney* v. *Campbell et als.*, 9 Humphreys, 680. Bills of exchange, payable on demand, or at sight, or after sight, must be presented within a reasonable time, in order to charge the drawer or endorser; *Robinson* v. *Ames*, 20 Johnson, 146, 151; *Aymar* v. *Beers*, 7 Cowen, 705, 709; *Dumont* v. *Pope*, 7 Blackford, 367, 368; *Daniels* v. *Kyle and Barnett*, 5 Georgia, 245: and in some cases, bills of exchange payable on demand, have been placed on the same footing as checks, in regard to the time of presentment; and it has been said to be the general rule, subject to variation from circumstances, that when the parties reside in the same place, the bill should be presented, the day it is received, or the day after, and when payable in a different place from that in which it is negotiated, should be sent forward by mail, on the same or the next succeeding day, for presentment, but much, it is agreed, depends upon the circumstances of the case: *dicta* in *Mohawk Bank* v. *Broderick*, 13 Wendell, 133, 135; *Smith* v. *Janes*, 20 Wendell, 192, 194; *Little* v. *Phœnix Bank*, 2 Hill's N. Y. 425, 430; probably overruling *dicta* in *Mohawk Bank* v. *Broderick*, 10 Wendell, 305, 307, and in *Gough* v. *Staats*, 13 Id. 549, 551; see the *Bridgeport Bank* v. *Dyer*, 19 Connecticut, 136, 140; but in several other particulars, bank-checks differ from bills of exchange; see *In the matter of Brown*, 2 Story, 503; and *Alexander* v. *Burchfield*, 7 M. & Gr. 1061. As between the holder and the drawer of a check, a demand at any time before suit will be sufficient, unless before presentment the drawee has in some way been injured by the holder's laches; *Daniels* v. *Kyle & Burnett*, 1 Kelly, 304; *Hoyt* v. *Seeley*, 18 Connecticut, 353, 360. A promissory note payable on demand, or without any appointment as to time, is due immediately; and in order to render the endorser liable must be presented within a *reasonable time*, whether it be payable with or without interest; *Sice* v. *Cunningham*, 1 Cowen, 397; *Perry* v. *Green*, 4 Harrison, 61: see *Lockwood* v. *Crawford*, 18 Connecticut, 362, 372; and whenever it is presented, immediate notice, that is, notice by the next convenient mail, must be given to the endorser; *Brenzer* v. *Wightman*, 7 Watts & Sergeant, 264; *Colt* v. *Barnard*, 18 Pickering, 260. So if a note is endorsed when over due, a demand must be made in a reasonable time; *Sanborn* v. *Southard*, 25 Maine, 409; *Rice* v. *Werson*, 11 Metcalf, 400, and immediate notice given. Reasonable time under the circumstances, is a question for the court: but no absolute rule has yet been fixed: in *Seaver* v. *Lincoln*, 21 Pickering, 267, 268, it is said by Shaw, C. J., that one of the most difficult questions, presented for the decision of a court of law, is, what shall be deemed a reasonable time, within which to demand payment of the maker of a note payable on demand, in order to charge the endorser; it depends upon so many circumstances to determine what is a reasonable time in a particular case: in *Camp* v. *Clark, Trustee*, 14 Vermont, 387, 391, Redfield, J. had supposed that the question of reasonable time of presentment, in regard to the liability of the endorser was not identical with the question of reasonable time in respect to a negotiation in discharge of equities; he had supposed that

to affect an endorser, demand must be made immediately, that is, on the same, or the next day, when the parties reside in the same town, and in the due course of communication by mail, when they reside in different places; and see *Fortner* v. *Parham and Gibson et al.*, 2 Smedes & Marshall, 151, 163. But the authorities do not warrant any fixed limit: seven days (*Seaver* v. *Lincoln*), have been held within the range of a reasonable time; and five months (*Sice* v. *Cunningham*), beyond it; in Massachusetts, by statute of 1839, c. 121, sixty days are now allowed. These rules as to the time of demand do not apply to bank notes or bank post notes; *Key* v. *Knott and Wife*, 9 Gill & Johnson, 342, 364; and see *The Fulton Bank* v. *The Phœnix Bank*, 1 Hall, 562, 577.

As to the time of day, at which presentment must be made; a note or bill may be demanded at any reasonable hour on the last day of grace: an instrument without days of grace is not due till the whole day of payment has expired: but an instrument with days of grace, is, for the purpose of fixing the commercial liabilities of the parties, due on demand on the last day of grace; *Whitwell* v. *Brigham*, 19 Pickering, 117, 122. Presentment should be made, during the proper business hours; and these, it is said, except when the paper is due from or at a bank, generally range through the whole day, down to bedtime in the evening; *Cayuga County Bank* v. *Hunt*, 2 Hill's N. Y., 635, 638; *De Wolf* v. *Murray*, 2 Sandford's S. Ct. 166,170: a demand at the dwelling, between eleven and twelve o'clock at night, when the maker of the note was in bed, has been held to be too late; *Dana* v. *Sawyer*, 22 Maine, 244; and a demand at eight in the morning too early; *Lunt* v. *Adams*, 17 Id. 230. But when a note or bill is payable at a banking house, or other place where it is known that business is transacted only during certain hours of the day, the effect of the contract is, that the note shall be paid at some time during the usual bank hours at such bank, and there is no default until the close of such bank hours; *Church* v. *Clark*, 21 Pickering, 310; *Bank of the United States* v. *Carneal*, 2 Peters, 543, 549; on the other hand, a demand cannot be made after such hours; *Dana* v. *Sawyer;* about the close of banking hours is the proper time; *Harrison* v. *Crowder*, 6 Smedes & Marshall, 464, 473: still, if the presentment be made after seasonable hours, and there be some one there to answer, and the bill be then dishonoured, as if, after bank hours, the note or bill be presented there, and the cashier refuses payment because no funds have been provided, or for other cause which would have operated as a dishonour of the bill if it had been presented before, it is sufficient to charge the endorser; *Flint* v. *Rogers*, 15 Maine, 67; *Commercial and Rail Road Bank* v. *Hamer et al.*, 7 Howard's Mississippi, 448; *Cohea* v. *Hunt et al.*, 2 Smedes & Marshall, 227.

As to the manner of presentment; regularly, by the law merchant, a bill or note must be exhibited or shown at the time the demand is made; *Musson et al.* v. *Lake*, 4 Howard's Supreme Court, 262; *Farmers Bank of Maryland* v. *Duvall*, 7 Gill & Johnson, 79, 89; *The Bank of Vergennes* v. *Cameron*, 7 Barbour's S. Ct. 144, 146: if the note is not lost, exhibition of a copy will not be sufficient; *Freeman et al.* v. *Boynton*, 7 Massachusetts, 483, 486; but if the original is lost, demand upon a copy will be good; *Hinsdale* v. *Miles*, 5 Connecticut, 331; but a tender of indemnity must be made at the same time; *Smith* v. *Rockwell*, 2 Hill's N. Y., 482. A demand through the post office, therefore, is insufficient, as is remarked in *Magruder* v. *Bank of Washington*, and is confirmed in *Stuckert* v. *Anderson*, 3 Wharton, 116. In *Tredick* v. *Wendell*, 1 New Hampshire, 80, it was decided that when a note was left at a bank,

and the maker resided close to the bank, a letter sent to his residence, informing him that the note was in the bank, and requesting payment, the person not being at his residence, was sufficient: but unless the note, by its terms, or by consent, or usage, was payable at the bank, that decision is unsound, for the maker may have left orders that notes presented at his house should be paid, but not that letters sent there should be opened. Usage, it seems, of a place or bank, may dispense with the presenting or exhibiting of the note: *Whitwell et al.* v. *Johnson*, 17 Massachusetts, 449; *Shoue* v. *Wiley*, 18 Pickering, 558; *Maine Bank* v. *Smith*, 18 Maine, 99; *Gallagher* v. *Roberts*, 2 Fairfield, 489. And, in general, the agreement or consent of the promisor, or of all the parties, may substitute a particular mode of demand for that which ordinarily is required by law; *State Bank* v. *Hurd*, 12 Massachusetts, 172; *North Bank* v. *Abbott*, 13 Pickering, 465, 470; *Gilbert* v. *Dennis*, 3 Metcalf, 495, 496, 499, 505; but probably the consent of the promisor could not dispense with demand altogether, as concerns the rights of the endorser; see *Lee Bank* v. *Spencer and another*, 6 Metcalf, 308.

As to the place of demand; when the note or bill is not payable at some particular city or town, and the maker or acceptor personally is not found, demand may be made either at his residence, or at his place of business during business hours; *Sussex Bank* v. *Baldwin & Shipman*, 2 Harrison, 488, 502; *Winans* v. *Davis*, 3 Id. 277, 282, 283: presentment at the dwelling will certainly be sufficient, if the maker or acceptor be not a banker: *Stivers and Page* v. *Prentice and Weissinger*, 3 B. Monroe, 461, 463. Going to the party's place of business in business hours, if he is not found there, is enough, and dispenses with further efforts; *Shed* v. *Brett and Trustees*, 1 Pickering, 413; *Fields* v. *Mallett*, 3 Hawks, 465; *Br. Bank at Decatur* v. *Hodges*, 7 Alabama, 42, 44; and see *Buxton* v. *Jones*, 1 Manning & Granger, 83; and so in respect to the party's dwelling or lodging house; *Belmont Bank* v. *Patterson*, 17 Ohio, 78, 94; but in *Ellis's Administrator* v. *Commercial Bank of Natchez*, 7 Howard's Mississippi, 294, 303, it was suggested that it might perhaps be further necessary to make inquiry in the neighbourhood. If the maker's residence or place of business is not known, there must be due diligence to discover it; and a demand in the street will, ordinarily, not be sufficient; *King* v. *Holmes*, 1 Jones, 456. Where two partners, makers of a note, had failed, and given up there place of business, which was let to strangers, and inquiry was made there and not elsewhere, and the notary was informed that they had gone out of town, when in fact one of them resided in the town, this was held not to be a sufficient demand or inquiry; *Granite Bank* v. *Ayers*, 16 Pickering, 392, 394. See *Buxton* v. *Jones*, 1 M. & Gr. 83.

When a note or bill is expressed to be payable at a particular place, a demand there is always sufficient to charge the endorser; *Evans* v. *St. John*, 9 Porter, 187, 193; *McClane* v. *Fitch, &c.*, 4 B. Monroe, 599; if it is payable in a particular town, and the maker's or acceptor's residence is elsewhere, the maker is not bound to make demand elsewhere than in that town; *Smith* v. *Little*, 10 New Hampshire, 526: the mere fact, however, of a note being dated at a particular place, does not make it payable there, so as to excuse a demand of the maker, personally, or at his residence elsewhere; *Lightner* v. *Will*, 2 Watts & Sergeant, 140; even if his residence be in another state or a foreign country; *Taylor* v. *Snyder*, 3 Denio, 146; *Gilmore* v. *Spies*, 1 Barbour, 159, 164, affirmed on error, *Spies* v. *Gilmore*, 1 Comstock, 322. If a note or bill is by its terms payable at a bank, and on the day of its maturity, the bank is the holder of

the note, or if the holder or his agent, makes demand there, or leaves the instrument at the bank and authorizes the bank to receive payment and give up the note, and the maker or acceptor neither offers payment, nor has funds in the bank appropriate to the payment of the bill or note, which is to be ascertained by an inspection of his bank-account, no other presentment or demand is necessary, and the bill or note is dishonoured: *U. S. Bank* v. *Smith; Bank of the U. S.* v. *Carneal*, 2 Peters, 543, 549; *Hildeburn* v. *Turner*, 5 Howard's Supreme Court, 69, 71; *Jenks* v. *The Doylestown Bank*, 4 Watts & Sergeant, 505, 511; *Phipps and others* v. *Chase*, 6 Metcalf, 491; *Gillett* v. *Averill*, 3 Denio, 85, 88; *State Bank* v. *Napier*, 6 Humphreys, 270; *Roberts* v. *Mason*, 1 Judges' Alabama, 374, 375; *Bank of the State of So. Car.* v. *Flagg*, 1 Hill's So. Car. 177, 179; *Allen* v. *Smith's Adm'r*, 4 Harrington, 234, 237. But whether there are funds provided or not, the note must be at the bank at maturity, for otherwise there can be no demand, constructive or actual; *Shaw* v. *Reed*, 12 Pickering, 132; *Lee Bank* v. *Spencer and another*, 6 Metcalf, 308: but if a note is the property of the bank where it is payable, it will be presumed that it was at the bank, and it will be for the endorser to prove that the maker called at the bank to pay the note; *Folger* v. *Chase*, 18 Pickering, 63, 66. If a note be payable "at either, or at any of the banks at B.," it was said in *North Bank* v. *Abbott*, 13 Pickering, 465, 468, that it is considered payable at either or any which the holder may appoint, and that it is not payable at a place certain, until the holder has given notice to the maker, in which bank the note is deposited: but this is denied, and probably with reason, in *Jackson* v. *Packer*, 13 Connecticut, 243, 358, *Page* v. *Webster*, 15 Maine, 249, 253, and *Langley* v. *Palmer*, 30 Id. 467, 469, where it is held that the note may be presented at either or any of the banks indicated. When a note, not, on its face, payable at a bank, is placed for collection in a bank at which the custom is to demand payment at the counter and not personally, such usage may affect the maker, if expressly or impliedly, he is consenting to it; but not if he does not know of the usage, and cannot be considered as having acquiesced in it; *Lewis* v. *The Planters' Bank*, 3 Howard's Mississippi, 267: but see *Bank of Washington* v. *Triplett and Neale*, 1 Peters, 25, 34.

In regard to the *necessity* of a demand at a particular place, when a note or bill is made or accepted payable there, the decisions in this country differ from those in England. In England, in the case of a promissory note made payable at a particular place named in the body of the note, the decisions have been uniform in all the courts, that in a suit against the maker, and of course, *a fortiori*, in a suit against the endorser, it is necessary to aver in the declaration, and to prove, a presentment at that place; *Sanderson* v. *Bowes*, 14 East, 500; *Spindler* v. *Grellett*, 1 Exchequer, 384; and the omission of such an averment is bad after verdict; *Emblin* v. *Dartnell*, 12 Meeson & Welsby, 830; but where the place of payment is appointed, not in the body of the note, but by a memorandum at the foot of it, such allegation is not necessary; *Williams* v. *Waring*, 10 Barnewall & Cresswell, 2. It appears, also, to be certain, that upon a bill of exchange drawn payable at a particular place, and accepted as drawn, a demand at that place is in England considered necessary as a condition precedent to charge the acceptor or drawer or endorser: per Lord Eldon, in *Rowe* v. *Young*, 2 Broderip & Bingham, 165, 170. And for the case where a bill has been drawn generally, and has been accepted payable at a particular place, the law was settled to be the same, by the House of Lords, in *Rowe* v. *Young*, in 1820. Pre-

viously to that decision, the Common Pleas had considered that such an acceptanee was conditional, and that a presentment at the appointed place must be averred in pleading, in a suit against the acceptor, and proved if put in issue, in order to establish a right of action in the holder; while the King's Bench had held that such an acceptance did not operate to render a demand at the place, a condition precedent to a right of action against the acceptor, and therefore that a demand at that place need not be averred in the declaration, nor proved, but yet that the defendant might show, by way of defence against damages and costs, in the nature of a plea of tender, that he was ready to pay at the time or place appointed, and must thereupon bring the principal sum into court. In *Rowe* v. *Young*, the Court of King's Bench, on demurrer to a declaration upon a bill accepted payable at a particular place, where there was not an averment of presentment at that place, had given judgment for the plaintiff; but upon error, though of the twelve judges who gave their opinion, eight, among whom were Bayley, J., and Abbott, C. J., approved of the practice of the King's Bench, the House of Lords, by the advice of Lord Eldon, Chancellor, and Lord Redesdale, reversed the judgment, and established the practice of the Common Pleas as the law of England. Shortly after, the statute 1 & 2 Geo. 4, c. 78 (sometimes called Serj. Onslow's Act), enacted, that an acceptance "payable at the house of a banker or other place," should be deemed a general acceptance, but an acceptance "payable at a banker's house or other place only, and not otherwise or elsewhere," shall be deemed a qualified acceptance, on which the acceptor shall not be liable unless there has been default after due demand at the place. And since this act, it has been decided in England that a bill *drawn* payable at a special place, and accepted as drawn, need not be presented at that place, in order to charge the *acceptor*, such bill being within the purview of the act; *Selby* v. *Eden*, 3 Bingham, 611; *Fayler* v. *Bird*, 6 B. & Cr. 531; though it must, to charge the drawer or endorser; *Gibb* v. *Mather*, 2 Cr. & J. 254; 8 Bingh. 214. The Irish courts, however, have differed from the English, and have held that such a bill is not affected by the statute, but that there must be a presentment at the place, to charge even the acceptor; *Roach* v. *Johnston*, Hays & Jones (Irish Exchequer), 246; but they are clearly wrong in supposing that *Gibb* v. *Mather* had overruled *Selby* v. *Eden*, and *Fayle* v. *Bird*.

The settlement of the point discussed in *Rowe* v. *Young*, seems, in reality, to depend upon the question whether the acceptance of a bill, or an acceptance qualified as to the place of payment only, imports in law an antecedent or independent consideration to the extent of the sum expressed in the bill; Abbott, C. J., and Bailey, J., in *Rowe* v. *Young*, both asserting it, and Lords Eldon and Redesdale both denying it, as a general proposition. To illustrate the principles connected with this subject, three cases may be considered. One where the declaration is against the acceptor and contains the common money counts only, and a bill with the acceptance qualified as to the place of payment, is offered in evidence: the point perhaps has not expressly been decided, but it seems to be impossible to say that such an acceptance would not be admissible and sufficient evidence. A second case is, where the suit is against the acceptor, but the declaration is specially on the bill: in this, two questions may be made; first, the general one, whether when suit is brought upon such an obligation as implies an antecedent debt, though the obligation be qualified as to the place of payment, it is necessary in a declaration upon the instrument to take notice of such qualification by

averring a presence or a demand at that place; and second, the particular question, whether an acceptance qualified as to place of payment does imply an antecedent debt. The reasonings of Bayley, J., appear to determine the former of these questions in the negative, and the general principle of law on this point as deduced by him seems not to have been denied by any one in that case: and as to the second question, if such an acceptance would of itself be evidence under the common money counts, as in the first case, it seems that it should be determined in the affirmative; and the law, it is believed, does certainly imply that every commercial acceptance, absolute as to the liability to pay, is an acceptance for value; the theory of a bill of exchange being that it is drawn on funds, and the acceptance being, in legal presumption, an admission of them; (See *Griffith* v. *Reed*, 21 Wendell, 502, 504, 507; *Luff* v. *Pope*, 5 Hill's N. Y., 413, 417; *Byrne, Ryan & Co.* v. *Schwing*, 6 B. Monroe, 199, 203.) A third case is where action is brought against the drawer or endorser of a bill, accepted with a qualification as to the place of payment: in this case the liability is collateral, and strictly contingent or conditional, and must be made out entirely upon the bill, and a demand at the appointed place, and non-payment, must be alleged in the declaration in order to show that the acceptor was in default; and so is the opinion of Bayley, J. in *Rowe* v. *Young:* and though it might be said that the drawing or endorsing of a bill implies an antecedent debt, and that a recovery may be had on the money counts, or some of them, by a holder against the drawer or endorser, yet strictly that is not so; it is the dishonour of a bill that is evidence in law of a consideration remaining with the drawer or endorser for the benefit of the holder; the implication of a debt does not arise till then; and under the money counts, if the bill itself is relied on as evidence, presentment according to the tenor of the bill, and every other fact necessary to show a default in the acceptor and notice of it to the drawer or endorser, must be proved.

In this country, the law is settled in almost exact accordance with the views expressed by Bayley, J., in *Rowe* v. *Young;* and in accordance, it is believed, with clear and settled principles. There is no difference between a promissory note, and the acceptance of a bill of exchange, qualified as to the place of payment; *dicta* in *Wallace* v. *McConnell*. In both cases, when the instrument is payable at a specified time and place, presentment or demand at that place need not be alleged in the declaration, nor proved, in a suit against the maker or acceptor: but if the maker or acceptor was at the place designated, personally or by his agent, with funds ready for the payment of the demand, this may be shown by way of defence, not in bar of the debt, but in discharge of damages and costs, and will have the effect of a tender, and on such defence being made, the money must be brought into court: *Wallace* v. *McConnell* (of course overruling *Picquet* v. *Curtis*, 1 Sumner, 478); *Carley* v. *Vance*, 17 Massachusetts, 389; *Payson* v. *Whitcomb*, 15 Pickering, 212, 216; *Eastman* v. *Fifield et a.*, 3 New Hampshire, 333; *Otis* v. *Barton*, 10 Id. 433; *Wolcott* v. *Van Santvoord*, 17 Johnson, 248; *Caldwell* v. *Cassidy*, 8 Cowen, 271; *Nazro* v. *Fuller*, 24 Wendell, 374; *Green* v. *Goings*, 7 Barbour's S. Ct. 653, 655; *Eldred* v. *Hawes*, 4 Connecticut, 466; *Jackson* v. *Packer*, 13 Id. 343, 358; *Bond* v. *Storrs*, Id. 412, 416; *Bacon* v. *Dyer*, 12 Maine, 19; *Lyon* v. *Williamson*, 27 Id. 149; *Gammon* v. *Everett*, 25 Id. 66; *Weed* v. *Van Houten*, 4 Halsted, 189; *Fitler* v. *Beckley*, 2 Watts & Sergeant, 458; *Bowie, use of Ladd, et al.* v. *Duvall*, 1 Gill & Johnson, 176, 181; *Armistead* v. *Armisteads*, 10 Leigh, 512; *Allen* v. *Smith's Adm'r*, 4 Harrington, 234; *Clarke* v. *Gordon*, 3 Richardson, 311; *M'Nairy* v. *Bell*, 1 Yerger, 502;

Mulherrin v. *Hannum*, 2 Id. 81; *Butterfield* v. *Kinzie*, 1 Scammon, 445; *Armstrong* v. *Caldwell*, Id. 546; *Irvine* v. *Withers*, 1 Stewart, 234; *Montgomery* v. *Elliott, use, &c.*, 6 Alabama, 701, 703; *Cook* v. *Martin*, 5 Smedes & Marshall, 379, 393; *Sumner* v. *Ford & Co.*, 3 Pike, 389, 403; *McKiel et al.* v. *The Real Estate Bank*, 4 Id. 592, 595; *Hanley et al.* v. *Gaines*, 5 Id. 38; *Thompson & Rawles* v. *The Real Estate Bank*, 5 Id. 59; *Edwards* v. *Hasbrook*, 2 Texas, 578: and the plea of readiness at the time and place, in order to be good, must state, according to *Lyon* v. *Williamson*, not only that the party was ready to pay the money at the time and place named, but that he has ever since been ready there to pay the same, and that he brings the money into court: and though in *Conn* v. *Gano*, 1 Ohio, 483, it was held by a majority of the court, that while a demand at the place need not be alleged, yet if alleged it must be proved, yet the opinion of the minority of the court who held that the whole averment is immaterial, and surplusage, which may be struck out, and therefore need not be proved as laid, is plainly correct, as indeed has been expressly decided in *Remick* v. *O'Kyle et al.*, 12 Maine, 340. But in a suit against the drawer or endorser of a bill drawn, or note made, payable at a particular place, demand at the appointed place must be averred in the declaration and proved; *Bank of the United States* v. *Smith*; *Watkins* v. *Crouch & Co.*, 5 Leigh, 522; *Hartwell* v. *Candler*, 5 Blackford, 215; *Roberts* v. *Mason*, 1 Alabama, 374; *Montgomery* v. *Elliott, use, &c.*, 6 Id. 701, 703; *Glasgow* v. *Pratte*, 8 Missouri, 336; *Gibb* v. *Mather*, 2 Cr. & J. 254; S. C., 8 Bing. 214. In Louisiana, however, the principle is established that when a note is made payable at a particular place, there must be a demand there, as a condition precedent before any suit; *Funes y Carillo* v. *The Bank of the United States*, 10 Robinson, 533, 540.

The decisions cited above as to the liability of a maker or acceptor, were mostly upon notes payable at a specified time; and there are *dicta* that if the note be payable on *demand*, at a specified place, no action will lie against the maker or acceptor without a demand: see *dicta* in *Carley* v. *Vance*, *Eastman* v. *Fifield et al.*, *Wallace* v. *M'Connell*, and in the opinion of Stanard, J., in *Armistead* v. *Armisteads*. But these *dicta* appear to have proceeded upon the supposition that the circumstance of the note being payable on demand in *Sanderson* v. *Bowes*, 10 East, 500, *Dickinson* v. *Bowes*, 16 Id. 110, S. C. on error, 5 Taunton, 30, was in some degree the ground of the decisions in those cases; but though a passing dictum of Lord Ellenborough in the first of those cases might seem to point at that distinction, yet a perusal of the opinions delivered in *Rowe* v. *Young*, especially those of Bayley, J., and Abbott, C. J., will show that that circumstance was not considered as being to any extent a ground of distinction, and that the law is precisely the same for the case of a note payable on demand, and one payable at a specified time. A note payable on demand is, in law, payable presently; there needs no demand to give a right of action, and the Statute of Limitations begins to run from the date: the specification of a place of payment cannot alter the nature of the legal liability, so as to render it not absolute and immediate. The point, however, is now settled by decisions; three adjudged cases have directly overruled this supposed distinction, and have determined that upon a note payable on demand at a particular place, an averment of demand is not necessary in a suit against the maker; *Haxtun* v. *Bishop*, 3 Wend. 13, 20; *McKenney* v. *Whipple*, 21 Maine, 98; *Montgomery* v. *Elliott, use, &c.*, 6 Alabama, 701, 703; besides a dictum to the same purpose in *Bowie, &c.*, v. *Duvall*, 1 Gill & Johnson, 176, 183.

It has been observed, above, that the maker or acceptor when sued on a

note payable at a specified place, may excuse himself by showing his readiness to pay at the place, and by bringing the money into court; but the further question has been raised whether he can excuse himself by showing that the money has been lost by the intermediate failure of the banker at whose office the note was payable, a point which Abbott, C. J., in *Rowe* v. *Young*, p. 282, thought one of so much doubt that he declined giving an opinion upon it at that time. In *Fitler* v. *Beckley*, 2 Watts & Sergeant, 458, 462, Huston, J. inclined to the opinion that if the maker or acceptor, where the money is payable at a bank, pays the money into the bank to the credit of the payee, and leaves it there, it will be a complete discharge, though the money should be lost by robbery of the bank or otherwise, though he admitted that the case did not call for an opinion of the Court on the point. If the note were in possession of the bank, as holder, or agent of the holder, so that payment into the bank would be very payment and discharge of the note, the conclusion of Mr. Justice Huston would probably be applicable; but if the note was not at the bank, and the bank had not authority from the holder, the creditor would have no right to make the bank the agent of the holder to receive payment of the note, although it might be payable *at* the bank; and probably the creditor would be responsible in the same way that he would for money rejected upon a tender.

Of the form of Notice of the dishonour of Bills and Notes.

MILLS, PLAINTIFF IN ERROR *v.* THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF THE UNITED STATES, DEFENDANTS IN ERROR.

In the Supreme Court of the United States.

FEBRUARY TERM, 1826.

[REPORTED, 11 WHEATON, 431–441.]

No form of notice to an endorser, of the default of the maker or acceptor of a note or bill, has been prescribed by law. The whole object of it is to inform the party to whom it is sent, that payment has been refused *by the maker; that he is considered liable; and that payment is expected of him.*

It is not necessary that the notice should state who is the holder of the instrument.

A misdescription of the instrument will not vitiate the notice, unless the variance be such as to mislead the party as to the particular instrument which has been dishonoured. If, under all the circumstances

of the case, the party could not fail to perceive that the note in suit was dishonoured, the misdescription is unimportant.

It is not necessary that the notice should contain a formal allegation of the mode *or* place *of the demand.*

THIS cause was argued by Mr. *Wright* for the plaintiff in error, and by Mr. *Webster* for the defendant in error.

Mr. Justice STORY delivered the opinion of the Court.

This is a suit originally brought in the Circuit Court of Ohio, by the Bank of the United States, against A. G. Wood and George Ebert, doing business under the firm of Wood & Ebert, Alexander Adair, Horace Reed, and the plaintiff in error, Peter Mills. The declaration was for 3,600 dollars, money lent and advanced. During the pendency of the suit, Reed and Adair died. Mills filed a separate plea of non-assumpsit, upon which issue was joined; and upon the trial, the jury returned a verdict for the Bank of the United States for 4641 dollars; upon which judgment was rendered in their favour. At the trial, a bill of exceptions was taken by Mills, for the consideration of the matter of which the present writ of error has been brought to this Court.

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

The plaintiffs offered in evidence a promissory note, signed Wood and Ebert, and purporting to be endorsed in blank by Peter Mills, Alexander Adair, and Horace Reed, as successive endorsers, which note, with the endorsements thereon, is as follows, to wit: "Chilicothe, 20th July, 1819. Dollars 3,600. Sixty days after date I promise to pay to Peter Mills, or order, at the office of discount and deposit of the Bank of the United States, at Chilicothe, three thousand six hundred dollars, for value received. Wood & Ebert." Endorsed, "Pay to A. Adair or order, Peter Mills." "Pay to Horace Reed or order, A. Adair." "Pay to the P. Directors and Company of the Bank of the U. States, or order. Horace Reed." On the upper right hand corner of the note is also endorsed, "3185. Wood & Ebert, 3,600 dollars, Sep. 18—21." It was proven, that this note had been sent to the office at Chilicothe, to renew a note which had been five or six times previously renewed by the same parties. It was proven, by the deposition of Levin Belt, Esq., Mayor of the town of Chilicothe, that, on the 22d day of September,

1819, immediately after the commencement of the hours of business, he duly presented the said note at the said office of discount and deposit, and there demanded payment of the said note, but there was no person there ready or willing to pay the same, and the said note was not paid, in consequence of which, the said deponent immediately protested the said note for the non-payment and dishonour thereof, and immediately thereafter prepared a notice for each of the endorsers respectively, and immediately on the same day deposited one of said notices in the post-office, directed to Peter Mills, at Zanesville (his place of residence), of which notice the following is a copy: "Chilicothe, 22d September, 1819. Sir, you will hereby take notice, that a note drawn by Wood & Ebert, dated 20th day of September, 1819, for 3,600 dollars, payable to you, or order, in sixty days, at the office of discount and deposit of the Bank of the United States at Chilicothe, and on which you are endorser, has been protested for non-payment, and the holders thereof look to you. Yours, respectfully, Levin Belt, Mayor of Chilicothe." (Peter Mills, Esq.) It was further proven by the plaintiffs, that it had been the custom of the banks in Chilicothe, for a long time previously to the establishment of a branch in that place, to make demand of promissory notes, and bills of exchange, on the day after the last day of grace (that is, on the 64th day), that the Branch Bank, on its establishment at Chilicothe, adopted that custom, and that such had been the uniform usage in the several banks in that place ever since. No evidence was given of the handwriting of either of the endorsers. The court charged the jury, first, that the notice being sufficient to put the defendant upon inquiry, was good, in point of form, to charge him, although it did not name the person who was holder of the said note, nor state that the demand had been made at the bank when the note was due. 2. That if the jury find that there was no other note payable in the office at Chilicothe, drawn by Wood & Ebert, and endorsed by defendant, except the note in controversy, the mistake in the date of the note made by the notary in the notice given to that defendant, does not impair the liability of the said defendant, and the plaintiffs have a right to recover. 3. That should the jury find that the usage of banks, and of the office of discount and deposit in Chilicothe, was to make the demand of payment, and to protest and give notice, on the 64th day, such demand and notice are sufficient.

The counsel on the part of the defendant prayed the Court to instruct the jury, "that before the common principles of law relating to the demand and notice necessary to charge the endorser, can be varied by a usage and custom of the plaintiffs, the jury must be satisfied that the defendant had personal knowledge of the usage or custom at the time he endorsed the note; and, also, that before the plaintiffs can recover

as the holder and endorser of a promissory note, they must prove their title to the proceeds by evidence of the endorsements on the note," which instructions were refused by the Court.

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

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

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

The objection of misdescription may be disposed of in a few words. It cannot be for a moment maintained that every variance, however immaterial, is fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonoured. If it does not mislead him, if it conveys to him the real fact without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility. In the present case, the misdescription was merely in the date. The sum, the parties, the time and place of payment, and the endorsement were truly and accurately described. The error, too, was apparent on the face of the notice. The party was informed, that on the 22d of September a note endorsed by him, payable in sixty days, was protested for non-payment; and yet the note itself was stated to be dated on the 20th of the same month, and, of course, only two days before. Under these circumstances, the Court laid down a rule most favourable to the defendant. It directed

the jury to find the notice good, if there was no other note payable in the office at Chilicothe, drawn by Wood & Ebert, and endorsed by the defendant. If there was no other note, how could the mistake of date possibly mislead the defendant? If he had endorsed but one note for Wood & Ebert, how could the notice fail to be full and unexceptionable in fact?

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

Upon the point, then, of notice, we think there is no error in the opinion of the Circuit Court.

Another question is, whether the usage and custom of the bank, not to make demand of the payment until the fourth day of grace, bound the defendant, unless he had personal knowledge of that usage and custom. There is no doubt, that according to the general rules of law, demand of payment out to be made on the third day, and that it is too late if made on the fourth day of grace. But it has been decided by this Court, upon full consideration and argument, in the case of Renner v. The Bank of Columbia (9 Wheat. Rep. 582), that where a note is made for the purpose of being negotiated at a bank, whose custom, known to the parties, it is to demand payment and give notice on the fourth day of grace, that custom forms a part of the law of such contract, at least so far as to bind their rights. In the present case, the Court is called upon to take one step farther; and upon the principles and reasoning of the former case, it has come to the conclusion, that when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment, and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal knowledge of it or not. In the case of such a note, the parties are presumed by implication to agree to be governed by the usage of the bank at which they have chosen to make the security itself negotiable.

Another question propounded by the defendant is, whether the plaintiffs were entitled to recover without establishing their title to the note,

as holders by proof of the endorsements. There is no doubt, that by the general rule of law, such proof is indispensable on the part of the plaintiffs, unless it is waived by the other side. But in all such cases, the defendant may waive a rule introduced for his benefit; and such waiver may be implied from circumstances, as well as expressly given. It is in this view that the rule of the Circuit Court of Ohio of 1819, which has been referred to at the bar, deserves consideration. That rule declares, "that hereafter, in any actions brought upon bond, bill, or note, it shall not be necessary for the plaintiffs on trial to prove the execution of the bond, bill, or note, unless the defendant shall have filed with his plea an affidavit, that such bond, bill, or note, was not executed by him." We think the present case falls completely within the purview of this rule. Its object was to prevent unnecessary expense and useless delays upon objections at trials, which were frivolous and unconnected with the merits. If the rule attempted to interfere with, or control the rules of evidence, it certainly could not be supported. But it attempts no such thing. It does not deny to the party the right to demand proof of the execution or endorsement of the note at the trial; but it requires him in effect to give notice by affidavit, accompanying the plea, that he means to contest that fact under the issue. If the party gives no such notice, and files no such affidavit, it is on his own part a waiver of the right to contest the fact, or rather an admission that he does not mean to contest it. We see no hardship in such a rule. It subserves the purposes of justice, and prevents the accumulation of costs. It follows out, in an exemplary manner, that injunction of the Judiciary act of the 2d of March, 1793, ch. 22, which requires the Courts of the United States "to regulate the practice thereof, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings." As no affidavit accompanied the plea of the defendant in the present case, he had no right to insist upon the proof of the endorsements.

Another objection now urged against the judgment is, that the count demands 3,600 dollars only, and the jury gave damages amounting to 4,641 dollars. But there is no error in this proceeding, since the *ad damnum* is for a larger sum. In all cases where interest, not stipulated for by the terms of the contract, is given by way of damages, the sum demanded in the declaration is less than the sum for which judgment is rendered. The plaintiffs may not recover more, as principal, than the sum demanded as such in the declaration; but the jury have a right to add interest, by way of damages, for the delay.

Some other objections have been suggested at the bar, such as, that the jury had no right, without evidence, to presume that there was no other note of Wood & Ebert, in order to help the misdescription; and

that the case proved was of several liabilities of the defendants, which would not support a declaration on a joint contract. These questions have been fully argued by counsel, but are not presented by the record in such a shape as to enable the Court to take cogizance of them.

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

Knowledge, on the part of the endorser, of the dishonour of a bill or note, is not an equivalent for *notice; Esdaile* v. *Sowerby*, 11 East, 114; *Burgh* v. *Legge*, 5 Meeson & Welsby, 418, 420; *Caunt* v. *Thompson*, 7 C. B. 400, 410; *Gibbs* v. *Cannon*, 9 Sergeant & Rawle, 198, 201. There must be some communication from an authorized person to the endorser, stating to him the fact or facts by which his liability has become absolute: and there are two particulars in which the form of the notice requires attention; one, relating to the information which the notice must convey as to the default of the maker or acceptor; and the other to the description or identification of the note or bill which is the subject of the notice. With regard to the former, it has been already shown that under different circumstances, a bill or note may be dishonoured in different ways, and the rule appears to be, that the notice should either state in terms the dishonour of the bill, or state, expressly or impliedly, those facts which, under the circumstances of the case, constitute the dishonour of the bill; *Gilbert* v. *Dennis*, 3 Metcalf, 495, 498; *Mechanics' Bank at Baltimore* v. *Merchants' Bank at Boston*, 6 Id. 13, 25. As to the other point, it is enough if under all the circumstances, the endorser could not have been misled as to the bill which was the subject of dishonour.

1. What facts as to the default of the principal party, the notice must state.

In *Hartley* v. *Case*, 4 B. & C. 339, it was decided by Lord Tenterden, that, though there is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange, yet the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. According to Baron Parke, in *Hedger* v. *Steavenson*, 2 M. & W. 799, this decision made an alteration in the law as it had before that time been generally understood; the impression after *Tindal* v. *Brown*, 1 T. R. 167, being, that it was sufficient if the notice conveyed an intimation that the party to whom it was given, was looked to for payment; and the confirmation of the law of *Hartley* v. *Case*, by *Solarte* v. *Palmer*, in the House of Lords, was, according to Baron Parke, "against the previous opinion of the profession."

In *Solarte* v. *Palmer*, 7 Bing. 530, a letter was written to the endorser, by the holder's attorney, in this form, "17th Dec. 1825. Gentlemen,—A bill for 683*l.*, drawn by Mr. J. K. upon Messrs. D. J. & Co., and bearing your endorsement, has been put into our hands by the assignees of Mr. J. R. A., with directions to take legal measures for the recovery thereof, unless immediately paid to, Gentlemen, Yours, &c." This was decided by Lord Tenterden to be insufficient as notice; and the case being taken into the Exchequer Chamber on error, his ruling was confirmed unanimously; and Tindal, C. J., declared, that no-

tice should at least inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonoured, and that the holder looks to him for payment of its amount: (S. C. 1 Cr. & J., 417.) This judgment was confirmed in the House of Lords, 1 Bing. N. C. 194, S. C. 8 Bligh, N. R. 874; 2 Cl. & Fin. 93; 1 Scott, 1; Park, J., declaring the opinion of the nine judges present to be, that "notice ought, in express terms, or by necessary implication, to convey full information that the bill has been dishonoured;" and the Chancellor, Lord Brougham, observing that the letter in that case was merely a threat of legal proceedings, or a demand of payment, and not a notice of dishonour. In acting under the rule thus laid down, the three Courts at Westminster have differed from one another. In the Common Pleas, the construction of the rule, in a case decided soon after its promulgation, was very strict; *Boulton* v. *Welsh*, 3 Bing. N. C. 688: and the *principle* of that decision can hardly be considered as disturbed by *Houlditch* v. *Cauty*, 4 Bing. N. C. 411, or by *Messenger* v. *Southey*, 1 M. & Gr. 76, though in the latter case, Tindal, C. J., observes, that the rule is not to be extended, and that any case to be governed by it ought to fall clearly within its principle. In the Queen's Bench, in *Strange* v. *Price*, 10 A. & E. 125, Lord Denman, C. J., expressed his doubts of the correctness of the reasoning on which the decisions in *Hartley* v. *Case*, and *Solarte* v. *Palmer*, were founded, but held the rule to be binding: "In all the cases," he said, "where such notices have been held defective, it might have been said that they furnished a reasonable implication of the fact; but clearly that is not sufficient; the notice must be a positive statement, that the bill has been accepted (presented?) and dishonoured;" and in the recent case of *Furze* v. *Sharwood*, 2 Q. B. 388, he wholly rejects the supposition that the mere fact of making a communication respecting the non-payment of the bill at a proper season, can extend the meaning of the words conveying notice of dishonour; and declares it to be undisputed, that the fact must be stated, the notice of dishonour plainly given. On the other hand, in the Exchequer, the construction has been extremely lax. In *Hedger* v. *Steavenson*, 2 M. & W. 799, Parke, B., indicated a strong doubt of the principle in *Solarte* v. *Palmer*, and questioned, whether, though the decision was of course authoritative, the reasoning and language of the Judges was binding upon the courts; and said that if the rule then propounded was obligatory, the terms "necessary implication" must at least be taken, as importing, according to the sense put upon those words by Lord Eldon, in *Wilkinson* v. *Adam*, 1 V. & B. 466, "not natural necessity, but so strong a probability of intention, that a contrary intention cannot be supposed;" and he considered it to be enough, if it appear by reasonable intendment, and would be inferred by any man of business, that the bill had been presented to the acceptor, and not paid by him: and views of this kind have ever since prevailed in the Court of Exchequer.

The effect of *Solarte* v. *Palmer* is, to require, instead of a declaration to the endorser, of the legal consequences of the maker's or acceptor's default, or of an intention to hold the endorser liable, merely a distinct notification of the facts from which his liability arises, that is, of the fact of default. Ordinarily, the facts which constitute the dishonour of the bill, are, a demand of payment from the acceptor or maker, and a refusal by him. A notice, stating these facts expressly, as, that a bill "has been presented for payment, and returned, and now remains unpaid." *Cook* v. *French*, 10 A. & E. 131, S. C. 3 P. & D. 596; or, that it "has been presented for payment to the acceptor thereof, and returned dishonoured, and now lies over-due and unpaid with me as above," *Lewis* v. *Gompertz*,

6 M. & W. 399; is certainly sufficient. As to the terms which by "necessary implication" amount to sufficient notice, it may be considered as settled, that the word "dishonoured," of itself, imports everything that is necessary; *Shelton* v. *Braithwaite*, 7 M. & W. 436; *Rowlands* v. *Springett*, 14 Id. 7; *dictum* of Coleridge, J., in *Strange* v. *Price*, 2 P. & D. 278, 282; *King* v. *Bickley*, 2 Q. B. 419. With regard to the word "returned," there has been some conflict of opinions. In *Grugeon* v. *Smith*, 6 A. & E. 499, the Court of Queen's Bench decided a notification, that a bill "is this day returned with charges to which your immediate attention is requested," to be sufficient: a few days after, the Court of Common Pleas, without knowing of this decision, held a letter stating that the note "became due yesterday, and is returned to me unpaid: I therefore give you notice thereof, and request you will let me have the amount thereof forthwith," to be insufficient; Tindal, C. J., remarking that the facts stated were consistent with an entire omission to present the note to the maker; *Boulton* v. *Welsh*, 3 Bing. N. C. 688. In *Hedger* v. *Steavenson*, 2 M. & W. 799, the court of Exchequer sided with the Queen's Bench: the form of notice there was, that the note "became due yesterday, and has been returned unpaid, and I have to request you will please remit the amount thereof, with 1*s.* 6*d.* noting;" which, in accordance with *Grugeon* v. *Smith*, was decided to be sufficient; Parke, B., disclaiming to go upon the distinction, that in *Boulton* v. *Welsh*, there was no intimation of notarial charges, but saying he thought that decision wrong: "The word 'returned' is almost a technical term in matters of this nature," he observed, "and means that the bill has come to maturity, has been presented, and has not been paid;" Bolland, B., said, "a *returned* note" is "an expression which is perfectly understood in the city of London, to designate a note which has been dishonoured:" and these views are reaffirmed by Baron Parke, in *Lewis* v. *Gompertz*, 6 M. & W. 399. (In *Ryan* v. *Seymour*, Armstrong, Macartney, and Ogle (Irish Reports), 181, a notice that a bill had been "returned to me unpaid, and lies in my hands," was decided to be insufficient: but in *Bell* v. *Robertson*, Id. 401, the form "returned to us under protest for nonpayment" was considered sufficient.) In *Houlditch* v. *Cauty*, 4 Bing. N. C., 411, the Common Pleas indicated distrust of their previous decision, but declined overruling it, and decided the case on another ground; but in *Messenger* v. *Southey*, 1 M. & Gr. 76, they may be considered as abandoning their first position as to this particular expression; for in referring to *Grugeon* v. *Smith*, and *Hedger* v. *Steavenson*, Tindal, C. J., says, "We are far from saying, that those cases may not have been properly decided; for it is difficult to give any other meaning to the terms 'returned' or 'returned with charges,' than an intimation that the bill had been actually presented, refused payment, and returned to the holder on that account." In *Strange* v. *Price*, 2 P. & D. 278, though Littledale, J., expressed some doubts whether "returned" would always be the appropriate word, Coleridge, J., said, "The word *returned* certainly does imply that the bill had been presented, and refused payment;" in *Furze* v. *Sharwood*, 2 Q. B. 388, the Queen's Bench fully sustain their decision in *Grugeon* v. *Smith;* and in *Robson* v. *Curlewis*, Id. 421, expressly decide that the form, "your draft is returned to us unpaid; and if not taken up this day, proceedings will be taken against you," was sufficient. Therefore it may be considered as settled, that where it appears that the note is due and unpaid, the word "returned" is a sufficient implication of demand and refusal.

In the late case of *Armstrong* v. *Christiani*, 5 Common Bench, 687, a notice was sent in this form. "Sir,—

I am the holder of a bill drawn by you on L. M. M. for 98*l.* 15*s.*, which became due yesterday, the 4th inst., *and is unpaid;* and I have to state, that, unless the same is paid to me immediately, I shall take proceedings against you without delay for the amount.

Amount of bill,	£98 15 0
Noting,	5 0
	£99 00 0"

This was decided to be sufficient, construing the effective part of the notice to be the reference to notarial charges; which of necessity implies that there has been a due presentment of the bill to the acceptor, and a refusal to pay. In this case Maule, J., remarked, in allusion to *Hedger* v. *Steavenson*, and *Grugeon* v. *Smith*, that "'returned unpaid' does not by any means import that the bill has been presented to the acceptor; but the addition of notarial charges helps it out." See *Caunt* v. *Thompson*, 7 C. B. 400, 410; a case in which notice was not necessary.

But language which carries no necessary intimation that the bill or note has been demanded, is insufficient. Accordingly, in *Messenger* v. *Southey*, 1 M. & Gr. 76, a letter in these words, "The bill I took of you, is not took up, and 4*s.* 6*d.* expenses; and the money I must pay immediately: my son will be in London on Friday morning," was held to be insufficient; Tindal, C. J., observing, that the words "not took up," indicated rather an expectation that the party addressed, or some other prior party, had engaged to take it up, than a regular presentment and refusal: in *Strange* v. *Price*, 10 A. & E. 125, S. C. 2 P. & D. 278, the form, "Messrs. S. & Co. inform Mr. J. P. that Mr. J. B.'s acceptance 875*l.* is not paid. As endorser, Mr. P. is called upon to pay the money, which will be expected immediately," was decided to be insufficient: and in *Furze* v. *Sharwood*, 2 Q. B. 388, Lord Denman, after a searching examination of the cases, decided a notification that the bill "due yesterday is unpaid," or that it is "unpaid and lies due," to be insufficient, because consistently with all that is set forth, the plaintiff may have abstained from presenting the bill: and *Brush* v. *Hayes*, 1 Jebb & Symes, 658, is to the same effect. In the recent case of *Bailey* v. *Porter*, 14 M. & W. 44, it was decided by the Exchequer, that a letter informing the defendant that "J. C.'s acceptance due that day was unpaid, and requested his immediate attention to it," was sufficient. The ground relied on by Alderson, B., and Pollock, C. B., seems to have been, that this language distinctly intimates that the plaintiff looks to the defendant for payment: it appears, however, that the bill was accepted payable at the plaintiffs', who were bankers, and, on the day it became due, were holders of the bill; so that a demand of the acceptor was not necessary; and this is, no doubt, the true ground of a decision, which would otherwise be in direct conflict with the latest decisions in the Queen's Bench and Common Pleas: under this point of view, the case becomes similar to *Smith* v. *Whiting*, 12 Massachusetts, 6; and the principle, that, if a note is made payable at a bank, notice of mere non-payment is enough, is again established in *Clark* v. *Eldridge*, 13 Metcalf, 96.

The principle established in *Mills* v. *Bank of the United States*, that the object of notice is, to inform the party to whom it is sent, that payment has been *refused* by the maker, that he is considered liable, and that payment is expected of him, is essentially the same with that of *Solarte* v. *Palmer:* the language of Story, J., that notice need not state that payment was demanded *at the bank when the note became due*, and that it is not the practice to state in the notice the *mode* or *place* of demand, but the mere naked non-payment, is to be understood not as implying that the fact of demand need not be communicated, but that the

place and time and manner of it need not be specified; that being the point before the Court. And in *Smith* v. *Little*, 10 New Hampshire, 526, 531; *Crocker* v. *Getchell*, 23 Maine, 392, 398; *Saltmarsh* v. *Tuthill*, 13 Alabama, 390, 402; *Cayuga Co. Bank* v. *Warden*, 1 Comstock, 414, 419; and *Mainer* v. *Spurlock and another*, 9 Robinson, 161, a form of notice, similar to that in *Mills* v. *Bank of the United States*, stating that the bill or note had been protested for non-payment, and that the holder looked to the endorser, was decided to be sufficient, because the endorser must have understood from it that a demand had been made, and the bill or note not paid: and see *Bank of the U. S.* v. *Norwood*, 1 Harris & Johnson, 423, 427; *Howe* v. *Bradley*, 19 Maine, 31, 35; *Bank at Alexandria* v. *Swann*, 9 Peters, 34, 46; *Crawford* v. *The Branch Bank at Mobile*, 7 Alabama, 206, 212; *Wheaton* v. *Wilmarth*, 13 Metcalf, 422, 428. In *Platt* v. *Drake*, 1 Douglass, 296, a notice from a notary, in the case of a promissory note, stating that the note "had been protested for non-payment, and the holders looked to him for payment of the same," was decided to be insufficient; as it was notice of an act entirely unnecessary, and even nugatory, in the case of a note; but in *Spies* v. *Newberry*, 2 Id., a notice in case of a foreign bill of exchange, stating that it "has this day been protested for non-payment, and the holder looks to you for payment thereof," was decided to be sufficient. "A protest," said the court in the last case, "is a constituent part of a bill of exchange, indispensably necessary to be made, to entitle the holder to recover the amount from the other parties to the bill; is by law made evidence of presentment and dishonour; is made only upon such presentment and dishonour. The words *protested for non-payment*, in this way, have come to have a technical meaning in matters of this nature. In them is included, not only the idea that the bill is past due, but that payment of it has been demanded, and not being paid, it is therefore dishonoured. They mean that the process necessary to dishonour the bill, viz., demand, refusal of payment, and the drawing up of a formal protest, has been gone through with. All this is included in, and meant by the term *protested*. The meaning of this word, as applied to bills of exchange, is well known; well understood; and as the main object of the notice is to put the party upon inquiry—upon his guard—it seems to me this is all that is necessary for that purpose." And this case ought fairly to be considered as overruling *Platt* v. *Drake*. See, also, *Coddington* v. *Davis*, 1 Comstock, 186, 190; S. C. on error, 3 Denio, 17, 25, as to the popular meaning of "protest." In *Gilbert* v. *Dennis*, 3 Metcalf, 495, 499, the late English cases are reviewed and approved of: and the general principle is deduced, that the notice should be such, that it will inform the endorser that the note has become due and dishonoured, and that the holder relies on the endorser for payment; which information may be express, or may be inferred by necessary implication or reasonable intendment, from the language; construing such language in reference to its accustomed meaning, when implied to similar subjects, and with reference to the terms of the note, and the time and place at which the note is to be paid, as fixed by express or tacit agreement, or inferred from general or particular usages. In that case a notification on the last day of grace, after refusal by the maker, was sent in these terms, "Sir, I have a note signed by C. E. B., and endorsed by you for seven hundred dollars, which is due this day and unpaid; payment is demanded of you;" which, as the note was payable not at a bank, but to an individual, was adjudged to be insufficient, because an averment that the note was unpaid, did not, by necessary implication, or reasonable intendment, amount to an aver-

ment or intimation that payment had been demanded and refused, or that the note had been otherwise dishonoured; in *Smith* v. *Whiting*, 12 Massachusetts, 6, however, where the note was payable at a bank, notice from the bank that the note was unpaid, was decided to be sufficient; and this is confirmed in *Clark* v. *Eldridge*, 13 Metcalf, 96. In *Pinkham, Executrix*, v. *Macy*, 9 Metcalf, 174, this principle is confirmed, that the notice must be such as to assert or imply that the note has been dishonoured; which may consist in stating that it has been dishonoured, or by stating that fact which, under the circumstances of the case, constitutes its dishonour, as, that it has been demanded and payment refused, where, as in ordinary cases, a demand is necessary, or, that, if payable at a bank, expressly or by usage, it lies over, or that the maker has absconded; but that except where non-payment and lapse of time constitute dishonour, and presentment or inquiry is not necessary, a notification, merely, that the note is due and unpaid, will be insufficient, because it is not, in terms, or by implication, notice that it has been demanded, or that it is dishonoured: and in this case, a notice, such as that in *Gilbert* v. *Dennis*, was decided to be insufficient, though given by a notary public. In *Sinclair* v. *Lynah*, 1 Speers, 244, the principle of *Gilbert* v. *Dennis*, and of the English cases on which it is founded, is adopted; and a notification by a notary to the endorser that the day of payment had expired, and that payment was expected of him, was decided to be insufficient, since it did not import that a demand had been made upon the maker. In *Remer* v. *Downer*, 23 Wendell, 620, 626, and *Ransom* v. *Mark*, 2 Hill's N. Y. 588, 594, the principle of *Solarte* v. *Palmer*, and the cases decided upon it, is approved of; and in *Wynn* v. *Alden*, 4 Denio, 163, it was applied with much strictness. In that case, notice was sent stating that the note in question had "this day been presented to the maker for payment, and payment refused," and adding, "I shall therefore look to you for the payment of the same," and in other respects sufficient, *but without date*. It was decided that the notice was defective in not showing that the demand had been made on the proper day. "Payment of a note," said Beardsley, J., "should be demanded at its maturity; when it becomes due and payable; and the notice should so state. The fact of such presentment and dishonour of the note, may appear in express terms, or by necessary or reasonable implication from what the notice contains; and it must appear in one form or the other, or the notice will be defective. This notice only states that the note was presented '*this day*,' and payment refused. But the notice being without date, it is impossible to ascertain from the paper itself, what day in particular was intended. It may have been some day before the note fell due, or a day subsequent to that time; and, from what is written we may quite as well infer one or the other, as to infer that the true day of payment was intended." More recently, in New York, the correctness of the principle adopted in the late English cases, and the importance of adhering inflexibly to it, and of considering the sufficiency of notice a question of law, was forcibly insisted upon, in *Dole* v. *Gold*, 5 Barbour's S. Ct. 490; and it was there decided, that a notice from the holder to the endorser, stating that the note "is due this day, and has not been paid; you will therefore take notice that I am the owner and holder of said note, and look to you for the payment of the same," was insufficient. The remarks in *Cayuga County Bank* v. *Warden*, 1 Comstock, 414, 419, must be considered as inadvertent. In *Shrieve & Combs* v. *Duckham*, 1 Littell, 194, *Higgins* v. *Morrison's Executor*, 4 Dana, 100, 105, *Stephenson* v. *Primrose*, 8 Porter, 156, 159, and *Nott's Executor* v. *Beard*, 16 Louisiana, 308,

311, the general rule is recognised, that no particular form of notice is necessary, so that it inform the party that the bill has been dishonoured.

There are some older cases, in which the rule has been held less strictly. In *Bank of Cape Fear* v. *Seawell*, 2 Hawks, 560, notice signed by a notary public in these words, "You will please to take notice, D. O.'s draft on S. M., accepted by him for 5000 dollars, on which note you are endorsed, is placed in my hands, from the P. and M. Bank for protest. It not being settled by the drawer, payment is expected from you immediately," was held to be sufficient; but except in the case of a bill or note payable at bank, according to the later cases it would not be. See *Sussex Bank* v. *Baldwin & Shipman*, 2 Harrison, 488, 490, 502, and *Chewning et al.* v. *Gatewood*, 5 Howard's Mississippi, 552, where it was said that notice is sufficient which puts the party upon inquiry. The late case of *Field* v. *Thornton*, 1 Kelly, 306, is also in favour of the larger view. A notarial certificate stating that payment has been demanded and refused, and on the same day *due notice of the non-payment thereof* given to the drawers and endorsers, was held sufficient. The court said that the fair implication from this language was, "that the notice contained the fact of demand and refusal: but if it did not, and only informed the defendant of the *non-payment* of the bill at maturity, the necessary inference was that the note had been *presented* and *dishonoured*, otherwise it would not have been protested for non-payment, and he notified thereof." This seems to make the fact of the notice of non-payment proceeding from a notary public sufficient to imply due presentment and protest. But the decision is probably grounded in part upon a statute of that state which gives peculiar effect to a notarial certificate. See *Walker and others* v. *The Bank of Augusta*, 3 Id. 486.

If sufficient notice of dishonour is given, it need not be expressly said that the holder looks to the endorser for payment; that is implied in giving notice; *King* v. *Bickley*, 2 Queen's Bench, 419; *Miers* v. *Brown*, 11 Meeson & Welsby, 372; *Caunt* v. *Thompson*, 7 C. B. 400, 410; *Bank of the United States* v. *Carneal*, 2 Peters, 543, 553; *Warren* v. *Gilman*, 17 Maine, 360, 365; *Ransom* v. *Mack*, 2 Hill's N. Y. 588, 593; *Hamilton* v. *Smith*, Longfield & Townsend, (Irish Exchequer), 100.

The sufficiency of notice in respect to the information which is given, is a question of law for the court; *Dole* v. *Gold*, 5 Barbour's S. Ct. 490, 492.

2. With regard to the description of the note; any description will be sufficient, which, under all the circumstances, so designates and distinguishes the note, as reasonably to leave no doubt in the mind of the endorser what note was intended; *Gilbert* v. *Dennis*, 3 Metcalf, 495, 498; *Bank of Alexandria* v. *Swann*, 9 Peters, 34, 46; and see *Shelton* v. *Braithwaite*, 7 Meeson & Welsby, 436; *Stockman* v. *Parr*, 11 Id. 809. An immaterial variance in the description will not vitiate it: the variance must be such, that, under the circumstances of the case, the notice conveys no sufficient knowledge to the endorsers of the identity of the instrument: a variance which is obviously a mistake of the copyist, and could not raise any real doubt, under all the facts of the case, as to the identity of the instrument referred to, would be immaterial: and it is settled that a notice defective in itself may be aided by external facts, and that they should be considered in determining the sufficiency of the notice; *Cayuga County Bank* v. *Warden*, 1 Comstock, 414, 418; *Tobey* v. *Lennig*, 2 Harris, 483; and as in such cases facts are involved, the question becomes one for the jury; *McKnight* v. *Lewis*, 5 Barbour's S. Ct. 682, 686. And it was formerly held in New York, and still is in some other states,

that it is in all cases a question for the jury, whether the endorser has been misled as to the particular note which has been the subject of dishonour; *Bank of Rochester* v. *Gould*, 9 Wendell, 279; *Smith* v. *Whiting*, 12 Massachusetts, 6; *Rowan et al.* v. *Odenheimer et al.*, 5 Smedes & Marshall, 44; *Kilgore* v. *Bulkley*, 14 Connecticut, 363, 393: but in *Ransom* v. *Mack*, 2 Hill's N. Y. 588, 594, grounded upon *Remer* v. *Downer*, 23 Wendell, 620; S. C. 21 Id. 10; and in *Wynn* v. *Alden*, 4 Denio, 163, 164, in *Crawford* v. *The Branch Bank at Mobile*, 7 Alabama, 206, 215, *Saltmarsh* v. *Tuthill*, 13 Id. 390, 401, and *Platt* v. *Drake*, 2 Douglass, 296, 300, and *Routh et al.* v. *Robertson*, 11 Smedes & Marshall, 383, 388; it is established that the sufficiency of a written notice is to be determined by the court, where there is no dispute about the facts; and in *Crocker* v. *Getchell*, 23 Maine, 392, 398, the same practice appears to have been adopted; and see *Mainer* v. *Spurlock and another*, 9 Robinson, 161. In *Carter* v. *Bradley*, 19 Maine, 62, 65, also it was said, that if the matter is to be determined by inspection of the paper alone, it is more proper that it should be settled by the judge, but if other and extrinsic facts enter into the evidence in relation to the endorser's being misled, the question may be referred to the jury; and this agrees with the opinion of Buller, J., in *Macbeath* v. *Haldimand*, 1 Term, 182, in regard to the construction of letters generally. In *Crocker* v. *Getchell*, a notice dated December 29, stated to the endorser that a note dated 25 August, payable in four months, became due that day and is protested for nonpayment, which was held not to be a misdescription, because the error in stating the time when it became due, could be discovered from the other parts of the description, and was therefore not fitted to mislead. But in *Ransom* v. *Mack*, where a note was dated April 1, and was payable three months after date, and the notary sent a notice, dated the 4th of July, that he had demanded payment on *that* day, though in fact he had made a demand on the third, which was the proper day, the court, overruling *Ontario Bank* v. *Petrie*, 3 Wendell, 456, and perhaps conflicting with *Smith* v. *Whiting*, decided that the notice was bad, since it stated that a demand had been made, it showed that it was made at such a time as to discharge the endorser: and *Ransom* v. *Mack* has been followed and confirmed by *Routh et al.* v. *Robertson*, 11 Smedes & Marshall, 382, 390; but see the distinction in *Tobey* v. *Lennig*, 2 Harris, 483. In *Ross et als.* v. *Planters' Bank*, 5 Humphreys, 335, the notary, in the copy of the note sent with the protest, made a mistake in the date; instead of 22d November, 1843, putting 22d November, 1844, an impossible date, that time not being then arrived; and it was held that the mistake in the notarial record, might be corrected by the evidence of the notary before the jury, and the court said that in such cases it took care to leave the question properly to the jury, as to the identity of the instrument, and as to whether the parties, notwithstanding the mistake, had substantial notice as to what security it was intended to fix their liability upon, by the notarial protest furnished them.

Notice may legally be given by the holder, or his agent, or other person in whose possession the bill lawfully is for payment; *Woodthorpe* v. *Lawes*, 2 Meeson & Welsby, 109; *Follain and others* v. *Dupré and others*, 11 Robinson, 456, 470; *Harris* v. *Robinson*, 4 Howard's Supreme Court, 336, 346; or by any party to the bill, if given in due time; *Chapman* v. *Keane*, 3 Adolphus & Ellis, 193; *Stafford* v. *Yates*, 18 Johnson, 327; *Glasgow* v. *Pratte*, 8 Missouri, 336; *Glasscock* v. *Bank of Missouri*, Id. 443, 445: the party entitled as holder to sue upon the bill may therefore avail himself of such notice given by any party to the

bill, as fixed the liability of the party noticed to the party giving the notice, and entitled him to sue, upon taking up the bill; *Jordan* v. *Ford & Dickinson*, 2 English, 416, 421: see *Harrison* v. *Ruscoe*, 15 Meeson & Welsby, 231: but notice given by a mere stranger will not be availing; *Walker* v. *Bank of the State of Missouri*, 8 Missouri, 704, 707; *The Juniata Bank* v. *Hale & another*, 16 Sergeant & Rawle, 157, 160. Notice when given by an agent in possession of the bill need not state at whose request it is given, nor who is the owner of the bill; *Woodthorpe* v. *Lawes*, 2 Meeson & Welsby, 109; *Harris* v. *Robinson*, 4 Howard's Supreme Court, 336, 346; in *Hamilton* v. *Smith*, Longfield & Townsend (Irish Exchequer), 100, service of the protest of a promissory note was decided to be sufficient notice, though it did not state from whom it proceeded. Where a person in giving notice as the agent of one party to a bill, by mistake stated in the notice that it was given by him as agent of another party to the bill, it was decided that the misstatement of the name of the person on whose behalf notice was given, would not wholly avoid the notice, but would place the party giving it in the same situation, as to the party to whom it was given, as if the statement had been correct; and therefore if notice by the person from whom it was erroneously stated to proceed would have been good, such erroneous notice would be availing, but if that party had been discharged by laches, or would have had no right of action on the bill against the party noticed, if he had taken up the bill, such notice would not charge the person to whom it was sent; *Harrison* v. *Ruscoe*, 15 Meeson & Welsby, 231, 236.

Of the Time when Notice of the Dishonour of a Note or Bill must be given.

LENOX ET AL *v.* ROBERTS.

In the Supreme Court of the United States.

FEBRUARY TERM, 1817.

[REPORTED 2 WHEATON, 373–377.]

A demand of payment of a promissory note must be made of the maker, on the last day of grace; and where the endorser resides in a different place, notice of the default of the maker should be put into the post-office early enough to be sent by the mail of the succeeding day.

THIS was a suit in chancery, brought by the appellants against the respondent in the circuit court of the District of Columbia, for the

county of Alexandria; the complainants, in their bill, stated that the president, directors, and company of the Bank of the United States, by their deed, assigned to Thomas Willing, John Perot, and James S. Cox, their executors, administrators, and assigns, all and singular the mortgages, judgments, suits, bonds, bills, notes, debts, securities, contracts, goods, chattels, money, and effects, whatsoever, due or belonging to the bank; together with all the ways, means, and remedies, for the recovery of the same, upon the especial trust in the deed expressed. That Thomas Willing, John Perot, and James S. Cox, afterwards assigned to the complainants, all and singular the debts included in the deed to them. The bill further stated, that one Elisha Janney, made and delivered to the defendant five promissory notes, dated and payable at Washington, and for the following sums, to wit: one note for 1,000 dollars, payable in sixty days from the 22d February, 1809, &c.; amounting in the whole, to 4,020 dollars. That the defendant discounted the said notes in the Branch Bank of the United States, at Washington, about the times they bear date, and endorsed the same *at Washington.* That Janney did not pay the notes when they became due, and that he was insolvent when the notes became due. That the notes being made and dated in the county of Washington, were subject to the laws prevailing in Washington county, and the defendant bound to pay, on failure of Janney to pay. The complainants claimed these debts as *proprietors thereof;* and called on the defendant *especially* to state whether Janney was not insolvent when the notes became due; whether the said notes were not *duly* protested for non-payment, and the defendant *in due time* notified thereof, and did not attempt to secure himself by some lien on Janney's property. The bill concluded by praying a decree against the defendant, for the amount of said notes.

The defendant, in his answer, did not admit that the complainants were duly authorized to recover and receive the debts due to the bank; but he admitted that the notes were by him endorsed in blank, and delivered to Janney, but contended that they were not obtained to be discounted in the Bank of the United States; nor were discounted for the benefit of the defendant, but for the use and benefit of Elisha Janney, who received the money from the bank. And that it was well known to the president and directors of the bank, that the said notes were endorsed by the defendant for the accommodation of the said Elisha Janney, without any value being received by the defendant. The defendant's answer farther alleged, that due and legal notice was not given by him of the non-payment of the notes; that no demand of payment of the notes was made of Elisha Janney, by the bank; that the notes were all dated at Alexandria; that Elisha Janney, on the 29th of May, con-

veyed all his property to Richard M. Scott, in trust for the payment of his debts, including the debt to the bank.

There was some contrariety of evidence as to the time when payment of the notes was demanded of the maker, and the time when notice to the defendant as endorser, who resided in Alexandria, was put into the post-office at Washington.

The bill was dismissed by the Court below, on which the cause was brought by appeal to this Court.

The cause was argued by Mr. *Swann*, for the appellants, and by Mr. *Lee*, for the respondent.

Mr. Chief Justice MARSHALL delivered the opinion of the court.

The Court will not give any opinion whether any action can be maintained at law upon any of the promissory notes in the record, by an assignee who does not claim the same by an endorsement upon the notes. For, in this case, there is no specific assignment of these notes; the only assignment is a general assignment, in trust, of all the property of the late Bank of the United States, and, as the act of incorporation had expired, no action could be maintained at law by the bank itself. Under these circumstances, the court is clearly of opinion that a suit may be maintained in equity against the other parties to the notes. Another question arises in the cause, whether the endorsers have had due notice of the non-payment by the makers? As there is some contrariety of evidence in the record, the court will only lay down the rule. And it is the opinion of the court, that a demand of payment should be made upon the last day of grace, and notice of the default of the maker be put into the post-office early enough to be sent by the mail of the succeeding day.

Decree reversed.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF ALEXANDRIA, PLAINTIFFS IN ERROR *v.* THOMAS SWANN.

In the Supreme Court of the United States.

JANUARY TERM, 1835.

[REPORTED, 9 PETERS, 33–47.]

The law does not require the utmost possible diligence in the holder in giving notice of the dishonour of a note. All that is required is ordinary reasonable diligence; and what shall constitute reasonable diligence ought to be regulated with a view to practical convenience, and the usual course of business; and is a question of law.

Notice need not be sent on the day of the dishonour. It will be in due time, if sent by the mail, the next day after the dishonour of the note.

MR. JUSTICE THOMPSON delivered the opinion of the Court.(*a*)

This suit was brought in the circuit court of the District of Columbia, for the county of Alexandria, upon a promissory note made by Humphrey Peake, and endorsed by the defendant in error. Upon the trial the jury found a special verdict, upon which the court gave judgment for the defendant, and the case comes here upon a writ of error.

The points upon which the decision of the case turns, resolve themselves into two questions.

1. Whether notice of the dishonour of the note was given to the endorser in due time?

2. Whether such notice contained the requisite certainty in the description of the note?

The note bears date on the 23d day of June, 1829, and is for the sum of 1400 dollars, payable sixty days after date at the Bank of Alexandria. The last day of grace expired on the 25th of August, and on that day the note was duly presented, and demand of payment made at the bank, and protested for non-payment; and on the next day notice thereof was sent by mail to the endorser, who resided in the city of Washington.

The general rule, as laid down by this court in Lenox v. Roberts, 2 Wheat. 373, 4 Cond. Rep. 163, is, that the demand of payment should

(*a*) The reporter's statement is omitted.

be made on the last day of grace, and notice of the default of the maker be put into the post-office early enough to be sent by the mail of the succeeding day. The special verdict in the present case finds, that according to the course of the mail from Alexandria to the city of Washington, all letters put into the mail before half-past eight o'clock, P. M., at Alexandria, would leave there some time during that night, and would be deliverable at Washington the next day, at any time after eight o'clock, A. M.; and it is argued on the part of the defendant in error, that as demand of payment was made before three o'clock, P. M., notice of the non-payment of the note should have been put into the post-office on the same day it was dishonoured, early enough to have gone with the mail of that evening. The law does not require the utmost possible diligence in the holder in giving notice of the dishonour of the note; all that is required is ordinary reasonable diligence; and what shall constitute reasonable diligence ought to be regulated with a view to practical convenience, and the usual course of business. In the case of the Bank of Columbia v. Lawrence, 1 Peters, 583, it is said by this court to be well settled at this day, that when the facts are ascertained, and are undisputed, what shall constitute due diligence is a question of law: that this is best calculated for the establishment of fixed and uniform rules on the subject, and is highly important for the safety of holders of commercial paper. The law, generally speaking, does not regard the fractions of a day; and although the demand of payment at the bank was required to be made during banking hours, it would be unreasonable, and against what the special verdict finds to have been the usage of the bank at that time, to require notice of non-payment to be sent to the endorser on the same day. This usage of the bank corresponds with the rule of law on the subject. If the time of sending the notice is limited to a fractional part of a day, it is well observed by Chief Justice Hosmer, in the case of the Hartford Bank v. Stedman and Gordon, 3 Conn. Rep. 495, that it will always come to a question, how swiftly the notice can be conveyed. We think, therefore, that the notice sent by the mail, the next day after the dishonour of the note, was in due time.

The next question is, whether, in the notice sent to the endorser, the dishonoured note is described with sufficient certainty.

The law has prescribed no particular form for such notice. The object of it is merely to inform the endorser of the non-payment by the maker, and that he is held liable for the payment thereof.

The misdescription complained of in this case, is in the amount of the note. The note is for 1400 dollars, and the notice describes it as for the sum of 1457 dollars. In all other respects the description is correct: and in the margin of the note is set down in figures 1457, and

the special verdict finds that the note in question was discounted at the bank, as and for a note of 1457 dollars; and the question is, whether this was such a variance or misdescription as might reasonably mislead the endorser as to the note, for payment of which he was held responsible. If the defendant had been an endorser of a number of notes for Humphrey Peake, there might be some plausible grounds for contending that this variance was calculated to mislead him. But the special verdict finds that from the 5th day of February, 1828 (the date of a note for which the one now in question was a renewal), down to the day of the trial of this cause, there was no other note of the said Humphrey Peake endorsed by the defendant, discounted by the bank, or placed in the bank for collection or otherwise. There was, therefore, no room for any mistake by the endorser as to the identity of the note. The case falls within the rule laid down by this court in the case of Mills v. The Bank of the United States, 11 Wheat. 376, that every variance, however immaterial, is not fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonoured. If it does not mislead him, if it conveys to him the real fact without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility. In that case, as in the one now before the court, it appeared that there was no other note in the bank endorsed by Mills; and this the court considered a controlling fact, to show that the endorser could not have been misled by the variance in the date of the note, which was the misdescription then complained of.

The judgment of the circuit court is accordingly reversed, and the cause sent back with directions to enter judgment for the plaintiffs, upon the special verdict by the jury.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the District of Columbia, holden in and for the county of Alexandria, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court that the judgment of the said circuit court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby sent back to the said circuit court, with directions to that court to enter judgment for the plaintiffs, upon the special verdict found by the jury.

"Perhaps Lord Mansfield never conferred so great a benefit on the commercial world," said Lord Denman, recently in *Furze* v. *Sharwood*, 2 Q. B. 415, S. C. 2 G. & D. 129, "as by his decision of *Tindal* v. *Brown*, 1 T. R. 167, where his perseverance compelled them, in spite of themselves, to submit to the doctrine of requiring immediate notice as a matter of law." That the reasonableness of notice, in respect to time as well as to other matters, is, in all cases where the facts are ascertained, a question for the court, and not for the jury, is now a settled principle in the commercial law of all the States in this country; *Hussey* v. *Freeman*, 10 Massachusetts, 84, 86; *Whitwell et al.* v. *Johnson*, 17 Id. 449, 453; *Nash* v. *Harrington*, 2 Aikens, 9, 11; *Haddock* v. *Murray*, 1 New Hampshire, 140; *Halsey* v. *Salmon*, Pennington, 916; *Sussex Bank* v. *Baldwin & Shipman*, 2 Harrison, 488; *Jones* v. *Wardell*, 6 Watts & Sergeant, 399 (overruling *Gurly* v. *The Gettysburg Bank*, 7 Sergeant & Rawle, 324); *Philips* v. *M' Curdy*, 1 Harris & Johnson, 187, 190; *Pon's Ex'rs* v. *Kelly*, 2 Haywood, 45; *Duggan* v. *King*, Rice, 240; *Dodge et al.* v. *Bank of Kentucky*, 2 Marshall, 610, 616; *Noble et al.* v. *Bank of Kentucky*, 3 Id. 262. In Alabama, at an early period, it was held that the strict commercial rules as to notice were not applicable there, and that the reasonableness of notice was a question for the jury; *Brahan & Atwood* v. *Ragland*, Minor, 85; but in 1828, by statute, the remedy on bills of exchange, and on notes payable in bank, was ordered to be governed by the rules of the law merchant, as to days of grace, protest, and notice; Aiken's Digest, 329; and since then, the legal rule has always been recognised; *Foster* v. *McDonald*, 3 Alabama, 34; *Tarver's Ex'rs* v. *Boykin*, 6 Id. 353; *Brown* v. *Turner*, 11 Id. 752, 755; *Smyth* v. *Strader et al.*, 4 Howard's Supreme Court, 405, 415.

It is settled, that where the parties reside in the same town, notice given at any time on the next day after the default, is sufficient; *Grand Bank* v. *Blanchard*, 23 Pickering, 305 (overruling the *dictum* in *Woodbridge et al.* v. *Brigham et al.*, 12 Massachusetts, 403, 404; that notice should be given on the same day); *Remington* v. *Harrington*, 8 Ohio, 507, 510; *Duggan* v. *King*, Rice, 240, 243; *Shrieve and Combs* v. *Duckham*, 1 Littell, 194; *Pearson & Co.* v. *Duckham*, 3 Id. 385; *Moore* v. *Somerset*, 6 Watts & Sergeant, 262; *Whittlesey & Stone* v. *Dean*, 2 Aikens, 263.

When the parties reside in different places, the rule laid down in *Lenox* v. *Roberts*, and *Bank of Alexandria* v. *Swann*, that notice must be sent by the mail of the succeeding day, is the established rule of every court in the United States, subject to the understanding that the mail of that day goes out at a convenient hour. A different rule, however, is laid down by the learned author of the Commentaries on American Law, who says, that the limitation in *Lenox* v. *Roberts* is too strict, and that the party has the whole of the next day for mailing notice, so that if notice is sent by the first mail that goes *after* the day next to the third day of grace, it is in season, though it be not mailed in season to go by the mail of the day after the default; 3 Comm. 106, and *note* (*d*) (3d edition). The English cases cited by the learned author do not sustain this conclusion: In *Bray* v. *Hadwen*, 5 Maule & Selwyn, 68, as in *Wright* v. *Shawcross*, 2 Barnewall & Alderson, 501, *note*, the notice having arrived on Sunday, was to be considered as having been received on Monday, and then the party had till next day's post for giving notice: in *Geill* v. *Jeremy & another*, 1 Moody & Malkin, 61, no post went out on the day following the day of the default, and on that account the party was allowed the whole of that day for mailing notice, but the rule was declared to require the employment of the "next post after the

day" on which notice is received: and in *Hawkes* v. *Salter*, 4 Bingham, 715, the bill was dishonoured on Saturday, and the mail left at half-past nine o'clock on Monday, and no doubt it closed before that time; and this being an unreasonable hour, Best, C. J., expressed himself clearly of opinion that it would have been sufficient if the letter had been put into the post before the mail started on Tuesday morning. In *Williams* v. *Smith*, 2 Barnewall & Alderson, 496, 500, the rule established by Lord Tenterden, is, that notice is to be sent by the post of the day following that in which the party receives intelligence of the dishonour. These and other cases have explained and enlarged the *dictum* of Marius, repeated in *Tindal* v. *Brown*, 1 Term, 167, and *Darbishire* v. *Parker*, 6 East, 3, 8, that notice should be sent by the next post; so as to fix its meaning to be, that notice must go by the post of the next day, which is the next *convenient* post; but they have not given the whole of the next day for mailing the notice, or till the post of the third day for sending it, as the learned commentator supposes. The English judges say, that each party has an entire day for giving notice; but their meaning is, that the notice may go by the mail of the next day, and need not be sent by the mail of the same day. The distinguished author of Commentaries on the Law of Bills of Exchange, has offered yet another explanation: he expresses the opinion that the holder is entitled to one entire day to prepare his notice, and that, therefore, it will be sufficient, if he sends it by the next post that goes after twenty-four hours from the time of the dishonour (p. 320, note); but this suggestion appears to be quite novel and unsupported. The subject is one of great importance; but the American cases are so clear and concordant as to render it quite certain that the views of these eminent writers are somewhat defective in precision.

The unquestionable general principle is, that notice must be sent by *the next convenient or practicable mail*. And in ascertaining what is meant by this, it may be considered as settled that notice need not be mailed on the day of the default, or the day on which notice of it is received: the party need not take any step on that day, but has till a convenient hour on the next day for putting the notice into the post-office; *Bank of Alexandria* v. *Swann*; *Hartford Bank* v. *Stedman & Gordon*, 3 Connecticut, 489, 495; *Farmers' Bank of Maryland* v. *Duvall*, 7 Gill & Johnson, 79, 92; *Howard* v. *Ives*, 1 Hill's N. Y. 263, 265; *Whitwell et al.* v. *Johnson*, 17 Massachusetts, 449, 453. The post that goes out at a convenient hour on the next day, is the conveyance by which notice ought to be sent; but if the post of that day goes out too early to allow notice to be prepared conveniently within business hours, then the subsequent post may be employed. And Sundays, and public holidays, as the 4th of July (*Cuyler* v. *Stevens*, 4 Wendell, 566), are to be wholly rejected from the account; *Agnew* v. *The Bank of Gettysburg*, 2 Harris & Gill, 479, 495; *Eagle Bank* v. *Chapin*, 3 Pickering, 180.

In the federal courts, the rule in *Lenox* v. *Roberts*, explained in *Bank of Alexandria* v. *Swann*, is adopted, also, in *Mitchell* v. *Degrand*, 1 Mason, 176, 180, in which it is said that notice must be sent by the next practicable mail; and in *United States* v. *Barker's Administratrix*, 4 Washington, 465, 468, Judge Washington, who says that notice must be given by the earliest practicable post after the bill is dishonoured, explains it to mean, that, the letter giving the notice should be put into the office early enough to be sent by the mail of the succeeding day; and this case was affirmed on error, 12 Wheaton, 559. Indeed, in *Fullerton et al.* v. *The Bank of the United States*, 1 Peters, 605, 618, the opinion that notice is in time, if mailed early enough to go by

the first mail that goes after the day next to the third day of grace, appears to be directly condemned; and the rule adopted, that notice must go by the mail of the next day, provided there be a mail on that day that does not go out before early business hours. In Massachusetts, the same authority is followed; and in *Whitwell et al.* v. *Johnson*, 17 Massachusetts, 449, 454, it is decided, that the next day is early enough for sending notice, and if there should be two mails a day, whether notice goes by the first or the second of those mails, is immaterial, provided it is put into the post-office early enough to go by a mail of that day; in *Eagle Bank* v. *Chapin*, 3 Pickering, 180, 183, it is said that notice should be sent the next day or by the next convenient mail, Sundays being thrown out of the account; and in *Talbot* v. *Clark*, 8 Id. 51, 54, it is declared that the law is entirely settled there, in England, and in New York, that notice must be sent by the next day's mail after knowledge of the dishonour of a bill. In New Hampshire, in *Carter* v. *Burley*, 9 New Hampshire, 559, 570, where the cases are examined, the rule is decided to be, that notice to a prior party, where the parties live in different places, is sufficient if forwarded by the mail of the day following the dishonour, or that on which the endorser receives due intelligence of it, subject to the qualification, that if a party receiving a notice, cannot, by the exercise of reasonable diligence, forward notice by the mail of the day following, it will be sufficient if sent by the next; for, in this country, where many of the mails go out at an early hour of the morning, and are sometimes closed at an early hour of the evening before, it would be impracticable always to prepare and forward a notice by the mail of next day, where notice was received late in the afternoon or evening; whether, where there are two mails on the next day, the notice may be sent by either, at the party's choice, is left undecided. In Vermont, the cases call for the first mail, or the next post, after the default, using the words in their general commercial acceptation; *Whittlesey and Stone* v. *Dean*, 2 Aikens, 263, 264; *Aldis et al.* v. *Johnson*, 1 Vermont, 136, 140. In New York; in *Smedes* v. *Utica Bank*, 20 Johnson, 372, 382, the *dictum* is, that notice must be forwarded on the day of demand, or the day after, and by the next mail: and in *Mead* v. *Engs*, 5 Cowen, 303, this is construed very strictly; the views expressed in *Darbishire* v. *Parker*, 6 East, 3, 10, are approved, and the general rule is declared to be, that notice must be sent by the next post after the intelligence of the dishonour, subject, undoubtedly, to the qualification that if the post goes out so early after the receipt of the intelligence as to render it inconvenient to send by it, it may be sent by the second post; and although the expressions of the Court might appear to limit the time even more narrowly than was done in *Lenox* v. *Roberts*, yet if regard is had to the point decided, it is to be inferred that the case does not require that notice should ever be sent on the same day on which it is received, but that it is in time if it go by the mail of the next day; see *Sewall* v. *Russell*, 3 Wendell, 276. In the late case of *Howard* v. *Ives*, 1 Hill's N. Y. 263, the rule is set forth in a very clear and satisfactory manner; there, a bill was refused payment between three and five o'clock, P. M., on Saturday; two mails left daily for the place where the person to whom notice was to be sent, resided; one, closing at 5½ A. M., and leaving at 7 o'clock, the other closing at 3 P. M., and leaving at 5 o'clock; notice was put into the post-office in time for the mail of 5 o'clock P. M. on Monday: the Court held this to be sufficient; and said that the holder of a bill is never required to mail notice on the very day of default of payment; and Sunday is not to be counted; that then, that the

afternoon post of Monday, the morning one having closed before the common hours of business, was the proper conveyance, as being the next practicable or convenient post: it is not necessary, the Court added, to say that in all cases where there are several mails on the same day, the party may elect by which he will send; but clearly he comes to the mark, when he selects the post which leaves next after the hours of business commence for the day; that is the next practicable or convenient post. In Maryland, in *Farmers' Bank of Maryland* v. *Duvall*, 7 Gill & Johnson, 79, a note had been dishonoured on the 22d of the month; the mail closed at nine o'clock on that evening, and went out at sunrise on the 23d; the next mail closed at nine o'clock on the evening of the 24th, and left at sunrise on the 25th; the letter containing notice was mailed on the 23d; it was contended that notice should have gone by the early mail of the 23d; but the court decided that this was not necessary; that that mail was really the mail of the 22d, and that a party is always allowed till the next day to place his letter in the post-office. In Virginia, in *Brown & Sons* v. *Ferguson*, 4 Leigh, 37, it is decided that notice should be sent by *the next post*, each party having a full day to give notice; and this is applied in that case so as to mean the post that goes out the next day. In Kentucky, in *Dodge et al.* v. *Bank of Kentucky*, 2 Marshall, 610, 616, and *Hickman* v. *Ryan*, 5 Littell, 24, the rule is declared to be settled that when notice goes by mail, it must go by the first mail after the last day of grace is over; or the mail of the next day after protest; and this appears to be recognised in *Stivers & Page* v. *Prentice & Weissinger*, 3 B. Monroe, 461, &c. In Ohio, and North and South Carolina, the rule stated in the cases, is, that notice must be sent by the next post, that is, by the post of the next day; *Remington* v. *Harrington*, 8 Ohio, 507; *Hubbard* v. *Troy*, 2 Iredell's Law, 134; *Denny* v. *Palmer*, 5 Id. 611, 622; *Duggan* v. *King*, Rice, 240, 243. In Pennsylvania, it is declared, in *Brenzer* v. *Wightman*, 7 Watts & Sergeant, 264, to be a settled principle of commercial law, that the holder is bound to forward immediate notice, on the day following the refusal, where there exists no reason to account for the omission to do so; and in Louisiana, the next mail, or the mail that goes out at a convenient hour on the next day, is declared to be the proper conveyance; *Townsley et al.* v. *Springer*, 1 Louisiana, 122; *Commercial Bank of Natchez* v. *King & others*, 3 Robinson, 243, 244; and in a late Alabama case, it is said that notice must be mailed the day after the refusal of payment, or by the first mail thereafter; *Brown* v. *Turner*, 11 Alabama, 752, 754.

From these authorities, the necessary inference is, that a party has not the whole of the next day to prepare or to mail his notice; but in several of the states, this particular point has been specially considered, and the decisions are in direct opposition to the views expressed in the Commentaries on American Law. In New Jersey, in *Sussex Bank* v. *Baldwin and Shipman*, 2 Harrison, 488, 493, the subject and the cases were ably examined, and it was adjudged that evidence which showed merely that notice was mailed on the next day, without indicating whether or not it was in time for the mail of that day, was insufficient. "It would certainly simplify this matter," said the Court, "to lay down the rule that a party has the next day entire to prepare and mail his notice, without reference to the time of the departure of the mail. But this would be in violation of the authorities and against the general principle which requires the exercise of at least reasonable diligence. Many of the authorities say, the party has an entire day to give the notice; and so he has, but not an entire day to

prepare it. He must give or send his notice on the next day if he can; if he neglect it, until after the departure of the mail, he does not give or send his notice the next day, but in point of fact, the day after the next, or at some other and perhaps more distant day. It is safe therefore to adhere to the rule, that the notice must be sent on the day next after the third day of grace, unless the mail of that day go out at so early an hour as to render it impracticable by the exercise of a reasonable diligence. No precise hour can be named, particularly in the country, where the term "business hours" has a somewhat vague and indefinite meaning. Cases will occasionally arise, where it will become necessary for the court to direct the jury whether due diligence has been exercised, supposing certain facts to be proved." In Maine, in *Goodman* v. *Norton*, 17 Maine, 381, a note was dishonoured on the 28th of the month, and notice was put into the post-office on the 29th, but the time of the day when it was put in was not shown; the notice, being produced, was dated the 28th, but post-marked the 30th; the jury inquired from the Judge whether it would be due diligence, to put notice in the post-office at any time on the 29th, and the Judge replied that it would, if put into the office in season to go by the mail on that day; a verdict being found for the defendant, a new trial was moved; but Weston, C. J., examining the cases, approved of the principle of *Lenox* v. *Roberts*, *Smedes* v. *Utica Bank*, *Mead* v. *Engs*, and *Darbishire* v. *Parker*, that notice must be sent by the mail of the next day, and sustained the ruling of the Judge below. In *Beckwith* v. *Smith*, 22 Id. 125, where the protest stated that notice was mailed at 9 o'clock, A. M., on the next day, it was decided that there should be proof, further, that the letter was placed in the post-office in season to be carried by the mail of the next day after the bill was dishonoured, and as no evidence was given as to the time at which the mail went out, and it was not stated that the letter was in season to be carried by the mail of that day, the protest, of itself, was insufficient evidence. In the case of *Beckwith* v. *St. Croix Man. Co.*, 23 Id. 284, the rule seems to be considered as requiring the next practicable mail; and though *Goodman* v. *Norton* and *Beckwith* v. *Smith*, might seem to require a greater strictness than has elsewhere been exacted, the recent case of *Chick* v. *Pillsbury*, 24 Maine, 458, after careful examination, adopts the general commercial rule of allowing a convenient time after business hours, or the next day after the dishonour, shall have commenced, to prepare and despatch notice, and decides that where the mail of the following day went out at six o'clock in the morning, notice mailed on that day between twelve at noon and eight at night was in due time; and the ordinary qualifications in case of the mail going out unreasonably early on the following day, is therefore received in the courts of that state. In like manner in *Downs* v. *Planters Bank*, 1 Smedes & Marshall's Mississippi, 261, 276, the rule is decided to be, that notice must, at furthest, be put into the post-office in time to go by the mail of the day next succeeding the protest, if there be a mail which goes on that day, and if not, then by the first mail which goes afterwards; the holder, it is said, need not put the notice in the office on the same day the note is protested; but he must on the next day in time for a mail of that day, unless it leaves at an unreasonably early hour; and Chancellor Kent's enlargement of the time, on the supposed authority of the English cases, is expressly condemned; and the same point is determined in *Deminds et al.* v. *Kirkman*, Id. 644; *Hoopes & Bogart* v. *Newman, Executor*, 2 Id. 71, 78; *Wemple* v. *Dangerfield*, Id. 445; and *American Life Insurance and Trust Co.* v. *Emerson*, 4 Id. 177, 190; and the judicial de-

termination by Mr. Justice Story, in the recent case of *Seventh Ward Bank* v. *Hanrick*, 2 Story, 416, 418, is to the same effect. In that case, a note was due, presented, and dishonoured, on Saturday, and the mail on Monday went out at 3½ o'clock, P. M. The learned judge told the jury, that the letter containing notice should have been put into the post-office on Monday, early enough to go by the mail of that day, and that if it were not put in, in time to go by the mail of that day, it was too late. There appear to have been no peculiar circumstances in this case, to take it out of a general rule.

When, from the circumstances of the case, this rule is not applicable, the question of reasonable diligence as to time is still a question of law for the courts; who have decided that, if notice is to be sent across the sea, it ought to be sent by the first regular, or first practicable conveyance; *United States* v. *Barker's Administratrix*, 4 Washington, 465, 468; *United States* v. *Barker*, Paine, 157, 164.

Each party to a bill has the same time for giving notice to parties beyond him, that the holder has; *Sheldon* v. *Benham*, 4 Hill's N. Y. 129, 133; *Eagle Bank* v. *Hathaway*, 5 Metcalf, 213, 215; *Palen* v. *Shurtleff*, 9 Id. 581; *Smith* v. *Roach's Ex'r.*, 7 B. Monroe, 17; but the over-diligence of one party cannot supply the laches of another; that is, if one party has given notice more speedily than he need to have done, this does not enlarge the time for those beyond him; for the object of giving notice is to indicate to the endorser that he is to be held liable, and a delay by any party beyond the legal time, is a presumption that that party has abandoned his claim, and this presumption acts without reference to the conduct of other endorsers; *Turner* v. *Leech*, 4 Barnewall & Alderson, 451; *Brown & Sons* v. *Ferguson*, 4 Leigh, 37, 50, 55; *Farmer* v. *Rand*, 16 Maine, 453; *Etting* v. *The Schuylkill Bank*, 2 Barr, 355; *Simpson* v. *Turney*, 5 Humphreys, 419; *Whitman and Hubbard* v. *The Farmers' Bank of Chattahoochie*, 8 Porter, 258, 262.

When a bill or note is sent for collection to an agent residing in another place, the agent is bound only to give notice of dishonour to his principal, who then has the same time for giving notice to the endorsers, as if he had himself been an endorser, receiving notice from a holder; *United States Bank* v. *Goddard*, 5 Mason, 366; *Church* v. *Barlow*, 9 Pickering, 547; *Bank of the United States* v. *Davis*, 2 Hill's N. Y. 452; *Crocker* v. *Getchell*, 23 Maine, 392; *Sussex Bank* v. *Baldwin and Shipman*, 2 Harrison, 488, 491; *Foster* v. *McDonald*, 3 Alabama, 34; *Gindrat et al.* v. *The Mechanics' Bank of Augusta*, 7 Id. 325, 331; *Hill* v. *Planters' Bank*, 3 Humphreys, 670; *The Grand Gulf Railroad and Banking Company* v. *Barnes*, 12 Robinson, 128; *Clode* v. *Bayley*, 12 Meeson & Welsby, 51; but see *Flack* v. *Green*, 3 Gill & Johnson, 474, 481. But where notice is sent by a party to his agent, who is not a party to the bill, to be communicated by him, he has not till the next day to communicate or transmit it, but must send it forward without loss of time; *U. S.* v. *Barker*, 4 Washington, 465; S. C. 12 Wheaton, 559; *Sewall* v. *Russell*, 3 Wendell, 276; *Freeman's Bank* v. *Perkins*, 18 Maine, 292.

Care must be taken by the holder that notice is not given too early. It has been repeatedly decided that it may be given on the last day of grace, after default made; *Burbridge* v. *Manners*, 3 Campbell, 193; *Bussard* v. *Levering*, 6 Wheaton, 102; *Linderberger* v. *Beall*, Id. 104; *Corp* v. *M'Comb*, 1 Johnson's Cases, 328; *Farmers' Bank of Maryland* v. *Duvall*, 7 Gill & Johnson, 79, 89; *Smith* v. *Little*, 10 Hampshire, 526, 532; *M'Clane* v. *Fitch*, &c., 4 B. Monroe, 599; *Coleman* v. *Carpenter*, 9 Barr, 178; *King* v. *Holmes*, 1 Jones, 456.

In some of the States it has been

decided that not only notice of dishonour may be given, but the maker of a note may be sued on the last day of grace, after default, and the drawer or endorser, on the same day, after notice; *Staples and another* v. *Franklin Bank*, 1 Metcalf, 43; *Greeley et al.* v. *Thurston*, 4 Greenleaf, 479; *Flint* v. *Rogers*, 15 Maine, 67; *Coleman* v. *Ewing*, 4 Humphreys, 241; *Wilson* v. *Williman*, 1 Nott & M'Cord, 440; *dictum* in *Dennie* v. *Walker*, 7 New Hampshire, 199, 201. But the question whether notice of protest may be given, is not the same with the question whether suit may be brought, on the last day of grace; and it seems to be more correctly decided in *Osborne* v. *Moncure*, 3 Wendell, 170, that though a note is *dishonoured* if not paid on demand on the last day of grace, yet that the maker cannot be sued on that day, as he has till the last instant of that day for making payment, if he chooses to seek the holder, and in regard to legal proceedings there are no fractions of a day; and this is confirmed in *Thomas* v. *Shoemaker*, 6 Watts & Sergeant, 179; *Coleman* v. *Carpenter*, 9 Barr, 178; and *Wiggle et al.* v. *Thomason*, 11 Smedes & Marshall, 452; and in *Bevan et al.* v. *Eldridge*, 2 Miles, 353, is applied in the case of an endorser.

Before suit can be brought against an endorser, there must be a right of action by notice or due diligence; and in Massachusetts and Maine it has been decided, that, where the parties live in different places, putting a letter of notice seasonably into the post-office is in itself due diligence or constructive notice, and suit may therefore be commenced immediately after the letter is mailed, and without waiting for the notice to be received; *New England Bank* v. *Lewis et al.*, 2 Pickering, 125; *Flint* v. *Rogers*, 15 Maine, 67. In Pennsylvania, however, it has been held that where notice is sent by mail to an endorser, suit cannot be brought against him, before the time when by the regular course of the mail, the notice would reach him; *Smith* v. *The Bank of Washington*, 5 Sergeant & Rawle, 318. But as to this point, the New England cases appear clearly to be correct.

Of the medium of communicating notice of the dishonour of notes and bills, and of the place to which notice must be sent.

THE BANK OF COLUMBIA, USE OF THE BANK OF THE UNITED STATES *v.* LAWRENCE.

In the Supreme Court of the United States.

JANUARY TERM, 1828.

[REPORTED, 1 PETERS, 578–584.]

Upon the dishonour of a note, the party whose duty it is to give notice, is bound to use due diligence in communicating such notice. It is not required of him to see that the notice is brought home to the party.

When the facts are undisputed, due diligence is a question of law.

If the parties reside in the same city or town, notice may be delivered at either the endorser's dwelling-house, or his place of business: if they live in different places, notice sent by the mail to the post-office nearest to the endorser, or to that at which he is in the habit of receiving his letters, will be sufficient, whether it reaches him or not.

If an endorser reside at such a distance from the city or town in which the holder lives as to render the employment of a special messenger unreasonably burdensome, and if the post-office of the holder's residence is the nearest to the endorser, and is that at which he usually receives his letters, a notice addressed to him at that place, through the post-office, will be good.

Mr. Justice THOMPSON delivered the opinion of the Court.(*a*)—

This case comes before the Court upon a writ of error to the Circuit Court of the District of Columbia.

The defendant was sued as endorser of a promissory note for $5000, made by Joseph Mulligan, bearing date the 15th of July, 1819, and payable sixty days after date, at the Bank of Columbia. The making and endorsing the note, and the demand of payment, were duly proved; and the only question upon the trial was touching the manner in which notice of non-payment was given to the endorser; no objection being made to the sufficiency of notice in point of time.

The material facts before the Court upon this part of the case, as shown by the bill of exceptions, were that the banking house of the

(*a*) The reporter's statement has been omitted

plaintiffs was in Georgetown, at which place the note appears to be dated. That some time before the note fell due, the defendant had lived in the city of Washington, and carried on the business of a morocco leather dresser, keeping a shop and living in a house of his own in the said city. That about the year 1818 he sold his shop and stock in trade and relinquished his business, and removed with his family to a farm in Alexandria county, within the District of Columbia, and about two or three miles from Georgetown. That the Georgetown post-office was the nearest post-office to his place of residence, and the one at which he usually received his letters.

The notice of non-payment was put into the post-office at Georgetown, addressed to the defendant at that place. It was proved, on the part of the defendant, that at the time of his removal into the country and from that time until after the note in question fell due, he continued to be the owner of the house in Washington, where he formerly lived: and which was occupied by his sister-in-law, Mrs. Harbaugh. That he came frequently and regularly every week, and as often as two or three times a week, to this house, where he was employed in winding up his former business and settling his accounts, and where he kept his books of account, and where his bank notices, such as were usually served by the runner of the bank on parties who were to pay notes, were sometimes left, and sometimes at a shop opposite to his house; and where also his newspapers and foreign letters were left. That his coming to town and so employing himself was generally known to persons having business with him. That his residence in the country was known to the cashier of the bank. That there was a regular daily mail from Georgetown to the city of Washington, and that the defendant's house was situated in Washington, less than a quarter of a mile from Georgetown.

There was also some evidence given on the part of the plaintiffs, tending to show that the usage of the bank in serving notices in similar cases, was conformably to the one here pursued, and that the defendant was apprised of such usage. But that testimony may be laid out of view, as this Court does not found its opinion in any measure upon that part of the case. Upon this evidence the plaintiffs prayed the Court to instruct the jury, that it was not incumbent on them to have left the notice of the non-payment of the note at the house occupied by Mrs. Harbaugh, as stated in the evidence; but that it was sufficient, under the circumstances stated, to leave the notice at the post-office in Georgetown; which instructions the Court refused to give, but instructed the jury that their verdict must be governed according to their opinion and finding on the subject of usage which had been given in evidence.

The jury found a verdict for the defendant.

From this statement of the case it appears that the note was made at Georgetown, payable at the Bank of Columbia, in that town. That the defendant when he endorsed the note, lived in the county of Alexandria, within the District of Columbia, and having what is alleged to have been a place of business in the city of Washington; and the notice of non-payment was put into the Georgetown post-office addressed to the defendant at that place, by which it is understood, that the notice was either enclosed in a letter, or the notice itself sealed and superscribed with the name of the defendant, with the direction "Georgetown" upon it; and whether this notice is sufficient is the question to be decided.

If it should be admitted, that the defendant had what is usually called a place of business in the city of Washington, and that notice served there would have been good; it by no means follows, that service at his place of residence, in a different place, would not be equally good. Parties may be and frequently are so situated, that notice may well be given at either of several places. But the evidence does not show that the defendant had a place of business in the city of Washington, according to the usual commercial understanding of a place of business. There was no public notoriety of any description given to it as such. No open or public business of any kind carried on, but merely occasional employment there, two or three times a week, in a house occupied by another person; and the defendant only engaged in settling up his old business. In this view of the case the inquiry is narrowed down to the single point, whether notice through the post-office at Georgetown was good; the defendant residing in the country two or three miles distant from that place, in the county of Alexandria.

The general rule is that the party whose duty it is to give notice in such cases, is bound to use due diligence in communicating such notice. But it is not required of him to see that notice is brought home to the party. He may employ the usual and ordinary mode of conveyance, and whether the notice reaches the party or not, the holder has done all that the law requires of him.

It seems at this day to be well settled, that when the facts are ascertained and disputed, what shall constitute due diligence is a question of law. This is certainly best calculated to have fixed and uniform rules on the subject, and is highly important for the safety of holders of commercial paper.

And these rules ought to be reasonable and founded in general convenience, and with a view to clog, as little as possible, consistently with the safety of parties, the circulation of paper of this description; and the rules which have been settled on this subject have had in view these objects. Thus, when a party entitled to notice, has in the same

city or town a dwelling-house or counting-house or place of business, within the compact part of such city or town, a notice delivered at either place is sufficient, and if his dwelling and place of business be within the district of a letter carrier, a letter containing such notice addressed to the party and left at the post-office, would also be sufficient. All these are usual and ordinary modes of communication, and such as afford reasonable ground for presuming that the notice will be brought home to the party without unreasonable delay. So when the holder and endorser live in different post towns, notice sent by the mail is sufficient, whether it reaches the endorser or not. And this for the same reason, that the mail being a usual channel of communication, notice sent by it, is evidence of due diligence. And for the sake of general convenience it has been found necessary to enlarge this rule. And it is accordingly held, that when the party to be affected by the notice, resides in a different place from the holder, the notice may be sent by the mail to the post-office nearest to the party entitled to such notice. It has not been thought advisable, nor is it believed that it would comport with practical convenience, to fix any precise distance from the post-office, within which the party must reside, in order to make this a good service of the notice. Nor would we be understood, as laying it down as a universal rule that the notice must be sent to the post-office nearest to the residence of the party to whom it is addressed. If he was in the habit of receiving his letters through a more distant post-office, and that circumstance was known to the holder, or party giving the notice, that might be the more proper channel of communication, because he would be most likely to receive it in that way: and it would be the ordinary mode of communicating information to him, and therefore evidence of due diligence.

In cases of this description, where notice is sent by mail to a party living in the country, it is distance alone or the usual course of receiving letters which must determine the sufficiency of the notice. The residence of the defendant therefore being in the county of Alexandria, cannot affect the question. It was in proof that the post-office in Georgetown was the one nearest his residence, and only two or three miles distant, and through which he usually received his letters. The letter containing the notice, it is true, was directed to him at Georgetown. But there is nothing showing that this occasioned any mistake or misapprehension with respect to the person intended, or any delay in receiving the notice. And, as the letter was there to be delivered to the defendant, and not to be forwarded to any other post-office, the address was unimportant, and could mislead no one.

No cases have fallen under the notice of the Court, which have suggested any limits to the distance from the post-office, within which a

party must reside in order to make the service of the notice in this manner good. Cases, however, have occurred, where the distance was much greater than in the one now before the Court, and the notice held sufficient. (16 John. 218.) In cases where the party entitled to notice resides in the country, unless notice sent by mail is sufficient, a special messenger must be employed for the purpose of serving it. And we think that the present case is clearly one which does not impose upon the plaintiffs such duty. We do not mean to say no such cases can arise, but they will seldom, if ever, occur, and at all events such a course ought not to be required of a holder, except under very special circumstances. Some countenance has lately been given to this practice in England in extraordinary cases, by allowing the holder to recover of the endorser the expenses of serving notice by a special messenger. The case of Pearson v. Crallan (2 Smith's Rep. 404; Chitty, 222, note), is one of this description. But in that case the Court did not say that it was necessary to send a special messenger, and it was left to the jury to decide whether it was done wantonly or not. The holder is not bound to use the mail for the purpose of sending notice. He *may* employ a special messenger, if he pleases, but no case has been found where the English Courts have directly decided that he *must*. To compel the holder to incur such expense would be unreasonable, and the policy of adopting a rule that will throw such an increased charge upon commercial paper, on the party bound to pay, is at least very questionable.

We are accordingly of opinion that the notice of non-payment was duly served upon the defendant, and that the Court erred in refusing so to instruct the jury.

Judgment reversed and a venire facias de novo awarded.

The rule stated in the principal case, that in communicating notice of dishonour, a holder is bound only to *due* or *reasonable* diligence, and is not obliged to see that notice is brought home to the party to be affected, is now well settled, both as concerns the medium of communication and the place to which the notice is sent: see *Dickins* v. *Beal*, 10 Peters, 574, 579, 580.

Another principle mentioned in the *Bank of Columbia* v. *Lawrence*, that due diligence is a question of law, is also universally established: that is to say, where there is no dispute about facts, the court is to determine whether reasonable diligence has been used, and not to submit it to the jury as a question of fact; and where the facts are disputed, it is the duty of the court to state to the jury the legal principles which are applicable, and leave the question to be determined by them according to those principles, as they shall find the facts in favour of

one or the other; *Bank of Utica* v. *Bender*, 21 Wendell, 643; *Remer* v. *Downer*, 23 Id. 620, 623; *Spencer* v. *The Bank of Salina*, 3 Hill's N. Y. 520; *Carroll* v. *Upton*, 3 Comstock, 272; *Rhett* v. *Poe*, 2 Howard's Supreme Court, 458, 481; *Harris* v. *Robinson*, 4 Id. 336, 345; *Creamer* v. *Perry & Tr.*, 17 Pickering, 332, 335; *Wheeler and another* v. *Field*, 6 Metcalf, 290, 295; *Belden* v. *Lamb*, 17 Connecticut, 442, 451; *Ferris* v. *Saxton*, 1 Southard, 1, 18, 21; *Collins* v. *Warburton & Risley*, 3 Missouri, 202, 203; *Godley et al.* v. *Goodloe*, 6 Smedes & Marshall, 255; an endorser, also, has a right to insist on strict legal proof of notice; *The Bank of Vergennes* v. *Cameron*, 7 Barbour's S. Ct., 144, 149.

If the holder and endorser reside in the same place, the rule is that notice must be personal, that is, must be given to the individual, or left at his domicil or place of business, and cannot be sent through the post-office; *Bowling* v. *Harrison*, 6 Howard's Supreme Court, 248, 258; *Peirce and another* v. *Pendar*, 5 Metcalf, 352; *Phipps and others* v. *Chase*, 6 Id. 491; *Sheldon* v. *Benham*, 4 Hill's N. Y. 129, 133; *The Cayuga County Bank* v. *Bennett*, 5 Id., 237, 241; *Brindley* v. *Barr*, 3 Harrington, 419; *Shepard* v. *Hall*, 1 Connecticut, 329, 333; *Green* v. *Darling*, 15 Maine, 141; *Kramer* v. *M'Dowell*, 8 Watts & Sergeant, 138; *Stephenson* v. *Primrose*, 8 Porter, 156; *Curtis* v. *The State Bank*, 6 Blackford, 312; *The State Bank* v. *Slaughter*, 7 Id. 133: and a custom among the notaries of a particular city to give notice through the post-office, cannot make that practice lawful; *Wilcox & Fearn* v. *M'Nutt*, 2 Howard's Mississippi, 776; but a custom or by-law of a bank, establishing this mode of giving notice, will bind parties to bills or notes expressed to be payable at the bank; *Gindrat et al.* v. *The Mechanics' Bank of Augusta*, 7 Alabama, 325, 333: see 1 Smith's L. C. 416.

If the party to whom notice is to be given, has both a dwelling-house and a place of business in the town, notice may be sent to either, as is remarked in the principal case, and in *Bank of Geneva* v. *Howlett*, 4 Wendell, 328, 331, and *Lord* v. *Appleton*, 15 Maine, 270, 272; and if he has several places of business, it may be left at any of them; *Phillips* v. *Alderson*, 5 Humphreys, 403: and if verbal notice is sent to the party's place of business during business hours, or to his dwelling at a seasonable hour, and there is no one there to receive it, the holder is not bound to take any further trouble; *Williams* v. *The Bank of the United States*, 2 Peters, 97, 101, 103; *Howe* v. *Bradley*, 19 Maine, 31, 35; *Stephenson* v. *Primrose*, 8 Porter, 156, 162: and if the party is at lodgings, and upon inquiry there, is not within, notice may be left with a fellow-boarder and inmate for him; *Bank of the United States* v. *Hatch*, 6 Peters, 250, 257; sustained by *Buxton* v. *Jones*, 1 Manning & Granger, 83. Notice, also, may be sent to any place indicated by the party as the one where notices for him are to be delivered; *Eastern Bank* v. *Brown*, 17 Maine, 356; see *Bank of the United States* v. *Corcoran*, 2 Peters, 121, 131, 132; and *Farmers' and Merchants' Bank* v. *Battle & Massey*, 4 Humphreys, 86, 92. But where notice was left at a shop near the endorser's with a person who promised to give it to him as soon as he saw him, and did give it the next day or the day after, it was held not to be sufficient; *Granite Bank* v. *Ayres*, 16 Pickering, 392; and where notice was given to a clerk of the endorser in the street, it was considered not to be enough without proof that the clerk was an agent to receive notice, or that it was his business to attend to such subjects; *Fortner* v. *Parham and Gibson et al.*, 2 Smedes & Marshall, 151, 164. These are merely illustrations of the general principle, that in communicating special notice, *due dili-*

gence is necessary, and that nothing more is required.

The rule requiring personal notice to be given, and forbidding the employment of the post-office, where the parties live in the same place, was applied in *Ireland* v. *Kip*, 10 Johnson, 490, S. C. 11 Id. 231, in a case where the endorser resided three or four miles from the post-office, and beyond the ordinary range of the letter-carriers, but in the same city, and received his letters from the same office where the notice was deposited. But of late, in some of the States, the courts have evinced a disposition to restrict this rule within narrow limits. The principal case, and the cases of *Jones* v. *Lewis*, 8 Watts & Sergeant, 14; *Timms* v. *Delisle*, 5 Blackford, 447; *Bell* v. *The State Bank*, 7 Id. 457, 460; *Fisher* v. *The State Bank*, Id. 610; *Walker & others* v. *The Bank of Augusta*, 3 Kelly, 486; *Carson* v. *The Bank of the State of Alabama*, 4 Alabama, 148, 152; and *Foster* v. *Sineath*, 2 Richardson, 338, decide that if the party lives out of the town, but comes to the post-office of that town, for his letters, notice may be directed to him through the post-office; (and see *Bank of the United States* v. *Norwood*, 1 Harris & Johnson, 423, and *Gist* v. *Lybrand*, 3 Ohio, 307, 320;) thereby deciding that the post-office is a legal place of deposit for notices where the endorser lives out of the town, or at least at such a distance from the town, as would render the employment of a special messenger unreasonably burdensome: on the other hand, in other States, the decisions continue strictly to enforce the old rule that the post-office is to be used only for transmission, and to hold that where the party lives a few miles out of the town, but comes there for his letters, notice cannot be deposited in the post-office; *Patrick* v. *Beazley*, 6 Howard's Mississippi, 609; *Hogatt* v. *Bingaman*, 7 Id. 565; *Barker* v. *Hall*, Martin & Yerger, 183; *Laporte* v. *Landry*, 5 Martin N. S. 359; *Louisiana State Bank* v. *Rowel et al.*, 6 Id. 506; and though in Louisiana, under the statute of 13th March, 1827, sec. 2, notice may be sent in such a case through the post-office, yet it is still held there that the general commercial law is otherwise; *Glenn* v. *Thistle*, 1 Robinson, 572; *Duncan* v. *Sparrow*, 3 Id. 165, 168; *Harris, for the use, &c.* v. *Alexander & another*, 9 Id. 152, 453: and see *Bank of Logan* v. *Butler*, 3 Littell, 499. In like manner, in *Ransom* v. *Mack*, 2 Hill's N. Y. 588, and *Farmers' & Merchants' Bank* v. *Battle & Massey*, 4 Humphreys, 86, the principle is affirmed that the post-office is for transmission and not deposit, and that the question is not whether the parties reside in the same town or legal district, nor of the distance at which they live from one another, but whether they use the same post-office, or whether there is a transmission by mail; and see *Pierce & another* v. *Pendar*, 5 Metcalf, 352, 356. In *Eagle Bank* v. *Hathaway*, 5 Metcalf, 213, the very important point is decided, that personal notice is required only where the transaction which is to be notified occurs in the same place in which the party to whom notice is to be given resides; and that where a bill was dishonoured in Philadelphia and notice sent to an endorser in Providence, the latter might give notice through the post-office to a previous party residing in Providence: and the court said that if it were an original question, it might be doubtful whether in large cities, and among commercial men, the post-office would not generally be the speediest method of communication, and though the rule is settled by a long course of judicial decisions, it is thus settled by positive law only so far as the cases are within it: and see *Hartford Bank* v. *Stedman and Gordon*, 3 Connecticut, 489, 496, and *Foster* v. *McDonald*, 3 Alabama, 34, S. C. 5 Id. 377. So in *Gindrat et al.* v. *The Mechanics' Bank of Augusta*, 7 Id. 325, 331, it is decided that the mail is an allowable

medium, if the parties between whom the notice proceeds do not reside in the same place; and therefore, that if the holder resides in a different place from the party to whom notice is to be given, notice may be given by his agent or notary, through the mail, to a party residing in the same place with the agent or notary. It should be observed also, that the usage of a bank where a note is made payable, may control the general law as to the mode of communication as well as other particulars, and authorize notice to be given through the post-office; *Chicopee Bank* v. *Eager*, 9 Metcalf, 583; see Smith's Leading Cases, vol. 1, p. 416.

It is obvious that the rule requiring personal notice where the parties reside in the same place, has lost its reasonable force, and exists only by authority. Instead of undermining it with exceptions that conflict with it in principle, and render the subject embarrassing in practice, it would be much better to declare that the rule itself has become obsolete, and is abolished.

If the parties reside in different places, notice may be sent by mail: and putting into the post-office seasonably a notice properly directed is, in itself, due diligence, or constructive notice; and will be sufficient, although it never reaches the party; *Shed* v. *Brett*, 1 Pickering, 401, 407; *Dickins* v. *Beal*, 10 Peters, 574, 579; *Thorn* v. *Rice*, 15 Maine, 263, 267; *Jones* v. *Lewis*, 8 Watts & Sergeant, 14, 15; *Woodcock* v. *Houldsworth*, 16 Meeson & Welsby, 124, 126. A party, however, is not obliged to make use of the mail for the transmission of notice, but may adopt a private conveyance, provided he shows that due diligence was used; *Jarvis* v. *St. Croix Manufacturing Company*, 23 Maine, 287. In *Fish* v. *Jackman*, 19 Maine, 467, 472, it was said that where an endorser resides in a secluded part of the country, twenty miles from any post-office, the mail is not an allowable medium of notice; but this is probably not correct; one who becomes a party to a commercial instrument should be considered as rendering himself subject to commercial law and usage; see *State Bank of Elizabeth* v. *Ayers*, 2 Halsted, 130, 131.

With regard to the place to which notice sent by mail is to be directed; if the residence of the party is known, the general principle of law is that laid down in the principal case, and recognised in *Bank of the United States* v. *Carneal*, 2 Peters, 543, 551, and in *Chouteau* v. *Webster*, 6 Metcalf, 1, 7, that notice should be sent to such place that it will be most likely promptly to reach the person for whom it is intended. Notice directed at large to the *town* or district of country, where the parties reside, is, in the absence of any special notification to adopt a different address, always sufficient, although there may be several post-offices in the town, or he may usually receive his letters at the post-office of another place; *Bank of Manchester* v. *Slason*, 13 Vermont, 334, 340; *Remer* v. *Downer*, 23 Wendell, 620, overruling *Cuyler* v. *Nellis*, 4 Id. 398; *Rand* v. *Reynolds*, 2 Grattan, 171. If, however, the party usually receives his letters at the post-office of a different place from that in which he resides, notice sent to that post-office will be good; *Reid* v. *Payne*, 16 Johnson, 218; *Hunt* v. *Fish*, 4 Barbour's Supreme Court, 325, 330. If the party does not live in any village or town in which there is a post-office, notice should be sent to the office nearest his domicil; *State Bank of Elizabeth* v. *Ayers*, 2 Halsted, 130, 131; *Dunlap* v. *Thompson*, 5 Yerger, 67, 70; *Priestley & others* v. *Bisland & others*, 9 Robinson, 426, 429; but if he commonly receives his letters at a more distant office, notice may be sent to that to which he usually resorts; *Bank of Geneva* v. *Howlett*, 4 Wendell, 328; *Glasscock* v. *Bank of Missouri*, 8 Missouri, 443, 445; *The New Orleans & Carrolton Rail-Road Company* v.

Robert, 9 Robinson, 130; *The Grand Gulf Rail-Road and Banking Company* v. *Barnes*, 12 Id. 128, 129; in such a case, notice may be sent to either office; *Farmers' & Merchants' Bank* v. *Battle and Massey*, 4 Humphreys, 86, 91; *New Orleans Canal and Banking Company* v. *Briggs*, 12 Robinson, 175; *Follain and others* v. *Dupré and others*, 11 Id. 456, 472; *Hazelton Coal Co.* v. *Ryerson*, Spencer, 129; *Barry et al.* v. *Crowley*, 4 Gill, 195, 202. In *Bank of the United States* v. *Lane*, 3 Hawks, 453, 456, it is said, that, after all, the question settles down to the inquiry, not whether the notice was directed to the nearest post-office to the party, but to that which was most likely to impart to him the earliest intelligence.

If the party is temporarily absent from home, for a longer or shorter time, notice sent to his general domicil will be sufficient, and should be sent there, if not given to him personally; *Fisher* v. *Evans*, 5 Binney, 541; *Hager* v. *Boswell, &c.*, 4 J. J. Marshall, 61, 62; *Stewart* v. *Eden*, 2 Caines, 121, 127; *M'Murtrie* v. *Jones*, 3 Washington, 206, 208; *Smedes* v. *Utica Bank*, 20 Johnson, 372, 382: see *Goodwin* v. *McCoy*, 13 Alabama, 271, 279. The better opinion is, that notice given to the party in person, or directed to him at his actual residence through the post-office, when he is away from home, will be good, unless at the time of incurring his liability he stipulated that notice should be sent to a particular place. Notice addressed by mail to an endorser, who is residing at Washington in the performance of his duty as a member of Congress, will be good; *Chouteau* v. *Webster*, 6 Metcalf, 1; *Tunstall* v. *Walker*, 2 Smedes & Marshall, 638: but in such a case, if the party's general domicil continues, notice sent to it will be sufficient; *Marr* v. *Johnson*, 9 Yerger, 1, 6. If the party's residence has been changed without the knowledge of the holder, notice may be sent to the original residence; *Union Bank of Tennessee* v. *Govan*, 10 Smedes & Marshall, 334, 342. Notice sent to a particular place pointed out by the endorser, will generally be good, both in reference to himself, and parties behind him; *Shelton* v. *Braithwaite*, 8 Meeson & Welsby, 252. If the residence of the party is transitory and variable, notice is properly sent to the place of his most usual resort; *McClain* v. *Waters*, 9 Dana, 55.

If the residence of the endorser is not known to the holder, he or his agent or notary, must use due diligence to discover it; and if due diligence be used, it will be sufficient, even though the notice should be sent to the wrong place; *Nichol* v. *Bate*, 7 Yerger, 305; *Barr, etc.* v. *Marsh*, 9 Id. 253; *Davis* v. *Beckham*, 4 Humphreys, 53; *Hoopes and Bogart* v. *Newman, Executor*, 2 Smedes & Marshall, 71, 79: and the rule is the same, where a known residence has been changed; *Phipps and others* v. *Chase*, 6 Metcalf, 491; *Barker* v. *Clark*, 20 Maine, 156; *Planters' Bank* v. *Bradford*, 4 Humphreys, 39; *Harris* v. *Memphis Bank*, Id. 519. By sending notice, after due diligence, a right of action is acquired, and if the holder subsequently discovers that his notice was missent, and acquires knowledge of the party's actual residence, he is not bound to send a second notice; *Lambert et al.* v. *Ghiselin*, 9 Howard's S. Ct., 552, 558. Due diligence consists in making inquiry from such accessible persons as, from their connexion with the transaction, or place, or parties, are most likely to be informed, and in sending notice to the place where, according to the best information to be obtained, the party is most likely to be reached; see *Winans* v. *Davis*, 3 Harrison, 277; *Woodruff* v. *Daggett*, Spencer, 526, 534; *Hill* v. *Varrell*, 3 Greenleaf, 233; *Branch Bank at Decatur* v. *Peirce*, 3 Alabama, 321; *Stuckert* v. *Anderson*, 3 Wharton, 116; *Hunt* v. *Nugent*, 10 Smedes & Marshall, 542, 548; *Carroll* v. *Upton*, and *Rawdon* v. *Redfield*, 2 Sandford's S. Ct., 172, and 178; *Lambert et al.* v.

Ghiselin, 9 Howard's S. Ct., 552, 558. The holder will be justified in relying upon information derived from the agent of the endorser to be affected, or from the drawer of an accommodation bill or maker of an accommodation note, endorsed and discounted for his benefit, or from his agent, or from a subsequent endorser, who professes to know and is interested to speak truly; *Bank of Utica* v. *Davidson*, 5 Wendell, 587; *Catskill Bank* v. *Stall*, 15 Wendell, 364, S. C. on error, 18 Id. 466; *Bank of Utica* v. *Bender*, 21 Id. 643; *Ransom* v. *Mack*, 2 Hill's N. Y. 588, 592; and see *Farmers' & Merchants' Bank* v. *Eddings*, 4 Humphreys, 521, *note;* but not on the statements of mere strangers having no connexion with the parties and no probable knowledge of them, unless it appear that no better information can be had; *Bank of Utica* v. *De Mott*, 13 Johnson, 432; *Spencer* v. *The Bank of Salina*, 3 Hill's N. Y. 520; see this matter considered at large in *Harris* v. *Robinson*, 4 Howard's S. C. 336, 346, &c. A holder is not justified in sending notice to the place where the bill is *dated*, without making inquiry, if the drawer really resides elsewhere; the date of a bill not being a sufficient indication of residence to dispense with further inquiry; *Fisher* v. *Evans*, 5 Binney, 541; *Lowery* v. *Scott*, 24 Wendell, 358; *Spencer* v. *The Bank of Salina; Carroll* v. *Upton*, 3 Comstock, 271, 274; *Barnwell* v. *Mitchell*, 3 Connecticut, 101; *Foard* v. *Johnson*, 2 Alabama, 565; *Fitler* v. *Morris*, 6 Wharton, 406, 415; and this applies still more strongly to the case of an endorser; *Denny* v. *Palmer*, 5 Iredell's Law, 611, 621; *M'Lanahan et al.* v. *Brandon*, 1 Martin, N. S. 322: however, if after due diligence, no information is obtained as to the party's residence, notice is properly sent to the place where the bill or note is dated; *Wood and others* v. *Corl*, 4 Metcalf, 203, 206; *Bank of Utica* v. *Davidson*, 5 Wendell, 587; *Godley et al.* v. *Goodloe*, 6 Smedes & Marshall, 255; *Branch Bank at Decatur* v. *Peirce*, 3 Alabama, 321. If, however, it be not shown that the drawer resides elsewhere, probably, it will be taken, *prima facie*, that the place of the date is the place of his residence, and notice sent there will be good; *Page and Stivers* v. *Prentice and Weisinger*, 5 B. Monroe, 7; *Robinson and Davenport* v. *Hamilton*, 4 Stewart & Porter, 91. If the holder cannot ascertain the endorser's residence, he may enclose the notice to some one elsewhere who is acquainted with it, directing him to send it on; *Hartford Bank* v. *Stedman and Gordon*, 3 Connecticut, 489; *Safford* v. *Wyckoff*, 1 Hill's N. Y. 12.

Beyond the limit of these very general suggestions, no fixed rule can be indicated: but it is a question for the Court, under all the circumstances, whether the holder has used reasonable and proper diligence. If the endorser be dead, notice, regularly, should be sent to his personal representative; *The New Orleans and Carollton Rail-Road Company* v. *Kerr and another*, 9 Robinson, 122; *Oriental Bank* v. *Blake*, 22 Pickering, 206. If it is known to the holder, or could be ascertained by reasonable inquiry, who the representative of the endorser is, a notice sent addressed to the deceased endorser is bad; *The Cayuga County Bank* v. *Bennett*, 5 Hill's N. Y. 237, 238: but if there be no executor or administrator, or their existence is not known to the holder, notice addressed to the endorser, at the residence of his family, will be sufficient; *Stewart* v. *Eden*, 2 Caines, 121, 128; *Merchants' Bank* v. *Birch*, 17 Johnson, 25; *Willis* v. *Green*, 5 Hill's N. Y. 232, 234; *Planters' Bank* v. *White*, 2 Humphreys, 112. Notice addressed "to the legal representative" of the endorser, and sent by mail to the place of the endorser's residence, the holder not knowing who the administrator is, is sufficient; *Pillow* v. *Hardeman, Adm'r*, 3 Humphreys, 538. Where a partnership is the endorser, and one of the firm is dead before the default, no-

tice intended to charge the firm effects must be sent to the surviving partner, but if intended to charge the private estate of the deceased partner, must be sent addressed to his administrator: *Cocke* v. *The Bank of Tennessee*, 6 Humphreys, 51.

Notice need not be in writing: verbal notice is sufficient; *Cuyler* v. *Stevens*, 4 Wendell, 566; *Gilbert* v. *Dennis*, 3 Metcalf, 495, 498; *Glasgow* v. *Pratte*, 8 Missouri, 336.

Where a note is endorsed in a partnership name, notice to one partner is notice to the firm; *Dabney* v. *Stidger*, 4 Smedes & Marshall, 749; but where joint payees, who are not partners, jointly endorse a note, both must have notice, to render either liable; *Sayre* v. *Frick*, 7 Watts & Sergeant, 383; *Willis* v. *Green*, 5 Hill's N. Y. 232; *The State Bank* v. *Slaughter*, 7 Blackford, 133; *Shepard* v. *Hawley*, 1 Connecticut, 367; and see *Wood* v. *Wood and Wood*, 1 Harrison, 429: Contra, *Dodge et al.* v. *Bank of Kentucky*, 2 Marshall, 610, 615; *Higgins* v. *Morrison's Executor*, 4 Dana, 100, 106; and see *Goddard* v. *Lyman*, 14 Pickering, 268.

Of the extent to which one member of a commercial partnership may bind the firm.

B. LIVINGSTON AGAINST C. C. ROOSEVELT AND C. I. ROOSEVELT.

In the Supreme Court of New York.

MAY TERM, 1809.

[REPORTED, 4 JOHNSON, 251–280.]

Where a person takes a partnership security from one of the partners, for what is known, at the time, to be a particular debt of the partner who gives the security, the copartnership is not liable.

Where there is a partnership limited to a particular trade or business, one partner cannot bind his copartner by any contract not connected with such trade or business. And a knowledge in third persons of the limited nature of the partnership, will be inferred from circumstances. It seems, *that a publication in the gazette, of the nature of the copartnership, at the time of its commencement, is constructive notice to all those who may, afterwards, take the copartnership security.*

THIS was an action of assumpsit. The plaintiff declared on a promissory note, dated April 26, 1805, drawn by the defendant, C. I. R.,

payable to C. C. Roosevelt & Co., and endorsed by the said C. I. R. in the name of C. C. R. & Co. to the plaintiff, who resides in the city of New York.

When the note became payable, it was regularly protested for non-payment, and notice given to C. C. Roosevelt.

A judgment by default was entered against C. I. Roosevelt. The other defendant, C. C. R. pleaded non-assumpsit. The cause was tried at the New York Sitting, in December, 1807, before Mr. Justice Spencer.

The defendants, in February, 1803, entered into copartnership in the city of New York, and published, for two weeks successively, in the "Evening Post" and "American Citizen," an advertisement, that they had entered into partnership in the sugar refining business, under the firm of C. C. Roosevelt & Co., and that their sugar-house was in Thames Street. Both these newspapers were taken by the plaintiff during the time of the advertisement. The copartnership continued until June, 1805, when it was dissolved, and notice of the dissolution was given in the same newspapers. The note in question was given for 20 pipes of brandy, purchased of John G. Bogert, agent for the plaintiff, and which were in the hands of Bogert, as administrator of Anthony Caroll, deceased, and were sold in part satisfaction of a debt due from that estate to the plaintiff. The bill of parcels of the brandy, with the contents, the number and mark of each pipe, was made out by a clerk, in the name of C. I. Roosevelt only. The brandy was entered at the custom-house, in the name of C. I. Roosevelt; and to obtain the usual debenture, the plaintiff made oath at the custom-house, that the sale was to C. I. Roosevelt. This affidavit was made the 24th April, 1805, subsequent to the sale, and before the note was given. The clerk at the custom-house, who attended with the affidavit, testified, that when an article was sold for exportation as he believed, to a copartnership, it was not uncommon in the affidavit made, in order to obtain the debenture, to state, that they were sold to one of the firm, without mentioning the other partners; but whether, in such cases, the sale was in reality made to the firm, or to the individual partner to whom it was stated in the affidavit to be made, he did not know. The brandy was actually exported in a vessel belonging to C. I. Roosevelt, and which had been purchased with his own note, without an endorser.

J. G. Lockwood, a witness for the defendant, testified, that, in the spring of 1805, he was employed by C. I. Roosevelt, as supercargo, on board the schooner Elizabeth, on a voyage to the West Indies; this was the vessel purchased by C. I. R., as above mentioned. The cargo consisted of cloves, 20 pipes of brandy, purchased of the plaintiff, and a

variety of other articles. C. C. Roosevelt had no interest or concern in the vessel or cargo.

John Y. Cebra testified, that he was a clerk of the defendant's from 1804, until the dissolution of their partnership. On the building where the copartnership business was conducted, was painted in large letters, "Sugar-House." He knew of no copartnership beyond the limits of the sugar refining business. The note in question was given at the dwelling-house of C. I. Roosevelt. No entry of the purchase of the brandies was made in the copartnership books, and he understood that it was a private speculation of C. I. Roosevelt.

John Cross testified, that he was directed to deliver the brandy by John G. Bogert, the agent of the plaintiff; but he received no directions from the plaintiff to make out the bill of parcels, nor did he recollect receiving any from John G. Bogert. Neither of them, as far as he knew, ever saw the bill. The bill was made out as C. I. Roosevelt directed. John G. Bogert directed the witness to call for the note, but gave no directions relative to the form in which it was to be made. He called on C. I. Roosevelt, at his dwelling-house, and received the note, and when he handed it to J. G. Bogert, no objection was made by him or the plaintiff relative to the form of it.

It appeared that at two of the banks, in the city of New York, the defendants, from the commencement of their copartnership, had been in the habit of keeping partnership accounts, and had been there considered as general partners. That the entry of the partnership name of C. C. R. & Co., in the bank book of signatures, was in the hand of C. I. Roosevelt, and that the checks and other partnership papers which passed at the banks were generally signed by C. I. Roosevelt, in the name of the firm; that credit was given at these banks principally to C. C. Roosevelt, and that nothing was known, at either of them, of any limitation of the partnership.

The plaintiff proved by several merchants and others, that although they knew of the partnership, they never heard, until after its dissolution, of any limitation, though several of them took the newspapers in which the advertisements were published.

John G. Bogert testified, that he was the agent of the plaintiff; that the bargain for the brandies was made with C. I. Roosevelt, but he understood they were sold to and for the partnership, although nothing was said on whose account the purchase was made. The partnership engagement was to be given, and the sale was not completed, until he had satisfied himself, by inquiries, that the defendants were partners. He never heard of any limitation to the partnership, until after its dissolution, and he gave no directions to Cross to make out a bill of parcels.

He believed when the sale was made, that the partnership was a general one.

The judge told the jury, that he was decidedly of opinion, upon the facts above stated, that the plaintiff was entitled to recover, and the jury accordingly found a verdict for the plaintiff.

The defendants moved for a new trial, on the ground of the misdirection of the judge, and because the verdict was against law and evidence. Two points were made:

1. A partnership security was taken for what was known to be the individual debt of one partner.

2. That if the individuality of the debt was not known to the plaintiff or his agent, still, in limited partnerships, one partner has no authority to bind the firm in a transaction out of the scope of the partnership.

Griffin, for the defendant. 1. The partnership of C. C. Roosevelt & Co. was special, being expressly limited to the sugar refining business. The note in question was given for brandy, and the purchase made exclusively for the interest of C. I. Roosevelt, and without the knowledge of C. C. Roosevelt. The plaintiff took a partnership security for an individual debt of one of the partners, knowing it to be so. The knowledge of the plaintiff, or his agent, that the security was for the individual debt of C. I. Roosevelt, is material, and is fully proved by the written documents in the case. The bill of parcels made to C. I. R. is a contemporaneous exposition of the understanding of the parties; for it is to be presumed, that if the sale had been actually made to the partnership, the bill would have been made out in the name of C. C. Roosevelt & Co. That is the natural and usual course of business. The entry at the custom-house for exportation, and the affidavit of the plaintiff himself, that the sale was made to C. I. Roosevelt, is strong evidence of the fact. Again, the form of the note is almost conclusive evidence, that the brandy was sold to C. I. Roosevelt alone. It is drawn by him alone, and he endorsed the name of the firm. If it was a copartnership debt, this mode of making and endorsing the note could give no additional security. If the name of the firm had been subscribed, as makers, each of the defendants would have been equally liable to the plaintiff.

It was expressly decided in the case of Livingston v. Hastie and Patrick, 2 Caines, 246, that a note given by one partner in the name of the firm, for his individual debt, was void, as against the firm, and even against a friendly endorser, not knowing on what account it was drawn, where the endorsee himself did not know for what the note was given. The same doctrine was recognised in the case of Lansing v. Gaine and Ten Eyck, 2 Johns. Rep. 300.

2. But admitting that the plaintiff or his agent did not actually know whether the brandy was purchased for the individual account of C. I. Roosevelt, or not, still, in the case of a limited partnership, one partner has no power to bind his copartner for anything out of the course of their copartnership dealings. The principle on which one partner is made liable for the acts of his copartner, is the implied assent arising from the copartnership; but no assent can be presumed to any contract out of the scope of the copartnership business. Suppose a copartnership between two silversmiths, or shoemakers, could one partner bind his copartner, by giving notes, in the name of the firm, for ships or merchandise? or suppose a partnership between two attorneys, could one bind the other, by purchasing ships or goods, in the name of the partnership? In the present case the copartnership was expressly limited to a particular manufacture or business. The distinction between general and limited partnership has been long known and settled. (Watson on Partn. 180, 2d. ed.) In a general partnership, one partner has an unlimited power to bind his copartner, except by a bond or sealed instrument, or where there is a collusion with a third person to cheat the firm. In a special partnership, if one party uses the name of the firm, in matters out of the scope of the partnership, it not only is an abuse, but a transgression of his power. So a general agent may abuse his authority, and yet the principal be liable; but if a special agent exceeds his authority, his principal is not liable. (3 Term. Rep. 757, 760.) It is only to act in the course of their particular trade or line of business, that an authority is delegated by partners to each other; and it is only in such transactions that strangers have a right to go on the credit of the partnership funds. (Watson, 180; 16 Vin. Abr. 242; 1 Salk. 126; Cowp. 814; 6 Vesey, jun. 604; 1 Esp. Cas. 29.)

There are two exceptions to the general rule on this subject: 1st. Where the partner who denies his liability, had an interest in, or derived a benefit from the contract; 2d. Where due diligence or caution has not been used in informing the world of the nature of the partnership; for the presumption must be, that the partnership is general, unless the contrary has been made known. C. C. Roosevelt cannot be brought within either of these exceptions; he knew nothing of the purchase of the brandy, which was made solely and exclusively for the benefit of C. I. Roosevelt. The defendants did all in their power to make known to the public the limited nature of their partnership. Advertisement in the gazette is the most usual, and certainly the most effectual, way of making such a fact known. It has been decided, that an advertisement in a gazette is sufficient notice of the dissolution of a copartnership (2 Johns. Rep. 300); for the same, or a stronger reason,

it ought to be considered as sufficient notice of the nature of the partnership.

T. A. Emmet, contra. If there is evidence sufficient to justify the jury, in finding their verdict, the court will not disturb it. Mere knowledge of the nature of the partnership, and of its being an individual transaction, is not sufficient; there must be collusion or fraud, and knowledge is only evidence of such fraud. This knowledge ought to be strong and full, not slight or presumptive.

Sugar refiners must purchase raw sugar; it is not, therefore, improbable, but a fair inference, that the brandy was purchased as an adventure to the West Indies on the partnership account, in order to procure the raw materials for the manufactory. The testimony of Bogert is direct and positive, that he trusted to the credit of the partnership, and that he thought it a copartnership transaction. Cross, who made out the list of parcels, was not the agent of plaintiff. He made it out agreeably to the directions of the person who called for it.

There is a material difference between a gazette notice of the dissolution of a partnership, and a notice of its nature and commencement. The former operates immediately; but a notice of the nature of limitation of a partnership which may continue many years, may, in a short time, be forgotten by the world, who only see persons acting together as general partners. These acts obliterate the remembrance of the former notice of the nature of the copartnership, published at its commencement; while the ceasing to act together, serves to confirm the recollection, and to recall the attention to the notice of the dissolution. Persons who commence partnership in relation to a particular business, may, afterwards, extend it to some other objects, or to some particular business or adventure, *pro tanto;* and how is the world to know whether they act according to the terms of the original contract or not? The sign affixed to the building where the manufactory was carried on, was no notice, for it did not express the nature of the copartnership. There is no evidence that the note was drawn, in the manner it appears to be, by the direction of Bogert. He naturally supposed that it was done so by the desire of C. C. Roosevelt & Co.

The true question is, whether there was any collusion between the plaintiff or his agent, and C. I. Roosevelt, to defraud C. C. Roosevelt. Knowledge of the fact, that the purchase was made for the individual account of C. I. R. and that he pledged the copartnership funds without the consent of his copartner, is essential to prove the covin or fraud. This is the doctrine to be collected from the cases on this subject. (Watson, 202, 8 Vesey, jun. 540, Ex parte Bonbonus; 7 East, 210, Swann v. Steele.) Suppose a check drawn in the copartnership

name on one of the banks, could the payment of the check be contested on the ground, that C. I. R. had drawn it on his own account without authority from his copartner? Certainly not; for C. I. R. had authority to issue negotiable paper in the copartnership name. If a partner has power to issue negotiable paper, in the name of the partnership, such power is unlimited; and it is, *pro tanto*, a general partnership. The person who receives the partnership paper, is not bound to inquire, for what account it is given. Again, a partnership is created or grows by reputation, and *a fortiori*, an extension of it may be created by reputation. Admitting that the partnership was originally limited, yet by the acts of the parties it may become unlimited. Indeed, there can be no limited partnership, where one party has power to sign and endorse notes with the names of the copartnership. If C. C. Roosevelt meant to avoid responsibility on notes not given in the course of the copartnership business, he should have guarded against it, by stipulating that one partner should not endorse notes in the name of the firm.

Whether the partnership be general or special, one partner has no authority to bind his copartner for anything not connected with the copartnership business. But the only question is, whether there was fraud or covin; the English decisions go on the ground of fraud (1 East, 48; 2 Esp. Cas. 523), and the jury are the proper judges how far fraud is made out by the evidence.

Harrison, in reply. If fraud invalidates the security which has been taken, and knowledge in the party receiving it, is evidence of that fraud, it must be conclusive evidence. It is the duty of every person who takes paper signed or endorsed by a copartnership name, to inquire, and know whether the party who gives it, has authority to sign the name of the firm. If, from all the evidence, the jury ought to have inferred that the plaintiff or his agent did know, that the note was given and endorsed for the individual debt of C. I. R., the verdict ought to have been set aside.

That the brandy was purchased to send to the West Indies, to be converted into raw sugar for the use of the copartnership, is an idea not warranted by the evidence. The written evidence in this case ought to outweigh the testimony of Bogert, the agent, who may naturally be supposed to have some bias in favour of his principal. The making out of the bill of parcels in the name of C. I. R. was a sufficient intimation of the plaintiff's agent, that the purchase was for the individual partner, and he ought to have inquired of C. C. R. whether he consented to give the note. The peculiar manner in which the note was drawn, was of itself sufficient to put Bogert on the inquiry, as to its being a copartnership transaction; and the oath of the principal at the

custom-house, that the sale was to C. I. R. ought to be held conclusive evidence of the fact.

If an advertisement in a gazette, is sufficient evidence of the dissolution of a copartnership, it ought to be evidence, also, of a limited nature. The transactions at the bank were perfectly consistent with a limited partnership. Reputation is *prima facie* evidence only of a partnership, but it must be connected with acts to establish the fact. Mere reputation is not enough to create a partnership; if it were, it would be easy for one man to make another liable, as a partner, without his knowledge or consent.

In the case ex parte Bonbonus, 8 Vesey, jun. 540, the Lord Chancellor said, "that if under the circumstances, the party taking the paper could be considered as advertised, in the nature of the transaction, that it was not intended to be a partnership proceeding, it should not bind them." The nature of the purchase, in the present case, and the circumstances attending it, were certainly sufficient to advertise the plaintiff or his agent, that this was not a partnership transaction.

If the doctrine contended for, on the part of the plaintiff, should be established, there must be an end altogether of limited partnerships. In every partnership, each partner must be authorized to use the name of the firm, in relation to the copartnership business. If the parties were to agree that they should sign their names separately, this would not be binding on third persons, and if one partner should use the name of the firm, in the course of the partnership business, the partnership would be bound, though done in violation of the agreement between the partners.

VAN NESS, J. Whether the plaintiff knew that the debt for which he received the partnership security, was the private debt of Cornelius I. Roosevelt, is a question of fact, and we are called upon to decide whether, if that question had been submitted to the jury, they ought not to have found for the defendant. The partnership was special, being limited to the sugar refining business in the city of New York, where all the parties resided. At the time the partnership was formed, notice was given for two weeks successively, of the nature and extent of it, in two daily papers, published here, both of which the plaintiff took during that period. The house where the business was to be transacted was designated in the notice, and "Sugar House," in large letters, was painted upon it. The defendant, Cornelius C. Roosevelt, at no time consented, or was privy to any extension of the connexion, beyond the particular object for which it was originally formed. The article sold, and which was the consideration of the note in question, had no relation to the business of sugar-refining, and it would, therefore, never have

occurred to any one, that Cornelius I. Roosevelt purchased it on the partnership account, unless he had expressly declared that to be his intention. There was nothing, either in the acts or declarations of Cornelius I. Roosevelt, from which the plaintiff's agent could infer, that he bought the brandy for the use of the company. The contract was made with Cornelius I. Roosevelt, without the knowledge or consent of his copartner. He gave his note at his *own house* (and not at the counting-house of the company) for the payment of it, with the endorsement of the firm, as collateral security; and the note, in this form, was received by the plaintiff, without objection. The manner in which the note was drawn is inconsistent with the idea of a sale to the firm. It is not hazarding anything when I say that, where a sale has been made to partners, it would be a perfect novelty among merchants to receive the note of one of them endorsed by the firm. There could be no possible use in it. No additional security was derived from its being given in that form. After the contract for the sale, but before the delivery of the note, the plaintiff himself (and this is the only instance of his personal agency in the whole transaction) made oath at the custom-house, that the sale was made to Cornelius I. Roosevelt; thus giving the highest, most solemn, and satisfactory evidence of his understanding of the sale, at the time when it was made, and which is in exact coincidence with all the documentary and other evidence in the cause, even with that of Mr. Bogert, which I shall presently notice. Upon this evidence, I am persuaded, the jury would have found, that the sale was made to Cornelius I. Roosevelt, in his individual capacity; that this was known to the plaintiff; and, consequently, that, originally, he only was liable for the payment of it. This court has often decided, that one partner cannot pledge the partnership security for what is proved to be the separate debt of such partner, without the consent or privity of the other partners. (Livingston v. Hastie and Patrick, 2 Caines, 246. Lansing v. Gaine and Ten Eyck, 2 Johns. Rep. 300.) In the case of Dubois v. Roosevelt, decided in May term, 1808, and which is not reported, the facts were almost precisely similar to those I have above stated. The court, in that case, were unanimously of opinion, that the plaintiff could recover, without overruling the principles laid down in Livingston v. Hastie and Patrick, and Lansing v. Gaine and Ten Eyck. The only difference between these two cases and the present, is that which may be supposed to arise out of the evidence, that the defendants were considered to be general partners at two of the banks, and by several merchants in this city, who were witnesses on the trial, and the testimony of John G. Bogert, the plaintiff's agent. As to the first, if mere reputation is sufficient to enable one of several special partners, to charge another in a case circumstanced as this is, then

there is an end, as to third persons, of all limited partnerships. In point of fact, here was not a general partnership. Of this, notice was given in a manner best calculated to apprise the community of it. What other precautionary measure could the defendant have taken? After this notice, not a single act at any time appears to have been done by Cornelius C. Roosevelt, from which a well-founded reputation of a general partnership could have originated. Besides, this reputation, at most, is but presumptive evidence of a general partnership, and the force of this is completely destroyed by direct and positive proof, that the partnership was limited to a particular object. Next, as to the testimony of Bogert, which was much relied upon.

On a critical examination of his evidence, it will, I think, be found to operate against the plaintiff. He says, in the first instance, that he understood the sale of the brandy to be "to and for the partnership;" but he adds immediately afterwards, "that nothing was said on whose account the purchase was made;" but "that the partnership security was to be given for it." He goes on to state, "that the sale was not completed until he had satisfied himself, *by inquiries*, that the defendants were partners." Now the fact stated by Bogert, that the partnership *engagement* was to be given, is the only one from which it can be inferred (for he nowhere says so in express terms), that *he* even supposed the sale was made to the company; and when we see *how* that was in fact given and received, without objection, and take into view the other facts in the case, the fair conclusion is, that he considered the contract as made with Cornelius I. Roosevelt, individually, and that all he was solicitous about, was to obtain the partnership security for the payment of it. If Bogert really conceived this to be a sale to the firm, is it not very singular that he never came to an explanation to that effect with Cornelius I. Roosevelt? Yet it does not appear, that during the whole negotiation, a syllable was uttered as to whom, or on whose account it was made; and this is the more surprising, when it appears that he made *inquiries* to satisfy the doubts and suspicions which he entertained of the existence of a partnership at all. Why, when making these inquiries, did he not apply to Cornelius C. Roosevelt, whose security he wished to obtain, and who was the only one able to give him the correct information? I confess that I am not satisfied with this testimony; and, after a careful review of all the circumstances, I cannot perceive how the jury could avoid saying that the plaintiff made the sale to Cornelius I. Roosevelt, in his private capacity; and that the debt, for which the endorsement of the firm was taken, was his private debt, contracted without the concurrence of Cornelius C. Roosevelt, expressed or implied: and if they had so found, it is conceded, that

the partnership security, as against Cornelius C. Roosevelt in judgment of law, is fraudulent and void.

But there is another equally fatal objection against the plaintiffs right to recover.

The distinction between *general* and *special* partnerships, is probably coeval with their existence. A general rule applicable to both is, that in transactions relating to the joint concern, one of several partners may bind the rest. He may sign notes, endorse or accept bills for the common benefit, &c., without applying to the rest in every particular case. But this authority of a single partner has its limitation. Formerly, as appears by the case of Parkney v. Hall (1 Salk. 126, and S. C. 1 Ld. Raym. 175), it was probably less extensive than at this day.

One partner of the concern has no authority to pledge the partnership goods, for his own debt, nor can he bind the firm to any engagements known at the time to be unconnected with, and foreign to, the partnership. This has not only been so settled by this court, but now is, and always has been the established law in England. Not an adjudged case, nor, I believe, a single *dictum*, can be found the other way. This will appear from most of the cases which I shall presently have occasion to mention for another purpose. In *special* partnerships, however, this power of the individuals composing them, is restricted to still narrower limits, and can only be legally exercised within the compass of that particular business to which the partnership relates. It is as circumscribed as the partnership itself. It is, therefore, analogous to that which is conferred on an agent appointed for a special purpose, who, if he exceed his authority, cannot bind his principal. (Fenn and another v. Harrison and others, 3 Term Rep. 757.) This analogy is complete, in all cases, where third persons have dealings with a special partner, with notice that he is such. And, accordingly, it has been repeatedly ruled that, whenever such a partner pledges the partnership funds, or credit, in a transaction which is known to be unconnected with, and not fairly and reasonably within, the compass of the partnership, it is, as to the other partners, fraudulent and void. They, however, to entitle themselves to the protection of this rule of law, must not do, or consent to, or suffer anything to be done, which may hold them out to the world as general partners; and it would always be prudent and proper (though I will not say it is indispensably necessary) to give public notice to the community, that the partnership is special, and of the particular species of traffic or business to which it is confined. (Cowp. 814. Willet v. Chambers. 1 Esp. N. P. Rep. 29. De Berkom v. Smith and another. 2 Esp. N. P. Rep. 524. Arden v. Sharpe and another. 1 East, 48. Shirreff and another v. Wilks.) In the case, ex parte Bonbonus (8 Ves. 540), Lord Eldon expresses himself thus: "I agree *it is settled*, that if

a man gives a *partnership engagement* in the partnership name, with regard to a transaction, *not in its nature a partnership transaction*, he who seeks the benefit of that engagement *must be able to say*, that though in its nature not a particular transaction, *yet there was some authority beyond the mere circumstance of partnership, to enter into that contract so as to bind the partnership;* and then it depends upon the degree of evidence." Nothing has been done, in the present case, to impair the claim to the benefit of this rule. The business, as far as it relates to Cornelius C. Roosevelt, has been carried on, for aught that it appears to the contrary, conformably to the terms upon which the partnership was formed. He has done no act to countenance a belief, that these terms were different from those specified in the notice. He was a stranger to the purchase of the brandy; he had no agency nor interest in the shipment of it afterwards; it was manifestly an article unconnected with the objects of the partnership; nor was there anything in the nature of the transaction, or the manner of conducting it, to justify a belief of the contrary. It has indeed been urged, that it might have been purchased for the purpose of exportation to the West Indies, and of bringing back from thence a cargo of raw sugar, to be refined in New York, on the partnership account. But the suggestion is not supported by the evidence. The whole transaction wears a different aspect. Suppose this had turned out to be a lucrative speculation. Certainly Cornelius C. Roosevelt would have had no claim to a participation in the profits. Therefore, there is no justice in imposing upon him the whole of the loss. Had it been submitted to the jury to decide whether the purchase of this brandy was connected with the business of the partnership, I think they would have decided in the negative.

There is no collision between what I have said, and the cases ex parte Bonbonus (8 Ves. 540), and Swan v. Steele (7 East, 210). As I understand these cases, they were decided upon the very principles which I have attempted to establish. To borrow money, and to negotiate bills and notes, are as incidental to, and as usual and necessary in a *special*, as a general, partnership. Business of this sort falls equally within the scope of the one as the other; and in the absence of all fraud, the authority of the individual partners to bind the company is the same in both. This is one of the risks common to all kinds of partnerships; and it would be repugnant to commercial policy and convenience to make any distinction, in this respect, between them. The reason why this would be the tendency of such a distinction is obvious. In all money concerns, and negotiations in commercial paper, there is nothing upon the face of them foreign from a limited partnership; nothing to awaken suspicion or excite inquiry, and if one partner, in the course of

business, abuse the special trust in him, innocent third persons might suffer.

My opinion is, that there ought to be a new trial, with costs, to abide the event of the suit.

THOMPSON, J., and YATES, J., were of the same opinion.

SPENCER, J. It cannot, I think, be pretended that, in point of fact, the plaintiff knew, when the brandy was sold, that it was on the private account of Cornelius I. Roosevelt. Mr. Bogert is explicit in his testimony, that the sale was on the credit of the partnership; that he knew of no limitation of the partnership, but, after inquiry, believed it to be general.

The circumstances which are supposed sufficient to render the plaintiff chargeable with notice of the limitation of the partnership, appear to me to be susceptible of easy explanation. From the evidence, in relation to the publication in the gazette, considering the lapse of time from the insertion of the notice, and the fact that the plaintiff was not engaged in commerce, with the further fact, that merchants who took both the papers were ignorant that the partnership was special, and had not attended to the notice, my mind is decisively impressed, that the plaintiff cannot be supposed ever to have retained it in his recollection. The bill of parcels and form of the note, which were the acts of Cross, ought, on no principle, to excite suspicion, for Cross was not the agent of the plaintiff, and, as he has testified, proceeded without any instructions from the plaintiff or Mr. Bogert, in making out the bill and in taking the note. The affidavit at the custom-house was made after the sale by Bogert; it is, therefore, impossible that he should have given information to the plaintiff, that the sale to Cornelius I. Roosevelt, contrary to the fact to which he testifies, that the sale was to the firm and on its credit. The affidavit was substantially true, and ought to be construed in reference to the object to be affected by it.

As it regarded the United States, it was perfectly immaterial whether the affidavit stated a sale to one or all the vendees; the object was to identify the goods, and obtain a debenture. I cannot but consider, for the reasons which I have given, that it would be contrary to the facts in the case, to suppose that the plaintiff knew that there was a special limited partnership when the brandy was sold, and, with this knowledge, is making an attempt to charge one of the firm for articles sold to the other; it would be neither more nor less than presuming a fraud, without a fact to support it.

The case ought to be tested by other principles, and if on those prin-

ciples the defendant, Cornelius C. Roosevelt, is not responsible, then the plaintiff must submit to his loss.

I recognise the authority of the cases of Livingston v. Hastie and Patrick, and Lansing v. Gaine & Ten Eyck, and fully assent to the law, that where a person takes a partnership security from one of a firm, knowing it to be for his private concerns, and disconnected with the objects of the partnership, the other partner is not chargeable, and he is not responsible, in consequence of the collusion and fraud. I hold it to be equally well settled, that if a person, in the course of trade, bona fide takes a bill, uninformed that it was given without the knowledge of the other partner, and not in relation to the partnership concerns, whether the partnership be a limited one or general, the whole firm will be bound. The case of Swann and others v. Steel and others, 7 East, 210, and ex parte Bonbonus, 8 Ves. 540, though not authoritative here, justify the position I have made. These cases decide, that a bona fide holder of a bill, for a sufficient consideration, and without notice that it was given by one partner for an individual debt not relating to the partnership, might recover against all the partners, though the bill was in fact given by one of them for a debt not relating to the partnership. But whatever might have been the objects of the defendant's partnership, in its inception, it appears to me, that the evidence in the case shows, conclusively, that by their own facts, the reputation that it had become general was well warranted.

The defendants, from the commencement of the partnership, kept accounts at two of the banks in the city, and had there been considered as general partners; the entry of the partnership firm was in the handwriting of C. I. Roosevelt, in the name of the firm; credit was given to the partnership on the responsibility of C. C. Roosevelt, and nothing was known, at either of the banks, of a limitation of the partnership business, until after its dissolution. In addition to this, the presidents and cashiers of the two banks, several merchants of extensive business, and brokers, testified, that they knew of the partnership, but never heard of any limitation, until after the dissolution. It cannot be denied that a special partnership may become general, from the acts of the parties in the conducting of their business, as well as from their specific arrangements. It is impossible to believe, that C. C. Roosevelt did not know of the mode adopted in carrying on business with the banks, and that he was there regarded as a general partner; and if he did, then it seems to me to follow, that he aided and assented to his being considered a general partner. It is probable that the reputation of a general partnership proved so fully, and not attempted to be contradicted, had its origin in the mode the defendants adopted, in carrying on their business at the banks; and certainly the authority devolved

on C. I. Roosevelt to negotiate paper at the banks, warranted the reputation, and renders both the defendants liable. The case seems to consider the plaintiff as the principal, and Bogert as the agent, in the sale of the brandy, but I cannot see on what facts this is founded. The legal property of the brandy was in Bogert, and the plaintiff was merely a creditor beneficially interested in the proceeds, without any authority to control or direct the disposition of the property. But it is not necessary to scrutinize or enlarge on this part of the case, as it will not change my opinion, be the fact either way.

One of two innocent men must suffer; I cannot hesitate in saying, that the person who has been so incautious in adopting a partner, deficient in prudence or funds, who has given to that partner, the management of the concerns, who has stood by, and permitted him to raise money unlimitedly on his credit, by pledging the name of the firm, and who has thus given his aid to the reputation which certainly existed, and on which the credit in this case was given, must be responsible.

KENT, Ch. J. The plaintiff cannot succeed in this case, if the facts warrant the conclusion, that he took a partnership security for a debt which he actually knew, at the time, was the private debt of the particular partner. Nor can he succeed, if this actual knowledge be not made out, provided the subject-matter of the contract, and the nature and circumstances of the copartnership, were sufficient to charge him with constructive or legal notice of the fact. Believing these propositions to be correct, I shall examine the case to see if, according to them, the plaintiff can be permitted to retain the verdict.

1. The law is well settled, that if a person takes a partnership security from one of the partners, for what is known, at the time, to be the particular debt of the partner who gives such security, the copartnership is not holden. The cases in this court of Livingston v. Hastie & Patrick, and of Lansing v. Gaine & Ten Eyck (2 Caines, 246. 2 Johns. Rep. 300), were decided upon this ground; and the cases in the English courts, of Arden v. Sharpe & Nelson, Shirreff v. Wilks, and the case ex parte Bonbonus in Chancery (2 Esp. Rep. 524. 1 East, 40. 8 Vesey, jun. 540), all recognise the same principle. The knowledge in the creditor, that the partnership name is given for the individual debt of one partner, renders the transaction fraudulent and void in respect to the copartnership. In the present case, the jury were told, that by law the plaintiff was entitled to recover. According to my view of the case, it ought to have been observed to the jury, that the weight of evidence was in support of the allegation, that the plaintiff understood, at the time, that he was contracting a debt with

Cornelius I. Roosevelt, in his individual capacity, and that, therefore, the plaintiff was not entitled to recover. Let us cast an eye over the material facts.

The note in question was given for 20 pipes of brandy, sold to C. I. Roosevelt, and there is no evidence in the case, that Cornelius C. Roosevelt & Co. ever dealt in the article of brandy, or carried on any business in the grocery line, or were concerned generally in trade. There was no evidence that the firm ever held themselves out to the world, as being engaged in any other concern than the sugar-refining business, nor that they ever did in fact step beyond that limited concern. The plaintiff was then unauthorized to conclude, that this purchase was upon a partnership account. Prima facie, it certainly was not, and it lay with him to show what colour he had for a contrary inference, and if he has shown none that is reasonable, he is not well founded in his attempt to charge this debt upon the firm.

The intrinsic circumstances of the transaction are sufficient to show, that the plaintiff knowingly dealt with C. I. Roosevelt, in his private capacity, and there can be no doubt but that, as a matter of fact, the purchase of the brandies was on the separate account of C. I. R., and that the partnership was not interested in the purchase. The brandy was not only purchased by C. I. Roosevelt, but shipped by him for the West Indies, on board of a vessel owned by him individually, and with other goods purchased and shipped by him on his private account. He drew this note, in his own name, for the purchase-money, in favour of the company, and then endorsed the name of the firm, and delivered the note, so endorsed, to the plaintiff. What can be plainer than the language of this fact, that the note was drawn, and received for a private debt, and that the firm was only given as a security? Was it ever known before, that one partner contracting a debt, in behalf of the copartnership, took this circuitous mode to give the note of his house? There could be no possible use in it, and merchants are not accustomed to take such indirect methods in doing business, without a motive. If it was understood to be the proper debt of the company, why was the individual partner bound directly and absolutely for the money, and the company only contingently, in the character of endorsers? Why did the plaintiff, when he sold to a company, take upon himself the burthen of making the first demand, at the precise time of payment, upon the individual partner, and of then using due diligence in giving notice so as to fix the endorsers? And, lastly, why did the partner himself assume the responsibility of being first singly answerable for the debt, and of being obliged to pay it or to lose his credit before the company were resorted to? These questions cannot be answered, as it strikes me, but upon the supposition, that the seller, as well as the purchaser,

understood that the sale was on a private, and not on a partnership account. The agent of the plaintiff sufficiently explains, why the note was taken in this shape, when he says that "the partnership engagement was to be given for the brandies."

There are other facts which go to prove that the brandies were understood to be sold to C. I. Roosevelt, and not to the company. The note was called for and given at the dwelling-house of C. I. Roosevelt, not at the counting-house of the firm; the bill of parcels was made out in the name of C. I. Roosevelt only; the brandy was entered at the custom-house in his name, and the plaintiff made oath there, that the sale was to C. I. Roosevelt. This last fact ought to have great weight in forming our conclusions upon the transaction. The affidavit was made before the note was given, and when the intention of the parties must have been well understood and recollected. It was a solemn act, in which we must suppose, that the fact of the sale, and to whom, was stated with caution and precision. It was made by a person who was perfectly competent to scrutinize and feel the force and import of expression, and who must have distinguished quickly and accurately between a sale to an individual, and a sale to a mercantile company. The affidavit is conclusive, that the plaintiff did not understand there was any other purchaser, than the single individual, and he must have obtained his knowledge of the sale, either from his own view of the act, or from the information of his agent. It appears then to me to be a consequence not to be resisted, that the note was drawn in the shape which we see it, in order to obtain the security of the firm to a debt, which both the contracting parties knew to be the proper debt of the single partner.

The written testimony, from which this conclusion is drawn, weighs much more in the scale of evidence, than the parol testimony (even if opposed to it) of the agents of the plaintiff, given two years and a half after the transaction took place. John Cross says, that the bill of parcels was made out as C. I. Roosevelt directed, and that he received no directions from the plaintiff, "nor does he recollect" receiving any from John G. Bogert, his agent, to make out the bill; that Bogert directed him to call for the note, "*but gave him no direction relative to the form of it*," and when it was delivered, neither Bogert, nor the plaintiffs, made any objection to the form of it. This negative testimony then proves nothing. Bogert was the principal agent of the plaintiff in the transaction, and he says that he understood the purchase was on a partnership account, although he declares that "*nothing was said relative to whose account the purchase was made.*" It was then a latent inference which he had no authority to draw; and it is a little remarkable, that if it was understood from the beginning to be a part-

nership purchase, that the agent should say, "*that the sale was not completed until he had satisfied himself by inquiries, that the defendants were partners, and that the partnership engagement was to be given for the brandies.*" The construction which I give to this parol testimony, goes in confirmation of the written proof; and even if any part of it should be deemed repugnant, it cannot be compared to the former, either in judgment of law, or in its power to produce conviction.

There is one circumstance in the case not well explained. It states that the sale of the brandies was made by Bogert, as agent of the plaintiff. This fact appears to be conceded throughout the case, and Bogert himself testifies that he acted as the plaintiff's agent; and yet it is further stated, that the brandies were in the hands of Bogert, as administrator of one Anthony Carroll, deceased, by whom the brandies were imported, and that they were sold in part satisfaction of a debt due from that estate to the plaintiff. It is possible that Carroll and the plaintiff had been concerned together as partners in importing the brandies, or that Carroll acted nominally as owner, and really as agent of the plaintiff, on whose capital the business was conducted, for the affidavit of the plaintiff at the custom-house (and which was made to obtain the usual debenture) must have been in the character of purchaser from Carroll. But without being able to solve this fact, it is sufficient to observe, that upon this case the Court must consider the plaintiff as the real vendor of the brandies, whatever may have been the form which the title had previously assumed. He was considered by all parties, both at the trial and upon the argument, as the vendor, and he took the note as *principal*, for a debt due to *him* from Roosevelt. The question of notice, therefore, applies to him as an original party to the sale, and though he may have chiefly effected the sale, and took the note, by means of Bogert, his agent, yet in all such cases notice to the agent is notice to the principal.

I am, therefore, of opinion, upon the first point, that the verdict is against evidence. The inevitable inference from the testimony appears to me to be, that the plaintiff or his agent actually knew that the purchase was not a partnership concern, and that they required a partnership endorsement, by way of security. Instead of a pointed direction in favour of the plaintiff, the justness of this inference ought to have been submitted to the jury.

2. But if the plaintiff did not in fact know that the purchase was made by C. I. Roosevelt upon his own account, and acted under the mistaken impression that it was a partnership business, still the firm were not bound by the endorsement, because the facts disclosed amounted to constructive notice, or notice in law. The partnership between the defendants was confined to the sugar-refining business. It had

nothing to do with the purchase or sale of brandies. The partners had given timely and due notice in the public gazettes, of their limited engagement, and had designated the place where their business was to be carried on. Every precaution was taken which the nature of the case admitted, to guard the public against misapprehension. If persons were, afterwards, under a mistake as to the confined nature of the partnership, it must have been owing to some dealings of the copartnership inconsistent with its declared object, or to gross negligence in those persons, in not seeking information at the proper sources. The understanding of particular merchants, that the defendants were general partners, was of no avail, without showing that the house had done some act to mislead, or given some reasonable cause for that impression. But there is no evidence before us, according to my view of the case, that the partnership ever misled the public, by a single act, or transacted any business which had not immediate connexion with its limited concern.

The habit of keeping partnership accounts with the banks, I do not consider as forming an exception to this conduct. That habit was perfectly consistent with their particular and avowed business, and it was, besides, a private matter, not in the way of dealing, and which the public were not to know. The checks and other proper negotiations with the banks, were generally, if not entirely, drawn and conducted by C. I. Roosevelt, and it does not appear that his partner ever knew of or rectified a single transaction with the banks. What those transactions were ought to have been explained, and not left, as they are now, by the case, in total uncertainty. Each partner had a power to draw checks, in the partnership name, for the partnership moneys in the bank, because it is incident to every partnership, that each partner should have a power to possess and dispose of the partnership moneys and stock. Each partner, in limited, as well as in general partnerships, can draw checks and give notes, but it does not follow from thence that paper given by a partner, on his private account, would bind the firm, because here the authority of the partner fails; there must, then, be something in the nature of the debt, or in the nature or conduct of the copartnership, to make the other partner responsible. There are cases which go the length of this general proposition, that one partner cannot pledge the partnership funds, nor make a valid partnership engagement for his individual debt. (Pinkney v. Hall, 1 Salk. 126, and 1 Ld. Raym. 175. The cases of Gregson v. Hutton, and Marsh v. Vansemmer, cited in 1 East, 49. The opinion of Le Blanc, J., in 1 East, 55, and of Lord Eldon, jun., in 6 Ves. jun. 604.) Whether this doctrine can be supported, in cases where the person dealing with the partnership is not chargeable with knowledge of the fact, I am not prepared to say. I

believe the English law is now understood to be otherwise, and, perhaps, there is no distinction in principle, upon this point, between *special* and *general* partnerships, and that the question, in all cases, is a question of notice, express or constructive. All partnerships are more or less limited. There is no one that embraces, at the same time, every branch of business; and when a person deals with one of the partners, in a matter not within the scope of the partnership, the intendment of law will be, that he deals with him on his private account, notwithstanding the partner may give the partnership name, unless there be some circumstances in the case to destroy that presumption. "If," says Lord Eldon (8 Vesey, p. 544), "under the circumstances, the persons taking the paper can be considered as being advertised, that it was not intended to be a partnership proceeding, the partnership is not bound." Public notice of the object of a copartnership, the declared and habitual business carried on, the store, the counting-house, the sign, &c., are the usual and regular *indicia*, by which the nature and extent of a partnership is to be ascertained. When the business of a partnership is thus defined and publicly declared, and the company do not depart from that particular business, nor appear to the world in any other light than the one thus exhibited, one of the partners cannot make a valid partnership engagement on any other than a partnership account. There must be some authority, beyond the mere circumstance of partnership, to make such a contract binding. Were it otherwise, it would be idle, and worse than idle, to talk of limited partnerships, in any matter or concern whatever, and the law would be recognising an association, only to render it a most dangerous illusion to those whom it embraced. Lord Kenyon must have understood the capacity of one partner to bind the rest with this restriction, when he observed in the case of De Berkom v. Smith and Lewis (1 Esp. Rep. 29), that persons might be partners in a particular concern, and if they did not appear to the world as partners, it should not be sufficient to make them liable in cases not connected with the particular business. The law will presume, in all such cases, that the creditor is *advertised*, that he is not dealing on a partnership account, and for him to take a partnership engagement, without the consent of the firm, is in judgment of law, a fraud upon the firm. Suppose, in the case of a general commercial partnership, a debt was to be contracted by one partner upon the purchase of new lands; or suppose, in the case of a partnership between two attorneys, in law business, a partnership note was to be given by one of them upon the purchase of groceries or furniture for his family, it could not be supposed by any one that the company would be holden. These would be plain cases of a fraud, practised upon the firm, of which the creditor would be chargeable with notice. When the public have the usual

means of knowledge given them, and no means have been suffered by the partnership to mislead them, every man is to be presumed to know the extent of the partnership with whose members he deals.

There are, however, qualifications, as to the extent of this doctrine, and some instances occur to me which explain and define its application, and which it may not be amiss to mention.

If negotiable paper of a firm be given by one partner, on his private account, and that paper should pass into the hands of an innocent and bona fide holder, as in the case of paper negotiated or discounted at the banks; or if one partner should purchase on his private account, an article in which the firm dealt, or which had an immediate and direct connexion with the business of the firm, in these cases I should think that a different rule ought to be adopted, and one requiring the actual knowledge of its being a private, and not a partnership dealing, to be brought home to the claimant. The circumstances of these cases would take away the intendment of knowledge in the creditor. The endorsee, for instance, of such a note, takes it upon the credit of the partnership, and he has no means of knowing, from the paper itself, on what account it was created, and he has a right to presume it was a fair partnership engagement. This is the English rule (2 Esp. Rep. 524, 731), in those particular cases. But the present case cannot be taken out of the operation of the general rule. The plaintiff had no just ground to infer, that, when he was selling brandy to C. I. Roosevelt, he was dealing with the sugar-refining company; considering the circumstances under which the partnership was announced and conducted, he was chargeable with notice, that he was not dealing on a partnership account.

I am accordingly of opinion, that the verdict is against law and evidence, and that it ought to be set aside, and a new trial awarded, with costs to abide the event.

New trial granted.

ANDERSON AND WILKINS *v.* TOMPKINS ET AL.

In the Circuit Court of the United States for the District of Virginia and North Carolina.

MAY TERM, 1820.

Before the Hon. JOHN MARSHALL, Chief Justice of the United States.

[REPORTED 1 BROCKENBROUGH, 456–465.]

One partner has a right to convey the partnership effects (other than real estate) to the creditors of the firm, in payment of their debts, either to the creditors directly, or through the intervention of trustees, and if the transaction be bona fide, *the deed will not be set aside, although the consent of the other partner was not obtained.*

Where all the partners of a mercantile firm are present, they have a right to be consulted, in giving a preference to particular creditors, *but this necessity is dispensed with, if one of the partners* is absent in a foreign country.

The doctrine that a partner cannot bind his copartner by a deed, does not apply in a case in which the property purported to be conveyed by the deed, is of such a description, that a title to it passes by the mere act of delivery. The mere circumstance of annexing a seal to the instrument of conveyance, in such a case, does not annul a transfer so consummated.

If real property is conveyed to a firm, or to partners in trust for a firm, the members of the firm are tenants in common, and neither party can convey more than his undivided interest in the subject.

THE complainants, merchants and partners, subjects of the King of Great Britain, filed their bill in this court, alleging that they were creditors of John Tompkins and Adam Murray, late partners in trade, residing in the city of Richmond, and State of Virginia, under the firm of Tompkins & Murray, to the amount of £715 13*s.* sterling: that on or about the 28th day of April, 1819, Adam Murray, one of the partners, embarked for Europe; and on the 8th day of May following, John Tompkins, the other partner, without (as was alleged) the knowledge or consent of Adam Murray, executed a deed, of that date, to Nicholas Anderson & Tompkins, citizens of Virginia, purporting to convey to

them, not only all the partnership effects, real and personal, of Tompkins & Murray, but also the separate property of Adam Murray, *upon trust;* 1st, for the benefit of Sutherland, Colquhoun & Co., and Samuel Christian, all of them citizens of Virginia; and, 2dly, for the benefit of such of the creditors of Tompkins & Murray, resident within the United States, as should within sixty days, and of such of them, resident elsewhere, as should within six months from the date of the publication of the trust, by the trustees, exhibit their claims: that prior to the execution of this deed, Tompkins & Murray purchased several lots of ground in the city of Richmond, and certain tracts of land in the state of Virginia: that Adam Murray was proprietor, also, of another lot of ground in the city of Richmond, in his own right, of a share of a tract of land in the state of Kentucky, of a tract of land in Illinois, and of sundry other articles of household furniture, and other personal estate in Virginia: that subsequent to the execution of the said deed of trust, the partnership was dissolved, and after the dissolution, Adam Murray, who has never returned to Virginia, executed several deeds, bearing date the 10th of November, 1819, conveying all his moiety of the partnership effects, both real and personal, of Tompkins & Murray, and the whole of his own individual property, in Virginia, to James Dunlop, of London, in trust for the benefit, 1st, of James and John Dunlop, to secure a debt due from the firm of Tompkins & Murray; 2dly, in satisfaction of a debt due from the same firm to Leslie & M'Indoe; and 3dly, to secure the debt due to the complainants, Anderson & Wilkins.

This suit was instituted for the twofold purpose of establishing the deed of the 10th of November, 1819, executed in England, by Adam Murray, and to set aside the deed of the 8th of May, 1819, executed by John Tompkins. The validity of the last-mentioned deed was contested, as well as to the complainants, and the other creditors of Tompkins & Murray, who failed to exhibit their claims within the time prescribed therein, as to Adam Murray, on several grounds: 1st, it was contended, that during the existence of the firm, Tompkins could not, without authority from Murray, dispose of the partnership effects, or any part thereof, *by deed:* 2dly, that the deed was void, because it gave a preference to Colquhoun & Co., and Christian, to all other creditors, without consulting with Murray: 3dly, that it was void, because it purported to convey the separate property of Murray, over which Tompkins had no control.

On the 12th of June, 1820, the following opinion was delivered by

MARSHALL, C. J. This suit is brought to establish a deed, made by Adam Murray, a partner of the house of Tompkins & Murray, in Novem-

ber, 1819, while in England, conveying his moiety of the property of that house, to certain creditors of the firm.

On the 29th of April, 1819, Murray had embarked for England, leaving all the effects of the company in the hands of John Tompkins, the partner remaining in this country, who continued, for a short time, to conduct the business of the concern. The pressure of their affairs was such, that in May, the house stopped payment, and Tompkins, for himself and his partner, conveyed all the effects of the company, and also the separate property of himself and partner, to trustees for the payment, first, of certain creditors named in the deed, and then of those who should bring in their claims, the American creditors within sixty days, the foreign creditors within six months. As the deed under which the plaintiffs claim, can operate on that property only, which is not conveyed by the first, it will be proper, first, to inquire into the legal extent of the deed made by Tompkins.

That deed, as has been already stated, purports to convey the whole property of the concern, and the private property of the partners. That property consisted of the effects of the partnership for sale, of real property, and of debts. I shall consider the deed in its application to each of these subjects.

First.—The goods in possession for sale.

The convenience of trade requires, that each acting partner should have the entire control and disposition of this subject. It would destroy copartnerships entirely, if the co-operation of all the partners were necessary to dispose of a yard of cloth. It is, therefore, laid down, in all the books which treat on commercial transactions, that with respect to all articles to be sold, for the benefit of the concern, each partner, though the others be within reach, has, in the course of trade, an absolute right to dispose of the whole. "Each," says Watson, "has a power to dispose of the whole of the partnership effects." This is a general rule, resulting from the nature of the estate, and from the objects for which men associate in trade. They are joint tenants, without the right of survivorship, they are seized *per mi et per tout*, and they associate together, for objects which require that the whole powers of the partnership should reside in each partner who is present and acting.

These general doctrines are universal, and have not been controverted in this case; but it is contended, that they do not authorize the deed made by Tompkins, because, 1st. This is not an act in the course of trade, but is a disposition of the whole subject, and a dissolution of the partnership.

2d. It is a preference to particular creditors, in making which, Murray ought to be consulted.

3d. It is by deed.

It will be readily conceded, that a fraudulent sale, whether made by deed or otherwise, would pass nothing to a vendee concerned in the fraud. But with this exception, I feel much difficulty in setting any other limits to the power of a partner, in disposing of the effects of the company, purchased for sale. He may sell a yard, a piece, a bale, or any number of bales. He may sell the whole of any article, or of any number of articles. This power would certainly not be exercised in the presence of a partner, without consulting him; and if it were so exercised, slight circumstances would be sufficient to render the transaction suspicious, and, perhaps, to fix on it the imputation of fraud. In this respect, every case must depend on its own circumstances. But with respect to the power, in a case perfectly fair, I can conceive no ground, on which it is to be questioned.

But this power, it is said, is limited to the course of trade. What is understood by the course of trade? Is it that which is actually done every day, or is it that which may be done, whenever the occasion for doing it presents itself?

There are small traders who scarcely ever, in practice, sell a piece of cloth uncut, or a cask of spirits. But may not a partner in such a store, sell a piece of cloth, or a cask of spirits? His power extends to the sale of the article, and the course of trade does not limit him as to quantity. So with respect to larger concerns. By the course of trade, is understood, dealing in an article in which the company is accustomed to deal; and dealing in that article for the company, Tompkins & Murray sold goods. A sale of goods was in the course of their trade, and within the power of either partner. A fair sale, then, of all or of a part of the goods, was within the power vested in a partner.

This reasoning applies with increased force, when we consider the situation of these partners. The one was on a voyage to Europe, the other in possession of all the partnership effects for sale. The absent partner could have no agency in the sale of them. He could not be consulted. He could not give an opinion. In leaving the country, he must have intended to confide all its business to the partner who remained, for the purpose of transacting it.

Had this, then, been a sale for money, or on credit, no person, I think, could have doubted its obligation. I can perceive no distinction in law, in reason, or in justice, between such a sale and the transaction which has taken place. A merchant may rightfully sell to his creditor, as well as for money. He may give goods in payment of a debt. If he may thus pay a small creditor, he may thus pay a large one. The *quantum* of debt, or of goods sold, cannot alter the right. Neither does it, as I conceive, affect the power, that these goods were conveyed

to trustees to be sold by them. The mode of sale must, I think, depend on circumstances. Should goods be delivered to trustees, for sale, without necessity, the transaction would be examined with scrutinizing eyes, and might, under some circumstances, be impeached. But if the necessity be apparent, if the act is justified by its motives, if the mode of sale be such as the circumstances require, I cannot say, that the partner has exceeded his power.

This is denominated a destruction of the partnership subject, and a dissolution of the partnership. But how is it a destruction of the subject? Can this appellation be bestowed on the application of the joint property, to the payment of the debts of the company? How is it a dissolution of the partnership? A partnership, is an association to carry on business jointly. This association may be formed for the future, before any goods are acquired. It may continue after the whole of a particular purchase has been sold. But either partner had a right to dissolve this partnership. The act, however, of applying the means of carrying on their business to the payment of their debts might suspend the operations of the company, but did not dissolve the contract under which their operations were to be conducted.

Second.—It is said that Murray had a right to be consulted, on giving a preference to creditors. It is true, Murray had a right to be consulted. Had he been present, he ought to have been consulted. The act ought to have been, and probably would have been, a joint act. But Murray was not present. He had left the country, and could not be consulted. He had, by leaving the country, confided everything which respected their joint business to Tompkins; who was under the necessity of acting alone.

Third.—It is said, this transfer of property is by a deed, and that one partner has no right to bind another by deed. For this a case is cited, which I believe has never been questioned in England, or in this country. [Harrison v. Jackson et al., 7 Durnf. & East, 207.]

I am not, and never have been, satisfied with the extent to which this doctrine has been carried. The particular point decided in it, is certainly to be sustained on technical reasoning, and perhaps ought not to be controverted. I do not mean to controvert it. This was an action of covenant on a deed; and if the instrument was not the deed of the defendants, the action could not be sustained. It was decided not to be the deed of the defendants, and I submit to the decision. No action can be sustained against the partner, who has not executed the instrument on the deed of his copartner. No action can be sustained against the partner, which rests on the validity of such a deed, as to the person who has not executed it. This principle is settled. But I cannot admit its application in a case where the property may be transferred by de-

livery, under a parol contract. Where the right of sale is absolute, and the change of property is consummated by delivery, I cannot admit that a sale, so consummated, is annulled by the circumstance that it is attested by, or that the trusts under which it is made, are described in a deed. No case goes thus far; and I think such a decision could not be sustained on principle.

The power of applying all the goods on hand for sale, to the payment of the partnership debts, is, I think, a power created by the partnership, and the exercise of it must be regulated by circumstances. In extraordinary cases, an extraordinary use of power must be made. What is called the course of trade, is not confined to the most usual way of doing business, in the usual state of things. In the absence of one of the partners, in a case of admitted and urgent necessity, the power to sell may be exercised by the partner, who is present, and who must act alone, in such manner as the case requires, provided it be exercised fairly. In this case, the fairness of the transaction is not impeached, and, certainly, upon its face, it is not impeachable.

So far, then, as respects the partnership effects which were delivered, I have never, from the first opening of the cause, entertained a moment's doubt.

Second.—The next subject to be considered is, the real property comprehended in this deed.

Real property, whether held in partnership, or otherwise, can be conveyed only by deed, executed in the manner prescribed by statute. This deed can convey no more title at law, than is in the person who executed it. Property conveyed to a firm, or to partners in trust for a firm, is held by them as tenants in common, and neither party can convey more than his undivided interest.

In this case, where the legal estate was in Tompkins, the whole property passes at law, by his deed. Where the legal estate was in Murray, the whole property passes at law, by his deed. Where the legal estate was in Tompkins & Murray, the property passes in moiety, by their several deeds. I do not think that the superior equity of either party is such, as to control the legal estate, or the disposition made by law of the subject.

Where the legal estate is in trustees, for the use of Tompkins & Murray, the title does not pass at law by either deed, and I have greatly doubted, whether the first deed ought not to be preferred. I have, however, come to the opinion, that this trust ought to follow the nature of the estate at law, and where the trustees have not conveyed before the subsequent deed was executed, that the title to this property, likewise, should pass in moieties.

The last subject to be considered, is, the debts due to the partner-

ship. The right of one of the partners to assign debts which are assignable at law, is admitted, provided that assignment be made in the usual way.

The assignment, then, of these debts, is as valid a transaction as the sale of goods on hand, if it be not contaminated by the seal. I should not suppose, on the principle settled in 7 Durnf. & East, that an action could be maintained on this assignment. But I am not satisfied that it does not pass the assignable paper, which the partner had a legal right to assign. I rather think it does.

A question of more difficulty respects the book debts. This is a part of the subject on which I have entertained, and still entertain, great doubts. The deed does not pass the debts at law. They are not assignable at law, but they are assignable in equity, and a court of equity sustains their assignment. At law, the assignment is only a power to collect and appropriate; and that power is revocable. So far as collections were made under it, before it was revoked, I can have no doubt, that the money collected was in the trustees. With respect to debts not collected, I have felt great doubts. I consider the power to collect, as a contract, which could not be enforced at law. But as Mr. Murray could not convey this property at law, and could only convey it in equity, I have supposed that the prior equity must be sustained, and that these debts, also, pass by the deed of Tompkins.

The opinion of the Court, then, is, that the plaintiffs have a right to a decree for a sale of all the real property contained in the deed made by Adam Murray, the legal title to which was in Adam Murray, and to a moiety of the real property, the title to which was in Tompkins & Murray, or in trustees for their benefit; and the residue of the property passes to the trustees, in the deed executed by John Tompkins.

N. ROGERS & SONS, PLAINTIFFS IN ERROR, *v.* JAMES BATCHELOR & OTHERS, ADMINISTRATORS OF ABEL H. BUCKHOLTS, DECEASED.

In the Supreme Court of the United States.

JANUARY TERM, 1838.

[REPORTED, 12 PETERS, 221–233.]

The implied authority of each partner to dispose of the partnership funds extends only to the business and transactions of the partnership itself. One partner cannot apply the partnership funds to the discharge of his own separate debt, without the assent, express or implied, of the other partner; and in such a case, it makes no difference, that the separate creditor had no knowledge, at the time, that the fund was partnership property. Without the consent of the other partner, that partner's title to the property is not divested in favour of such separate creditor, whether he knew it to be partnership property or not. His right depends, not upon his knowledge of its being partnership property, but upon the fact whether the other partner had assented to such disposition of it, or not.

Mr. Justice STORY delivered the opinion of the Court.(*a*)

This cause comes before us on a writ of error to the District Court of the District of Mississippi. The original action was debt brought by the plaintiffs in error (Rogers & Sons), against Abel H. Buckholts, upon the following writing obligatory,—"Natchez, Mississippi, $3288.03. On the first day of April next, we promise to pay N. Rogers & Sons, or order, three thousand two hundred and eighty-eight dollars three cents, value received with interest from date. Witness our hands and seals, this first day of January, 1824. Jno. Richards, [seal.] A. H. Buckholts, [seal.]" Upon such an instrument, by the laws of Mississippi, one of the parties may be sued alone; and accordingly, Richards was no party to the suit. Upon the plea of payment, issue was joined, and, pending the proceedings, Buckholts died, and his administrators were made parties; and upon the trial, a verdict was found for the de-

(*a*) The Reporter's statement is omitted.

fendants for the sum of eighteen hundred and twenty-six dollars and seventy-four cents, being the balance due to them upon certain set-offs set up at the trial. A bill of exceptions was taken at the trial by the plaintiffs; and, judgment having passed for the defendants, the present writ of error has been brought to revise that judgment.

By the bill of exceptions, it appears, that the defendants set up as a set-off, an account headed "Dr. Messrs. N. Rogers & Sons, in account current to first of April, 1830, with John Richards & Co. Cr.," on the debit side of which account were the two following items, which constituted the grounds of the objections, which have been made at the argument—"To cash, $1450.46." "To our acceptance of your draft, payable at six months, $3000." To support their case, the defendants offered the testimony of one Rowan; who testified to a conversation had in his presence, in the year 1830, between Buckholts and one of the plaintiffs, relative to their accounts; that the accounts then before them were accounts made out by Rogers and Sons, between themselves and Richards & Buckholts, and John Richards & Co., and John Richards & Lambert & Brothers in account with John Richards & Co., Richards & Buckholts, and John Richards; and an account was made out by Buckholts between Richards & Buckholts, and Rogers and Sons. In the conversation relative to these accounts, Buckholts asked Rogers, if the several items charged in his account had not been received; and Rogers admitted that they had been. Among other items so admitted, were the above items of fourteen hundred and fifty dollars, forty-six cents, and three thousand dollars. In the conversation about the item of fourteen hundred and fifty dollars, forty-six cents, Rogers admitted that that sum had been received by Rogers & Sons, from Lambert and Brothers, in New York, and that it was part of the proceeds of seventy-four bales of cotton, shipped by Richards and Buckholts to Lambert & Brothers. Very little was said about the item of three thousand dollars. Something was said between Buckholts & Rogers about the right to apply moneys to the payment of John Richards's private debts, Buckholts contending that he had no right so to do, and Rogers that he had; but which particular item of payment the witness did not understand. This was all the evidence of payment introduced by the defendants to support the above two items of fourteen hundred and fifty dollars forty-six cents; and three thousand dollars. The witness stated, that he had understood, that John Richards had once failed, before he went into partnership with Buckholts. It was admitted by the defendants, that the item of three thousand dollars was for a bill of exchange, drawn in 1825 by Rogers & Sons on John Richards alone.

The plaintiffs then introduced a letter written by John Richards to the plaintiffs, dated at Natchez, June 6th, 1825 (which is in the

record), containing statements relative to a shipment of seventy-eight bales of cotton, made to Lambert & Co., and to certain payments, which the letter says, "we have left in the hands of Messrs. Lambert, Brothers & Co., to be divided among you and them." It then enumerates eight thousand five hundred and fifty dollars, "intended to pay my own debts," and on account of Richards & Co., three thousand dollars. It then adds, that the sum of six hundred and fifty-four dollars fifty-five cents had been that day sent to New Orleans to purchase exchange on New York, to be forwarded, and go to the payment of John Richards & Co.'s debt to plaintiffs, and Messrs. Lambert, Brothers & Co.

Upon this evidence, the plaintiffs requested the court to charge the jury, that the defendants were not entitled, upon the evidence before them, to the item of fourteen hundred and fifty dollars forty-six cents, as an off-set to the plaintiffs' claim; and also that the defendants were not entitled, upon the evidence before the jury, to the item of the three thousand dollars, as an off-set, which charge the court refused to give, and in our judgment, very properly refused to give, as it involved the determination of matters of fact, properly belonging to the province of the jury.

The defendants then requested the court to charge the jury as follows: "First, that if the jury believe the off-set of fourteen hundred and fifty dollars was the proceeds of cotton of Richards and Buckholts or John Richards & Co., shipped on their joint accounts, then it is a legal off-set to a joint debt, and cannot be applied to an individual debt of John Richards, without proof that Buckholts was himself consulted, and agreed to it. Second, that if the jury believed that the draft of three thousand dollars was paid by Richards and Buckholts or John Richards & Co., or out of the effects of either of those firms, with the knowledge of Rogers & Sons, then in law it is a legal off-set to the joint debt of the said Richards & Buckholts, or John Richards & Co., and cannot be applied to the private debt of either partner, without the consent of the other partner. Third, that the letter of John Richards, read in this case, is not evidence against Buckholts, unless the jury believe that Buckholts knew of the letter, and sanctioned its contents." The court gave the charge as requested: and the present bill of exceptions has brought before us for consideration the propriety of each of these instructions.

The first instruction raises these questions: whether the funds of a partnership can be rightfully applied by one partner to the discharge of his own separate pre-existing debt, without the assent, express or implied, of the other partner; and whether it makes any difference, in such a case, that the separate creditor had no knowledge, at the time of the fact, of the fund being partnership property. We are of opinion

in the negative on both questions. The implied authority of each partner to dispose of the partnership funds strictly and rightfully extends only to the business and transactions of the partnership itself; and any disposition of those funds by any partner beyond such purposes, is an excess of his authority as partner, and a misappropriation of those funds, for which the partner is responsible to the partnership, though in the case of bona fide purchasers, without notice, for a valuable consideration, the partnership may be bound by such acts. Whatever acts, therefore, are done by any partner, in regard to partnership property or contracts, beyond the scope and objects of the partnership; must, in general, in order to bind the partnership, be derived from some further authority, express or implied, conferred upon such partner, beyond that resulting from his character as partner. Such is the general principle; and in our judgment, it is founded in good sense and reason. One man ought not to be permitted to dispose of the property, or to bind the rights of another, unless the latter has authorized the act. In the case of a partner paying his own separate debt out of the partnership funds, it is manifest, that it is a violation of his duty and of the right of his partners, unless they have assented to it. The act is an illegal conversion of the funds; and the separate creditor can have no better title to the funds than the partner himself had.

Does it make any difference, that the separate creditor had no knowledge at the time, that there was a misappropriation of the partnership funds? We think not. If he had such knowledge, undoubtedly he would be guilty of gross fraud, not only in morals, but in law. That was expressly decided in Sheriff v. Wilks, 1 East, R. 48: and indeed seems too plain upon principle to admit of any serious doubt. But we do not think, that such knowledge is an essential ingredient in such a case. The true question is, whether the title to the property has passed from the partnership to the separate creditor. If it has not, then the partnership may reassert their claim to it in the hands of such creditor. The case of Ridley v. Taylor, 13 East, R. 175, has been supposed to inculcate a different and more modified doctrine. But upon a close examination, it will be found to have turned upon its own peculiar circumstances. Lord Ellenborough, in that case, admitted that one partner could not pledge the partnership property for his own separate debt; and if he could not do such an act of a limited nature, it is somewhat difficult to see how he could do an act of a higher nature, and sell the property. And his judgment seems to have been greatly influenced by the consideration, that the creditor in that case might fairly presume, that the partner was the real owner of the partnership security; and that there was an absence of all the evidence (which existed and might have been produced) to show, that the other partner did not know, and

had not authorized the act. If it had appeared from any evidence, that the act was unknown to, or unauthorized by the other partners, it is very far from being clear, that the case could have been decided in favour of the separate creditor; for his lordship seems to have put the case upon the ground, that either actual covin in the creditor should be shown, or that there should be pregnant evidence, that the act was unauthorized by the other partners. The case of Green v. Deacon, 2 Starkie's Rep., 347, before Lord Ellenborough, seems to have proceeded upon the ground, that fraud, or knowledge by the separate creditor, was not a necessary ingredient. In the recent case Ex parte Goulding, cited in Collyer on Partnership, 283, 284, the vice-chancellor (Sir John Leach), seems to have adopted the broad ground upon which we are disposed to place the doctrine. Upon the appeal his decision was confirmed by Lord Lyndhurst. Upon that occasion his lordship said: "No principle can be more clear, than that where a partner and a creditor enter into a contract on a separate account, the partner cannot pledge the partnership funds, or give the partnership acceptances in discharge of this contract, so as to bind the firm." There was no pretence in that case, of any fraud on the part of the separate creditor: and Lord Lyndhurst seems to have put his judgment upon the ground, that unless the other partner assented to the transaction, he was not bound; and that it was the duty of the creditor to ascertain whether there was such assent or not.

The same question has been discussed in the American courts on various occasions. In Dob v. Halsey, 16 John Rep., 34, it was held by the court that one partner could not apply partnership property to the payment of his own separate debt without the assent of the other partners. On that occasion, Mr. Chief Justice Spencer stated the difference between the decision, in New York, and those in England, to be merely this: that in New York the court required the separate creditor, who had obtained the partnership paper for the private debt of one of the partners, to show the assent of the whole firm to be bound, and that in England the burthen of proof was on the other partners to show their want of knowledge or dissent. The learned judge added: "I can perceive no substantial difference, whether the note of a firm be taken for a private debt of one of the partners by a separate creditor of a partner, pledging the security of the firm, and taking the property of the firm, upon a purchase of one of the partners, to pay his private debt. In both cases, the act is equally injurious to the other partners. It is taking their common property to pay a private debt of one of the partners." The same doctrine has been, on various occasions, fully recognised in the Supreme Court of the same state. And we need do no more than refer to one of the latest, the case of Evernghim v. Ensworth,

7 Wend. Rep. 326. Indeed, it had been fully considered long before, in Livingston v. Roosevelt, 4 John. Rep. 251.

It is true, that the precise point now before us, does not appear to have received any direct adjudication; for in all the cases above mentioned there was a known application of the funds or securities of the partnership to the payment of the separate debt. But we think, that the true principle to be extracted from the authorities is, that one partner cannot apply the partnership funds or securities to the discharge of his own private debt without their consent; and that without their consent their title to the property is not divested in favour of such separate creditor, whether he knew it to be partnership property or not. In short, his right depends, not upon his knowledge, that it was partnership property, but upon the fact, whether the other partners had assented to such disposition of it or not.

If we are right in the preceding views, they completely dispose of the second instruction. The point there put involves the additional ingredient, that the separate debt and draft of Richards for the three thousand dollars, was, with the knowledge of the plaintiffs (Rogers & Sons), paid out of the partnership funds; and if so, then, unless the payment was assented to by the other partner, it was clearly invalid, and not binding upon him. It is true, that the draft of three thousand dollars was drawn on Richards alone; and, therefore, it cannot be presumed, that the plaintiffs had knowledge, that it was accepted by the partnership, or paid out of the partnership funds. But the question was left, and properly left to the jury to say, whether the plaintiffs had such knowledge; and if they had, unless the other partner consented, the payment would be a fraud upon the partnership. With the question, whether the jury have drawn a right conclusion, it is not for us to intermeddle. It was a matter fairly before them upon the evidence; and the decision upon matters of fact was their peculiar province.

The third instruction admits of no real controversy. The letter purports to be written by Richards alone, and not in the name of the firm, or by the orders of the firm. It embraces topics belonging to his own private affairs, as well as to those of the firm. Under such circumstances, not being written in the name of the firm, it cannot be presumed that the other partner had knowledge of its contents, and sanctioned them, unless some proof to that effect was offered to the jury. If the other partner did not know of the letter or sanction its contents, it is plain, that he ought not to be bound by them; and such was the instruction given to the jury.

Upon the whole, our opinion is, that the judgment of the court below ought to be affirmed, with six per cent. interest and costs.

This cause came on to be heard on the transcript of the record from the district court of the United States for the district of Mississippi, and was argued by counsel. On consideration whereof, it is now here adjudged and ordered by this Court, that the judgment of the said district court in this cause be, and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

It is a consequence of a commercial partnership, that each acting partner is the general agent of the firm; that is, has an implied authority to act for the firm in all matters within the scope of the business transacted by it. In all that the firm has undertaken to do, or usually does, an acting partner is identified with the company; and secret agreements, restrictive of his power, do not affect third persons who deal with him fairly and in good faith, without a knowledge of them. See *Winship et al.* v. *The Bank of the United States*, 5 Peters, 530, 561; S. C. 5 Mason, 177; *Le Roy, Bayard & Co.* v. *Johnson*, 2 Peters, 187, 197; *Smith* v. *Lusher*, 5 Cowen, 689; *Tradesmen's Bank* v. *Astor*, 11 Wendell, 87, 90; *Sage* v. *Sherman*, 2 Comstock, 418, 427; *Boardman* v. *Gore, et al.* 15 Massachusetts, 331, 339; *Beck* v. *Martin*, 2 M'Mullan, 260; and see to the same effect, *Hawken* v. *Bourne*, 8 Meeson & Welsby, 703, 710. This authority in a single partner, however, is not an inseparable legal consequence of an interest in the partnership, but is an actual agency implied from the supposed assent of the other members: an express notice, therefore, from one member of a firm, communicated to third persons, that he will not be bound by the acts, or by a particular act, of another partner, puts a stop to the implied authority of that partner to bind the firm; *Lord Gallway* v. *Mathew and Smithson*, 10 East, 264; *Leavitt* v. *Peck*, 3 Connecticut, 125, 128; *Monroe* v. *Conner*, 15 Maine, 178; *Feigley* v. *Sponeberger*, 5 Watts & Sergeant, 564.

But the case of *Livingston* v. *Roosevelt*, establishes the principle, that one partner has not an implied power to bind the firm in any engagements which are unconnected with, and foreign to, the partnership, and that when a third person deals with one of the partners, in a matter not within the scope of the partnership, though that partner himself may be bound, the firm will not be, without affirmative evidence of the consent of the other members; and this is confirmed in *Mercein* v. *Mack*, 10 Wendell, 461; *Nichols* v. *Hughes*, 2 Bailey, 109; *Walcott* v. *Canfield*, 3 Connecticut, 194, 198; *Thomas* v. *Harding*, 8 Greenleaf, 417, 420; *Cocke* v. *The Branch Bank at Mobile*, 3 Alabama, 175; *Goode* v. *Linecum and Nash*, 1 Howard's Mississippi, 281; *Eastman* v. *Cooper*, 15 Pickering, 276, 290. It has been held that the question whether the matter contracted about, is within the objects of the partnership, may, in doubtful cases, be determined by usage; *Galloway* v. *Hughes et al.* 1 Bailey, 553; See *Woodward* v. *Winship*, 12 Pickering, 430. The act done, also, must be such as is necessarily or usually incident to the business transacted by the firm; in a partnership for the practice of law or medicine, one partner has not authority to borrow money,

or draw bills of exchange to raise money, in the name of the firm; such powers being beyond the scope of the partnership objects; *Crosthwait* v. *Ross*, 1 Humphreys, 23; *Breckinridge* v. *Shrieve*, 4 Dana, 375, 379. "Partners in trade," said Lord Denman, C. J., in *Hedley* v. *Bainbridge*, 3 Q. B. 316, 321, "have authority, as regards third persons, to bind the firm by bills of exchange, for it is the usual course of mercantile transactions so to do; and this authority is by the custom and law of merchants, which is part of the general law of the land. But the same reason does not apply to other partnerships. There is no custom or usage that attorneys should be parties to negotiable instruments; nor is it necessary for the purposes of their business." But where a transaction is beyond the professed and regular objects of the firm, there may be an actual assent by the other members, which of course will bind them; and this assent need not be anterior or express, but may be implied from their conduct: *Waller* v. *Keyes*, 6 Vermont, 257; *Woodward* v. *Winship*, 12 Pickering, 430, 436; *Mc Neill's Ex'rs.* v. *Reynolds*, 9 Alabama, 313.

In a general commercial partnership, the implied agency of an acting partner extends to all contracts, executed or executory, within the range of its ordinary business. One partner may draw, accept and endorse, notes and bills of exchange, in the name and for the use of the firm; and a note or bill executed by one partner in the name of the firm, is *primâ facie* evidence that it was executed rightfully and for partnership purposes, and if not so executed, it lies upon the other party to impeach it, by showing that it was given for an object beyond the scope of the authority of a partner; *Le Roy, Bayard & Co.* v. *Johnson*, 2 Peters, 187, 197; *Whitaker* v. *Brown*, 16 Wendell, 505, 507, 511; *Rochester* v. *Trotter et al.*, 1 Marshall's Kentucky, 54; *Magill* v. *Merrie & Bullin*, 5 B. Monroe, 168, 171; *Ensminger* v. *Marvin*, 5 Blackford, 210. One partner may borrow money, in the name, and on the credit, of the firm, by note, bill, or otherwise, and all will be liable, though the money, when obtained, be appropriated to the use of the partner borrowing it, if there was nothing at the time of the loan, to create a suspicion of fraud; *Winship et al.* v. *The Bank of the United States*, 5 Peters, 530; *Church* v. *Sparrow*, 5 Wendell, 223; *Whitaker* v. *Brown*, 16 Id. 505; *Onondaga Co. Bank* v. *De Puy*, 17 Id. 47; *Miller* v. *Manice*, 6 Hill's N. Y. 115, 119; *Steel* v. *Jennings & Beatty*, Cheves' Law, 183; *Emerson* v. *Harmon*, 14 Maine, 271; *Bascom* v. *Young*, 7 Missouri, 1, 4. One partner may purchase goods for the firm within the scope of the partnership business; *Feigley* v. *Sponeberger*, 5 Watts & Sergeant, 564; pay debts of the firm; *Tyson & others* v. *Pollock*, 1 Pennsylvania, 375; receive payment in money or commodities in discharge of debts due to the firm; *M'Kee & M'Elhenney* v. *Stroup*, Rice, 291; and generally do all acts ordinarily done by the firm. The firm will be liable also civilly for fraudulent representations made by one partner, in a matter within the scope of the partnership business, as, on a sale of partnership property; *Locke* v. *Stearns & another*, 1 Metcalf, 560; but see *Sherwood* v. *Marwick*, 5 Greenleaf, 295, 302. An agency of a commercial nature given to a firm by their partnership name, may be executed by one in the name of the firm; but when a power is given to them individually, it cannot be so executed; *Gordon* v. *Buchanan*, 5 Yerger, 72, 81; see *Beck* v. *Martin*, 2 M'Mullan, 260, 266. Each partner has complete control over the partnership effects, and power of selling or assigning them for partnership purposes; *Quiner* v. *Marblehead Social Insurance Company*, 10 Massachusetts, 476, 482; *Lamb et al.* v. *Durant*, 12 Id. 54; and this extends equally to the assign-

ment of a chose in action; *Everit* v. *Strong*, 5 Hill's N. Y. 163; *Mills* v. *Barber*, 4 Day, 428; and to a sale or assignment of the whole partnership stock, by one contract, for money, or for payment of debts; *Arnold* v. *Brown*, 24 Pickering, 89, 92; *Deckard* v. *Case*, 5 Watts, 22; and to a mortgage of the whole stock; *Tapley* v. *Butterfield*, 1 Metcalf, 515; and see *Cullum* v. *Bloodyood, Ford et als.*, 15 Alabama, 34, 42.

On the question, whether one partner has a right to make a general assignment to a trustee for the payment of the debts of the firm, the cases appear to be in some conflict, but, on the whole, perhaps, they may be reconciled with one another. They may be arranged in two classes; those which hold the general principle that one partner possesses no such power; and those which decide that one partner, *in the absence of the other*, acting in good faith for the benefit of the concern, is reasonably to be considered as vested with such authority.

In *Pearpont & Lord* v. *Graham*, 4 Washington, 232, Judge Washington said that one partner undoubtedly had power to dispose of the whole to third persons, who deal with him in relation to the partnership concerns, but that it might admit of serious doubt whether one partner can, without the assent of his associates, assign the whole of the partnership effects (otherwise than in the course of the trade in which the firm is engaged), in such manner as to terminate the partnership, which he supposed would be the effect of an assignment of all the effects to trustees for the benefit of creditors; but he gave no decision upon the point. In Missouri, it has been decided that one partner has not authority to make a general assignment to a trustee for creditors; *Hughes* v. *Ellison*, 5 Missouri, 463, 466; *Drake* v. *Rogers and Shrewsburry*, 6 Id. 317, 320. In New York, it has been determined by the Chancellor, that though one of the partners, during the continuance of the partnership, may make a valid assignment of the partnership effects, in the name of the firm, directly to one or more of the creditors in payment of his or their debts, an assignment by one partner, against the known wishes of his copartner, to a *trustee* for the benefit of particular creditors, in fraud of the rights of his copartner to participate in the distribution of the partnership effects among the creditors, is illegal and inequitable, and cannot be sustained. "The principle," said the Chancellor, in that case, "upon which an assignment by one partner in payment of a partnership debt rests is, that there is an implied authority for that purpose from his copartner, from the very nature of the contract of partnership; the payment of the company debts being always a part of the necessary business of the firm. And while either party acts fairly within the limits of such implied authority, his contracts are valid and binding upon his copartner. One member of the firm, therefore, without any express authority from the other, may discharge a partnership debt, either by the payment of money, or by the transfer to the creditor of any other of the partnership effects; although there may not be sufficient left to pay an equal amount to the other creditors of the firm. But it is no part of the ordinary business of a copartnership to appoint a trustee of all the partnership effects, for the purpose of selling and distributing the proceeds among the creditors in unequal proportions. And no such authority as that can be implied. On the contrary, such an exercise of power by one of the firm, without the consent of the other, is in most cases a virtual dissolution of the copartnership; as it renders it impossible for the firm to continue its business." In *Hitchcock et al.* v. *St. John et al.*, 1 Hoffman's Chancery, 512, the Assistant Vice Chancellor, also held that one partner has not power to make an assignment to a trustee for the benefit of creditors, though he

could transfer property directly in payment of a debt or debts. And, in *Dana, Adm'r* v. *Lull*, 17 Vermont, 390, two of the judges were of the same opinion.

On the other hand, it was held in the principal case, *Anderson & Wilkins* v. *Tompkins et al.*, that if one of the partners is absent, the partner who is present, conducting the affairs of the firm, acting in good faith for the benefit of the firm, may make a general assignment to a trustee with preferences. The power of selling the whole effects, says the Chief Justice in that case, "would certainly not be exercised in the presence of a partner, without consulting him; and if it were so exercised, slight circumstances would be sufficient to render the transaction suspicious, and, perhaps, to fix on it the imputation of fraud. In this respect, every case must depend on its own circumstances. But with respect to the power, in a case perfectly fair, I can conceive no ground on which it is to be questioned." "One partner was on a voyage to Europe, the other in possession of all the partnership effects for sale. The absent partner could have no agency in the sale of them. He could not be consulted. He could not give an opinion. In leaving the country, he must have intended to confide all its business to the partner who remained for the purpose of transacting it." "It is true, Murray had a right to be consulted. Had he been present, he ought to have been consulted. The act ought to have been, and probably would have been, a joint act. But Murray was not present. He had left the country, and could not be consulted. He had, by leaving the country, confided everything which respected their joint business, to Tompkins, who was under the necessity of acting alone." It will be observed that the Chief Justice puts the case in part upon the absence of the other partner, and the general delegation of authority to be thence inferred, and says that had he been present, his concurrence, express or implied, would have been requisite to the fairness of the transaction. In *Harrison* v. *Sterry*, 5 Cranch, 289, Robert Bird, who was the only member residing in America, of an English firm which transacted business in New York, for the purpose of supporting the credit of the house, by raising funds upon the security of an East India cargo, and of certain debts due in South Carolina, assigned this cargo and these debts to a trustee for the security and indemnity of the present and future creditors, and the Supreme Court sustained the transaction as being in the usual course of trade. "The whole commercial business of the company in the United States," said the Chief Justice, "was necessarily committed to Robert Bird, the only partner residing in this country. He had the command of their funds in America, and could collect or transfer the debts due to them. The assignment under consideration is an act of this character, and is within the power usually exercised by a managing partner." In all the cases which have been decided upon the authority of *Harrison* v. *Sterry*, the absence of one of the partners is one of the elements of the decision in favour of the right of the other to make a general assignment. In *M'Cullough et al.* v. *Sommerville*, 8 Leigh, 416, the partner who made the general assignment to a trustee for creditors, was the sole managing partner, and the other partner resided in another state, and took no part in the business; and the point decided was, that a partner has a right to convey the firm effects, except real estate, to trustees, to pay specified creditors, without the consent of his copartner, where that copartner resides out of the state, and the grantor is sole manager of the concern. In two Pennsylvania cases, it has been decided that one partner may make a general transfer to creditors, or a

general assignment to trustees for the benefit of creditors; *Deckard* v. *Case*, 5 Watts, 22; *Hennessy* v. *The Western Bank*, 6 Watts & Sergeant, 301; but in the former case, the other partner had run off, and left the country, and "from necessity," said the court, "the remaining partner should have the power of disposal in payment of debts;" and in the latter case, the non-joining partner was absent in a distant state. In South Carolina it had been determined at an early period that one partner had not the power to make a general assignment; *Dickinson* v. *Legare and others*, 1 Desaussure, 537, 540; but in that case, the assignment was made by an absent partner, while a prisoner in a foreign country; and in *Robinson & Co.* v. *Crowder, Clough & Co.*, 4 M'Cord, 519, 537, it was decided that two resident, acting partners, might make a general assignment when a third member was absent in a distant country. In *White* v. *Union Insurance Co.*, 1 Nott & M'Cord, 557, 562, the point determined was that a *surviving* partner, especially in case of insolvency, may assign the firm effects to a trustee for payment of debts. In *Whitton & Hurlbert et al.* v. *Smith et al.*, Freeman's Chancery, 231, 238, it was decided that a *sale* by one partner of all the concern, when the other partner was absent in another state, was valid, but was a dissolution of the partnership.

Thus far, there is no American case which says that one partner, when the other members are present, may without their consent, make a general assignment of the firm effects, to a trustee for the benefit of creditors. The principle to be extracted from decisions appears to be this: That, as a general assignment, if it does not dissolve the partnership, at least takes away from the partners the right of disposing of the effects assigned, all the members, if they are present, have a right to be consulted upon such a step; that an assignment by one against the known wishes of the other, would be fraud upon him, and invalid; and an assignment without his knowledge would be presumptively so; but that if one partner has left the country, he must be considered as having vested in the other implied authority to act in all matters for the benefit of the firm: and an assignment under such circumstances, if fairly made, and beneficial to the interests of the company, will be sustained. And this is, in effect, the conclusion arrived at, in *Kirby* v. *Ingersoll*, 1 Douglass, 477, where the subject was ably examined. A majority of the court there held, "that it is not within the ordinary powers arising from the partnership relation, while the business of the firm is proceeding in the usual manner, and both partners are present, and attending to the affairs of the firm in the ordinary manner contemplated by their partnership agreement, for one partner to make an assignment to a trustee for the benefit of preferred creditors, with the design of putting an end to the partnership, and closing up its concerns. But the power to make such assignment may be conferred by one partner on another, or may, like any other power, be inferred from the conduct of the partners, their manner of doing business, and the circumstances in which they place themselves in reference to the business of the firm."

In order to be binding upon the firm at once, and without further proof, contracts entered into by virtue of the implied agency resulting from partnership, must be made in the name of the firm, or at least there must be apparent, on the face of the contract, an intention to pledge the credit of the firm; if that do not appear, the firm may still be bound upon the consideration, but further proof must be given that it was a partnership transaction; *Crouch & Emmerson* v. *Bowman*, 3 Humphreys, 209: a partner has no *implied* authority to bind the firm by any other than the firm name; *Kirk* v. *Blurton*, 9 Meeson & Welsby 284. A note payable to a partnership, if endorsed by one

partner only in his own name, does not transfer the legal interest in the note; *McIntire* v. *McLaurin*, 2 Humphreys, 71. If the firm has no fixed name, a signing by one, in the name of himself and company, will bind the partnership; *Austin & Taylor* v. *Williams, &c.*, 2 Hammond, 61: and a note in the name of one, and signed by him "For the firm, &c.," will bind the company, for the fact that credit was given to the partnership, and that it was intended to be bound, appears sufficiently on the face of the instrument; *Caldwell* v. *Sithens*, 5 Blackford, 99. There are cases, also, in which bills are drawn, and other acts done, for the partnership, in the name of one partner, by agreement of the partners, where the name of that member is to be regarded as the partnership name in a particular region, or a particular class of transactions; *South Carolina Bank* v. *Case*, 8 Barnewall & Cresswell, 427; *The Bank of Rochester* v. *Monteath*, 1 Denio, 402, 405; see *In re Warren*, Davies, 320, 325, and *Pease* v. *Dwight*, 6 Howard's S. Ct., 190, 199; but the consent of the members, or at least the intention of the acting partner to use his own name as representing the firm, ought to be clearly proved; *Rogers* v. *Coit*, 6 Hill's N. Y. 322; *Palmer* v. *Stephens*, 1 Denio, 472, 482. Where a written contract is made in the name of one, and another is a *secret* partner with him, both may be sued upon it; *Snead* v. *Barringer & Rhodes*, 1 Stewart, 134; *Graeff* v. *Hitchman*, 5 Watts, 454; and when a man is connected with a dormant partner, and transacts business both on his individual account, and on the partnership account, it is a question of evidence as to which account any transaction was upon; *Ethridge* v. *Binney*, 9 Pickering, 272; *United States Bank* v. *Binney et al.*, 5 Mason, 177, 189; *Mifflin* v. *Smith & another*, 17 Sergeant & Rawle, 165. If a written contract for the purchase of goods is made with one, the existence of other partners not being known, and the goods are delivered to the firm, the firm are liable for the consideration, in general assumpsit; *Reynolds* v. *Cleveland*, 4 Cowen, 282; *Bisel* v. *Hobbs*, 6 Blackford, 479. And where the partnership is a public one, and is known by the other party to exist, and a written contract is made with one partner in his own name, the liability of the firm for the consideration, depends upon the question whether the transaction was on partnership or on individual account, and whether exclusive credit was given or not, to the individual partner; the fact that the individual name of the partner was used, being *prima facie* evidence of the latter. Accordingly, where a firm is known to exist, and money is lent to one partner on his own account and responsibility, it does not become a debt of the firm to the lender, in consequence of the money being afterwards used and applied to partnership purposes, but it is an advance by the partner to the firm; and the partner's individual note being given is *prima facie* evidence that the transaction was on his private account; *Graeff* v. *Hitchman*, 5 Watts, 454; *Green* v. *Tanner & others*, 8 Metcalf, 411, 420; *Ostrom* v. *Jacobs & another*, 9 Id. 454; *Thorn* v. *Smith*, 21 Wendell, 365; and see *Ketchum & others* v. *Durkee and others*, 1 Hoffman's Chancery, 539, 543; and see *Miner* v. *Downer et al.*, 19 Vermont, 15; and this applies equally to a purchase of goods on the individual credit of a partner, the avails of which, afterwards, go into the partnership; *Holmes* v. *Burton et al.*, 9 Vermont, 252: but though a contract of loan or purchase be made by one partner in his own name, and his own note be given, it is competent to prove that it was made for the firm, and on their account and credit, and in that case the firm will be liable, not upon the note, but upon the consideration; and the fact that money or property borrowed or purchased generally, and not on the exclusive

credit of the partner, is appropriated, with the knowledge and by consent of the others, to the use of the firm, will be sufficient evidence of liability in the firm, unless it be shown that it was used by the firm, as the money or property of the partner, and as creating a debt from the firm to him, and not to the third party; *Jaques* v. *Marquand*, 6 Cowen, 497; *Church* v. *Sparrow*, 5 Wendell, 223; *Whitaker* v. *Brown*, 16 Id. 505, 509, 510; *Onondaga Co. Bank* v. *De Puy*, 17 Id. 47; *Crouch & Emmerson* v. *Bowman*, 3 Humphreys, 209; *Foster* v. *Hall & Eaton*, 4 Id. 346; *Union Bank* v. *Eaton*, 5 Id. 499: but on a bill or note given by one partner not in the firm name, only the person whose name is upon the note, can be sued; but see *Beckman* v. *Drake*, 9 Meeson & Welsby, 79, 92, 96. If a receipt of property be signed by one partner in his own name, *prima facie*, on the face of the written memorandum, it is an individual contract, but if it appear by evidence that it was a matter relating to partnership business, and that it was for joint interest, the firm will be responsible; *Brown* v. *Lawrence*, 5 Connecticut, 397.

But in all partnerships, there are some legal acts to which the general authority of a partner is not competent. The general implied power of a partner does not extend to binding the firm by instruments under seal; *Harrison* v. *Jackson*, 7 Term, 207; *Clement* v. *Brush*, 3 Johnson's Cases, 180; *Van Deusen* v. *Blum*, 18 Pickering, 229; *Executors of Fisher* v. *Executors of Tucker*, 1 M'Cord's Chancery, 169, 171; *Posey* v. *Bullitt*, 1 Blackford, 99; *Trimble* v. *Coons*, 2 Marshall's Kentucky, 375; *Cummins, &c.* v. *Cassily*, 5 B. Monroe, 74; *Nunnely* v. *Doherty*, 1 Yerger, 26; *Blackburn* v. *McCallister*, Peck, 371; *McNaughten & others* v. *Partridge and others*, 11 Ohio, 223; *Doe, ex dem.* v. *Tupper*, 4 Smedes & Marshall, 261; *Snodgrass' Appeal*, 1 Harris, 471, 473; *Morris* v. *Jones & Spence*, 4 Harrington, 428. An express authority, however, will enable him to do so; but where this authorization is not by deed, it was formerly supposed to be the sense of the English cases, that a deed executed by one partner for the firm under a parol authority from the other, must be executed in his presence and by his directions: in that case it is in law his deed; *Ball* v. *Dunsterville & another*, 4 Term, 313; *Ludlow* v. *Simond*, 2 Caines' Cases, 1, 42, 55; *Hart* v. *Withers*, 1 Pennsylvania, 285, 290; *Fichthorn* v. *Boyer*, 5 Watts, 159, 161; *Overton* v. *Tozer*, 7 Id. 331; *Flood* v. *Yandes*, 1 Blackford, 102; *Modisett* v. *Lindley*, 2 Id. 119; *Henderson* v. *Barbee*, 6 Id. 26, 28; *Day et al.* v. *Lafferty*, 4 Pike, 450; and such an execution, even of a submission by bond to arbitration, has always been held good; *Mackay* v. *Bloodgood*, 9 Johnson, 285; *Lee & Rector* v. *Onstott, Adm'r*, 1 Pike, 206, 218; now, however, it is settled, after thorough investigation of the cases, that a partner may bind his copartner by an agreement under seal, in the name of the firm, provided the copartner assents to the contract previously to its execution, or afterwards ratifies and adopts it, and this assent or adoption may be by parol, and it need not be express and special, but may be implied from the conduct of the other partner or the course of dealing by the firm; and this principle extends to the execution of a bond with a warrant of attorney to confess judgment, and of a bond of submission to arbitration; *Gram* v. *Seton & Bunker*, 1 Hall, 262; *Cady* v. *Shepherd*, 11 Pickering, 400; *Swan* v. *Stedman & others*, 4 Metcalf, 548, 551; *Bond* v. *Aitkin*, 6 Watts & Sergeant, 165, 168 (of course overruling *Hart* v. *Withers*, 1 Pennsylvania, 285, 291); *Pike* v. *Bacon*, 21 Maine, 280, 287; *McCart* v. *Lewis*, 2 B. Monroe, 267; *Darst et al.* v. *Roth*, 4 Washington, 471; *Lucas* v. *Sanders & M'Alilly*, 1 M'Mullan, 311; *Fleming* v. *Dunbar*, 2 Hill's So. Car. 532. In Illinois and Alabama, a similar rule is adopted,

and it is held as a general principle that when a deed professes to be executed by several, and has fewer seals than there are parties, it will be presumed that the others have adopted, as their own, the seal which is put to the deed, and the burden of disproving it will be put upon those who deny it; *Davis* v. *Burton et al.*, 3 Scammon, 41; *Witter et al.* v. *McNeil*, Id. 433; *Hatch* v. *Crawford*, 2 Porter, 54. In Tennessee, also the same rule appears to be now adopted; *Lambden* v. *J. & P. Sharp*, 9 Humphreys, 224; but see *Turbeville* v. *Ryan*, 1 Humphreys, 113; *Napier* v. *Catron et als.*, 2 Id. 534.

The rule that one partner cannot, by his implied authority as general agent of the partnership, bind the firm by a sealed instrument, applies only where the firm is sought to be charged, and not where the object is to discharge a debt due to it; one partner may, therefore, release under seal: this, indeed, he may do by virtue of his joint interest in the debts of the firm, without reference to authority, express or implied, from the other; *Piersons* v. *Hooker*, 3 Johnson, 68; *McBride* v. *Hagan*, 1 Wendell, 326, 334; *Morse* v. *Bellows*, 7 New Hampshire, 550, 567; and one partner may also give authority under seal to an attorney to release; *Wells* v. *Evans*, 20 Wendell, 251, 255; S. C. 22 Id. 325, 334. And the general principle that a partner cannot enter into agreements under seal, has received this further important qualification, that where a seal is not essential to the nature of the contract, and will not change or vary the liability, the addition of a seal will not vitiate it; and that where an act is done, which one partner may do without deed, it is not less effectual that it is done by deed; this appears to be settled in reference to operations that transfer an interest; and it has been decided, in case of sales and assignments, where the property may be transferred by delivery, that such a transfer, so consummated by delivery, is not annulled by being attested, or having the trusts on which it is made, described by a deed, and this applies to a general assignment for the benefit of creditors, to a mortgage of chattels, and to an assignment of a chose in action, by one partner under seal; *Anderson & Wilkins* v. *Tompkins et al.*; *Robinson & Co.* v. *Crowder, Clough & Co.*, 4 M'Cord, 519, 537; *Deckard* v. *Case*, 5 Watts, 22; *Halsey et al.* v. *Whitney et al.*, 4 Mason, 207, 231; *Hennessy* v. *The Western Bank*, 6 Watts & Sergeant, 301, 311; *Everit* v. *Strong*, 5 Hill's N. Y., 163; *Tapley* v. *Butterfield*, 1 Metcalf, 515; *Milton & another* v. *Mosher*, 7 Id. 244, 248; *M'Cullough et al.* v. *Sommerville*, 8 Leigh, 416; *Forkner* v. *Stuart, &c.*, 6 Grattan, 197, 206; and in *Lucas* v. *Bank of Darien*, 2 Stewart, 280, 297, it was held that the appointment of an agent to sign or endorse notes, by one partner, as it would be good without seal, is not invalidated by being under seal. The rule has also been applied to executory contracts; and though perhaps such an application of it may be allowable in certain cases where the action is brought upon something collateral or consequential to the deed, as in *Lawrence* v. *Taylor*, 5 Hill's N. Y., 108, 113, it is not seen how it can possibly be applicable to a case where an action is brought upon the deed or contract itself, on a right having no legal existence but by the operation of the deed; the doctrine, above mentioned, could not in an action on the deed on a plea of non est factum, extend to make the deed of one partner the deed of the other; nor could it so set aside the deed as to leave in force any antecedent parol contract, express or implied; and this seems to be admitted in *Anderson & Wilkins* v. *Tompkins et al.*, and *Montgomery* v. *Boone et al.*, 2 B. Monroe, 244.

A deed executed by one partner, under circumstances not to be binding upon the other, is yet the deed of the one that executed it; a bond given by one in the firm name for a partnership

debt, extinguishes the partnership liability; *Clement* v. *Brush*, 3 Johnson's Cases, 180; *McBride* v. *Hagan*, 1 Wendell, 326, 335; *Nunnely* v. *Doherty*, 1 Yerger, 26; *Waugh & Finley* v. *Carriger*, Id. 31; *Morris* v. *Jones & Spence*, 4 Harrington, 428. But it has been recently held in several of the States, that as a bond is not an extinguishment of a simple contract debt where it is intended that it should not be, a bond by one partner in the name of the firm for a simple contract debt, will not discharge the firm, because it is apparent on the face of the instrument, that it was not intended to accept the liability of a siugle partner in lieu of the firm, and consequently, that the firm may be sued upon the original simple contract; *Doniphan, &c.* v. *Gill*, 1 B. Monroe, 199; *Fleming, Ross & Co.* v. *Lawhorn & Co.*, Dudley's Law, 360, citing North Carolina cases to the same purport; and see remarks to a similar effect in *Despatch Line of Packets* v. *Bellamy Man. Co.*, 12 New Hampshire, 206, 235; but these cases proceed, apparently, upon a misapprehension of the extent to which intention can control the principle of extinguishment: the only case in which a bond will not be an extinguishment in law of a simple contract is, where it is intended to be a collateral security, and not an absolute liability; but if a partner give an absolute liability under seal, it will extinguish his liability upon the parol contract, and if the parol liability is extinguished as to one, it is extinguished as to all, because a part cannot be sued alone; and where an absolute liability by deed is thus given, intention cannot prevent either the extinction of the parol liability of the one giving it, or the discharge of all from the parol liability as a legal consequence of the discharge of one. But where such a bond has been taken, under a misapprehension of its effect in discharging the firm, equity may relieve against extinguishment, and keep alive the liability of the firm; *McNaughten & others* v. *Partridge & others*, 11 Ohio, 223; *Sale* v. *Dishman's Ex'ors*, 3 Leigh, 548, 555; but see, perhaps to the contrary, *Moser* v. *Libenguth*, 1 Rawle, 255, as explained in *Hart* v. *Withers*, 1 Pennsylvania, 285, 290. So, a deed of assignment of the partnership property, executed by one partner, as his deed only, passes his interest in the property; *Bowker* v. *Burdekin*, 11 Meeson & Welsby, 128; overruling Lord Eldon's doubts in *Dutton* v. *Morrison*, 17 Vesey, 193, 200, which doubts, however, are sustained by the decision in *Hughes* v. *Ellison*, 5 Missouri, 463, 466.

One partner has not power to confess judgment, or authorize the confession of judgment against the firm, where no writ has been issued against both; *Crane* v. *French*, 1 Wendell, 311; *Grazebrook* v. *M'Creedie*, 9 Id. 437; *Barlow* v. *Reno*, 1 Blackford, 252; *Sloo* v. *The State Bank of Illinois*, 1 Scammon, 428, 442: but if a judgment be entered under such circumstances, it will not be set aside on the application of the partner who confessed the judgment, or gave the authority; nor will it be set aside altogether, on motion of the other partner, but either his name will be struck out, and the judgment corrected so as to bind the other only, or execution will be ordered not to be served on the person or property of that partner, but only the other's separate estate, or his interest in the partnership property, will be sold, the judgment being binding only on the one who authorized it; *Motteux* v. *St. Aubin & others*, 2 Blackstone, 1133; *Green & Mosher* v. *Beals*, 2 Caines, 254; *St. John & Witherell* v. *Holmes*, 20 Wendell, 609; *Gerard* v. *Basse et al.*, 1 Dallas, 119; *Bitzer* v. *Shunk*, 1 Watts & Sergeant, 340; *Harper* v. *Fox*, 7 Id. 142; *Doe, ex dem.* v. *Tupper*, 4 Smedes & Marshall, 261. In Pennsylvania, where the judgment in *scire facias* is absolute for the debt, though a judgment on bond and warrant executed by one partner in the name of the firm binds

only that partner, yet if regularly revived by *scire facias* against both, the judgment will be binding on both; *Overton* v. *Tozer*, 7 Watts, 331; *Cash* v. *Tozer*, 1 Watts & Sergeant, 519, 525.

It appears to be settled, also, that one partner cannot appear, or lawfully authorize an appearance, for another, where a suit has been instituted against them; *Haslet & others* v. *Street & others*, 2 M'Cord, 310; though there is a dictum to the contrary in *Taylor & others* v. *Coryell & others*, 12 Sergeant & Rawle, 243, 250; see *Morcdon* v. *Wyer*, 6 Manning & Granger, 278, and note. But if an appearance be entered for all, by an attorney appointed by one, or if, after writ issued, judgment be confessed against all by the attorney of one, the judgment will not be set aside or reversed, but, either, the other partner will be left to his remedy against the attorney or his copartner, or, according to the circumstances, the judgment will be opened, and he will be let into a defence; but this depends, not upon the right of one partner to bind the other, but, upon the general practice of the courts where an appearance by attorney is entered without authority; *Denton* v. *Noyes*, 6 Johnson, 296; *Grazebrook* v. *M'Creedie*, 9 Wendell, 437; see cases collected in note to *Sloo* v. *The State Bank of Illinois*, 1 Scammon, 428, 444. The right of a partner to appear or authorize an appearance for all, is a distinct question from the legal effect of an appearance by an attorney who is an officer of the court; see *Hills et al.* v. *Ross*, 3 Dallas, 331.

Another power which a partner does not possess by implication, is that of referring any partnership matter to arbitration; there are a few decisions, indeed, in which it has been held that a partner has power to bind the firm by such an agreement not under seal; *Taylor & others* v. *Coryell & others*, 12 Sergeant & Rawle, 243; *Southard & Starr* v. *Steele*, 3 Monroe, 435; *Wilcox & Gamble* v. *Singletary*, Wright, 420: yet these opinions are controlled by better authorities; *Stead* v. *Salt*, 3 Bingham, 101; *Adams* v. *Bankart*, 1 C. M. & R. 681; *Karthaus* v. *Ferrer et al.*, 1 Peters, 222, 228; dictum of Gibson, C. J., in *Harper* v. *Fox*, 7 Watts & Sergeant, 142, 143.

But independently of these particular legal acts, which one member of a commercial partnership is not competent to do for the firm, and besides the restriction of all operations to the particular kind of business which the partnership was established to conduct, there are in all, even the most general mercantile partnerships, some further limitations on the exercise of the powers of a partner, grounded upon a limitation in the purpose for which, in the nature of the case, a partnership is formed.

One of these general legal limitations is, that as a partnership is formed for the common benefit of all the partners, and as every transaction ought legally to be on joint account, and not for the exclusive benefit of one member of the company, one partner cannot apply the partnership funds or securities to the discharge of his own private debt, unless by consent of the other partners; *Dob* v. *Halsey*, 16 Johnson, 34; *Yale* v. *Yale*, 13 Connecticut, 185, 190; *Hickman* v. *Reineking*, 6 Blackford, 388; *West* v. *McCabe*, 2 Florida, 32, 40; *Daniel* v. *Daniel*, 9 B. Monroe, 195, 196; *Bourne* v. *Wooldridge, et al.*, 10 Id. 493; and though it has sometimes been supposed that to invalidate such an arrangement, it is requisite that the person receiving the property should have knowledge that it is partnership property, yet it is now settled that that is not necessary; without the consent of the other partners, the transaction is void, and the partnership title is not devested in favour of such separate creditor, whether he knew that the property belonged to the partnership or not; the right of the creditor depending, not upon his knowledge that it was partnership property, but upon the fact whether the other partners had assented to such

disposition of it or not; *Rogers* v. *Batchelor; Brewster* v. *Mott et al.*, 4 Scammon, 378; *Purdy* v. *Powers*, 6 Barr, 492; *Minor* v. *Gaw*, 11 Smedes & Marshall, 322, 324; *dictum* in *Tanner* v. *Hall and Easton*, 1 Barr, 417, 418, and *Hester, Wilson, White & Co.* v. *Lumpkin*, 4 Alabama, 509, 514: see *Kelley* v. *Greenleaf et al.*, 3 Story, 93, 100. A partner, also, has no power, by any species of arrangement, to bind the firm to pay his private debts; *Noble* v. *McClintock*, 2 Watts & Sergeant, 152, 155; *Beckham & Eckles* v. *Peay*, 2 Bailey, 133; *Jones' Case*, Overton, 455. On some kindred points, there is a conflict of decisions; in *Gram* v. *Cadwell*, 5 Cowen, 489, 493; *Evernghim* v. *Ensworth*, 7 Wendell, 326, and *Burwell & Clarke* v. *Springfield*, 15 Alabama, 274, it was held that one partner cannot extinguish or release a debt due to the firm by way of set-off or discharge of his own individual debt; but the contrary is decided in *Hall, Kirkpatrick & Co.* v. *Coe, &c.*, 4 McCord, 136: and in *Strong* v. *Fish*, 13 Vermont, 277, and *Greely et a.* v. *Wyeth et a.*, 10 New Hampshire, 15, and *White* v. *Toles & Dunlap*, 7 Alabama, 569, it was held that an agreement by one partner that goods to be sold or services to be rendered by the partnership should be compensated for by the discharge of a debt due by that one alone, or be paid for in articles furnished for that partner's domestic use, barred or discharged the claim of the partnership for payment; while the contrary had been held in *Pierce & Baldwin* v. *Pass & Co.*, 1 Porter, 232; see *Eaton et al.*, v. *Whitcomb*, 17 Vermont, 642; *Arnold* v. *Brown*, 24 Pickering, 89, 93, and *McKee & M'Elhenney* v. *Stroup*, Rice, 291.

It has been stated, above, that a note or bill, drawn or endorsed by one partner in the name of the firm, is *prima facie* evidence of a liability on the part of the firm: and it was formerly supposed that the rule in England was, that although a partnership note or bill was given by one partner for his individual debt, it was binding unless covin was proved, or at least unless there was proof that the creditor knew that the partner dealing with him had no authority to use the partnership name for the purpose: see *Ridley* v. *Taylor*, 13 East, 175. But in this country, from an early period, two cases have been settled, in which the transaction is considered as carrying on its face notice that it is beyond the scope of the authority or agency of a partner, and as putting upon the creditor a necessity of proving an authorization or consent by the other partners: these are, first, where the note is given for a private debt of the partner, and knowingly so received by the creditor; and second, where it is known to be an accommodation note or a note given as surety for a third person or firm; *Joyce* v. *Williams*, 14 Wendell, 141; *N. Y. F. In. Co.* v. *Bennett*, 5 Connecticut, 575; *Mauldin* v. *The Branch Bank at Mobile*, 2 Alabama, 503, 511, 512. The principle of the American cases on this point, is stated by the Chancellor in *Stall* v. *Catskill Bank*, 18 Wendell, 466, 477, in the Court of Errors, to be this; that it is no part of the ordinary business of a mercantile firm to make or endorse notes as sureties for third persons, or to pay the private debts of the individual partners, and of course there is no implied authority for one member to endorse or fix the name of the firm to negotiable paper, in which the partnership has no interest, for such purposes: such notes or bills are therefore not binding upon the firm, when in the hands of any one who has taken them with a knowledge of the nature of the consideration; but in the hands of a *bona fide* holder for value they are binding.

Accordingly, with regard to the former case, viz., where partnership paper is given for a private debt, the course of proof is thus: the partnership name, affixed by one member of

the firm, is, as before remarked, *prima facie* evidence of indebtedness by the firm, the presumption of law being, that an instrument so drawn or endorsed is given for a partnership debt, and the plaintiff is not obliged to show, in the first instance, that it was given in a partnership transaction; *Doty* v. *Bates*, 11 Johnson, 544, 546; *Vallett* v. *Parker*, 6 Wendell, 615, 619; *Waldo Bank* v. *Greely*, 16 Maine, 419; *Barrett* v. *Swann*, 17 Id. 180; *Jones* v. *Rives*, 3 Alabama, 11; *Knapp* v. *McBride & Norman*, 7 Id. 20, 27; but proof, on the defence, that the note was given by one partner for his private debt, and was taken by the plaintiff with knowledge of that fact, renders it incumbent on the plaintiff to prove a previous authority, or subsequent consent, by the other partners, without which he cannot recover; *Lansing* v. *Gaine & Ten Eyck*, 2 Johnson, 300, 305; *Dob* v. *Halsey*, 16 Id. 34, 38; *Chazournes* v. *Edwards et al.*, 3 Pickering, 5, 10; *Baird* v. *Cochran & Dowling*, 4 Sergeant & Rawle, 397, 401; *Davenport* v. *Runlett*, 3 New Hampshire, 386, 391; *Taylor* v. *Hillyer*, 3 Blackford, 433; *West* v. *McCabe*, 2 Florida, 32, 41; and this assent need not be express, but may be implied by the jury from the facts and circumstances of the case, upon sufficient evidence; *Jones* v. *Booth*, 10 Vermont, 268; as, from the other partner's not declaring his dissent within a reasonable time after the transaction comes to his knowledge; *Foster* v. *Andrews*, 2 Penrose & Watts, 160. But if a note or bill, though fraudulently put into circulation for the individual debt of a partner, comes into the hands of a holder for value without notice, in his hands the instrument is binding upon the firm; *Wells* v. *Evans*, 20 Wendell, 251, 259; S. C., 22 Id. 325, 333; *Munroe* v. *Cooper et al.*, 5 Pickering, 412; but not if the holder have notice, actual or implied; *N. Y. F. In. Co.* v. *Bennett*, 5 Connecticut, 575; see *Smyth* v. *Strader et al.*, 4 Howard's Supreme Court, 405, 416. A firm note given by one partner for a private debt, as it does not bind the firm, so it does not bind a surety or guarantor, who became security upon it as a note of the firm; *Livingston* v. *Hastie & Patrick*, 2 Caines, 246, 250; *Williams* v. *Walbridge*, 3 Wendell, 415, 417; *Hagar* v. *Mounts*, 3 Blackford, 57; S. C., 261.

In like manner, in the second case above-mentioned, if a party takes negotiable paper, made, accepted, or endorsed by one of the partners in the partnership name, knowing that the name of the firm was signed or endorsed, only for the *accommodation* of a third person or firm, or by way of *surety* for them, the creditor cannot charge the other members of the firm, unless he proves that they have assented to the transaction; and this, whether money is advanced, or other new consideration intervene, at the time, or not, and whether the fact of the paper being but a security be apparent on the face of the instrument, or implied in the nature of the transaction, or expressly communicated to the creditor; *Foot* v. *Sabin*, 19 Johnson, 154; *Laverty* v. *Burr*, 1 Wendell, 529; *Bank of Rochester* v. *Bowen*, 7 Id. 158; *Boyd* v. *Plumb*, Id. 309; *Wilson* v. *Williams*, 14 Id. 146; *Austin* v. *Vandermark*, 4 Hill's N. Y. 260; *The Bank of Vergennes* v. *Cameron*, 7 Barbour's S. Ct. 144, 150; *Sweetzer* v. *French and others*, 2 Cushing, 310, 314; *Wagnon and others* v. *Clay*, 1 Marshall's Kentucky, 257; *Chenowith & Co.* v. *Chamberlin*, 6 B. Monroe, 60, 61; *Whaley* v. *Moody*, 2 Humphreys, 495; *Bank of Tennessee* v. *Saffarrans*, 3 Id. 597; *Andrews* v. *The Planters' Bank of Mississippi*, 7 Smedes & Marshall, 192; *Rolston* v. *Click et al.*, 1 Stewart, 526; *Hibbler & Pearson* v. *De Forest, Morris & Wilkins*, 6 Alabama, 93; *Lang's Heirs* v. *Waring*, 17 Id. 145, 157; *Tanner* v. *Hall & Easton*, 1 Barr, 417: but an accommodation note, in the hands of a *bona fide* holder for value, who took it without notice, express or implied, of the pur-

pose for which it was issued, will be binding upon the firm; *Catskill Bank* v. *Stall*, 15 Wendell, 364; S. C. 18 Id. 466; *Austin* v. *Vandermark*, 4 Hill's N. Y. 260, 261; *Waldo Bank* v. *Lumbert*, 16 Maine, 416; *Hawes* v. *Dunton & White*, 1 Bailey, 146; *Duncan* v. *Clark*, 2 Richardson, 587. An authority to draw or endorse for accommodation may sometimes be implied from a general course of dealing, as where it is the usual practice of the firm, or of a partner, to endorse for the accommodation of another house; *Bank of Kentucky* v. *Brooking, &c.*, 2 Littell, 41, 45; *dicta* in *Gansevoort* v. *Williams*, 14 Wendell, 133, 139; *Sweetzer* v. *French and others*, 2 Cushing, 310, 315; *Tanner* v. *Hall & Easton;* and *Bank of Tennessee* v. *Saffarrans*. In *Early* v. *Reed*, 6 Hill's N. Y. 12, it was held that the fact of one partner's having repeatedly *endorsed* the name of the firm by way of accommodation, with the knowledge and assent of the other partner, was not sufficient evidence to show an authority to sign the name of the firm to such paper as *surety*, the two contracts being materially different. It seems, also, that the presumption against an authority to issue accommodation paper, arises only where the paper is issued for the benefit of the person to whom it is given; for if the accommodation paper be issued really for the benefit of the firm, in whose name it is issued, and for the purpose of raising money for them, the transaction being in fact an exchange, with another firm, of bills or acceptances for the benefit of both firms, in such a case, it has been held, that an accommodation bill made or accepted by one partner in the name of the firm is binding upon the firm; *Gano & Thoms* v. *Samuel*, 14 Ohio, 592. South Carolina, it should be remarked, has lately deviated from the uniform course of decision in this country, and has held, that, upon an acceptance by one partner in the firm name, for the accommodation of a third person, the knowledge and assent of the other partners need not be proved; *Flemming* v. *Prescott*, 3 Richardson, 307.

The *principle* of the English and American cases, in relation to a bill or note of the firm being given for the private debt of a partner, is undoubtedly the same, viz., that such an exercise of power by one partner is a fraud upon the other partner; notwithstanding the *dictum* of Bronson, J., in *Wilson* v. *Williams*, 14 Wendell, 146, 158, that in this country it is a question not of fraud but of contract; and see opinion of Tracy, Senator, in *Stall* v. *Catskill Bank*, 18 Id. 466, 480, &c. Practically, too, the application is the same, the fact of the note or bill having been given for a private debt, being, when it stands alone, sufficient to put upon the creditor the necessity of proving the consent of the other partner, in England as well as in this country; see the British and American cases compared in *Gansevoort* v. *Williams*, 14 Wendell, 133, 136; *Bank of Tennessee* v. *Saffarrans*, 3 Humphreys, 597, 606; and *Rogers* v. *Batchelor*. Probably the highest authority as to what is the state of the English law on this subject, is to be found in the opinion of the Master of the Rolls in *Frankland* v. *M'Gusty*, 1 Knapp's Cases before the Privy Council, 274, 301, 306, in 1830, who undertook to examine all the authorities on the subject, and to report to the Privy Council what the law was. He said, that upon a consideration of all the authorities, the law is, that, *simpliciter*, if there be nothing more in the case, bills drawn by one partner for a separate debt, in the partnership name, could not be recovered upon as against the partnership firm; but that the person claiming payment of the bills must prove either a direct assent of the other partners to the formation of the bills, or, if not such direct assent, that there were some circumstances in the transaction, from which the party taking them might reasonably infer, that they were given with the

consent of the other partners; and that, if such circumstances exist, it lies upon the partners to prove the fraud: and he said that *Ridley* v. *Taylor*, 13 East, 175, was to be reconciled with the other cases, upon the ground that there did exist in that case, such special circumstances as to afford the separate creditor a reasonable ground of belief, that the security was not given to him in fraud of the partnership, and therefore to repel the general presumption, that a partnership security when applied in payment of a separate debt, is in fraud of the partnership.

It will be observed, that to defeat the title of a holder of partnership paper, he must have knowledge that it is given for a private debt, or for the security of a third person. Such paper carries on its face notice that it is partnership property: and the question whether there must be knowledge that the consideration for which it was given, is a private debt, is entirely different from the question considered in *Rogers* v. *Batchelor*, whether the creditor receiving funds from a partner in payment of his own individual debt, must have knowledge that it is partnership property. When a person has notice that a debt is the individual debt of a partner, he has notice that it is a subject in which the partner has no more authority to dispose of partnership property, than he has to dispose of the property of third persons; and title is a matter in which every one who receives property is bound to inquire for himself.

On the same ground as in the case of negotiable paper given by way of security or accommodation, it is held that in ordinary cases the implied power of a partner does not extend to giving a guaranty in the name of the firm, where that is not the business or custom of the firm; *Sutton & M'Nickle* v. *Irwine and another*, 12 Sergeant & Rawle, 13; *Mayberry, Pollard & Co.* v. *Bainton & Co.*, 2 Harrington, 24; see, also, *Hasleham* v. *Young*, 5 Queen's Bench, 833. If one partner assign a judgment, and guaranty it, the guaranty will not bind the firm without distinct evidence that there was an assent, authority, or recognition of it, by the other members, or that giving such guaranties was in the usual course of the partnership business; *Hamil* v. *Purvis*, 2 Penrose & Watts, 177; and see *Sandilands* v. *Marsh*, 2 Barnewall & Alderson, 673. It is a general principle, also, that the implied power of a partner to bind the firm does not extend to illegal contracts; such as usurious loans; *Hutchins* v. *Turner*, 8 Humphreys, 415.

Of the respective rights of execution creditors of the firm, and of the partners individually, in relation to the joint and separate effects of the partners.

IN THE MATTER OF PETER S. SMITH, AN ABSCONDING DEBTOR.

In the Supreme Court of New York.

JANUARY, 1819.

[REPORTED, 16 JOHNSON, 102–109.]

Upon an execution against a partner for his separate debt, which is levied upon partnership property, no more is transferred to the purchaser than the partner's interest, *or his proportion of the* surplus *of the joint property remaining after payment of the partnership debts.*

BY virtue of a warrant of attachment, issued by N. Williams, commissioner, under the Act for relief against absent and absconding debtors (1 N. R. L. 157), the sheriff of Ontario seized sundry *goods*, wares, and merchandises, belonging to P. S. Smith and William Soulden, who were partners in trade, and which, at the time of seizure, were in the hands of Trueman Smith, in a store occupied for the purpose, at Geneva, where he was selling them for the account of Smith & Soulden; also, the *books of account* in the same store, and 146 dollars and 73 cents, in *cash*, belonging to S. & S.

Under a second attachment, directed to the sheriff of Oneida, the sheriff of that county seized the *books of account* and *papers* of S. & S., as copartners, and also claiming *goods* belonging to S. & S., so far as they could be held under the attachment, they being already subject to an execution issued against S. & S. at the suit of Thomas Beekman.

One of the attachments was for the separate debt of Peter S. Smith, and the other for the partnership debt of S. & S.

Talcot, in behalf of Soulden and Smith, moved to set aside the attachments, and that the property taken by the sheriffs under them be restored.

He contended that the attachments, on the face of them, were irregular. The sheriff is commanded to attach not only the property of Smith, but all the property, real and personal, of S. & S. If any

attachment would lie at all, it can only be against the separate property of the absconding debtor. The books of account and papers have also been taken.

But the act does not contemplate the issuing of an attachment in the case of *partners*, where one absconds, but the other remains within the state. It speaks throughout of an individual debtor. The case of a vessel, mentioned in the 21st section of the act, is the only one in which the legislature appear to have thought that partnership property was to be taken; and it is provided, that if any person shall give security for the appraised value, the vessel is to be discharged. If the act is applicable to this case, it must be equally so in the case where one of several partners is *absent* or resident abroad; and it will be in the power of a creditor, to the amount of one hundred dollars, to break up the most respectable commercial house in the state. It is true, the court, in the case of Cyrus Chipman (14 Johns. Rep. 217), have said that an attachment might issue against the property of an absent or absconding partner; but the case of Crispe v. Perrit (Willes, 471), to which the Court was referred, and on which their decision seems to be founded, is not analogous. In M'Comb v. Dunch (2 Dallas, 73), the Philadelphia Court of C. P. held, that partnership property could not be attached to answer the separate debt of one of the partners.

There can be no doubt that this is a proper motion. A third person, whose goods have been taken by a sheriff, under an execution, may apply to the Court, by motion, to have the goods restored to him. (Tidd's Pr. 935.) It is for the protection and advantage of the sheriff, as it is more summary and less expensive than an action against him.

Wells and *J. Lynch*, contra. There is a suit pending in the Court of Chancery, where all the questions relative to this property will be properly decided. The applicants here do not state, in their notice, to whom the property is to be restored. There was a claim to the property put in by a person of the name of Van Santfort, before the sheriff, and the jury decided against him. Besides, the property is already under *execution*, and S. & S. have no right to demand its restoration.

In Mersereau v. Norton (15 Johns. Rep. 179), the Court decided, that the property of an absconding debtor, which he has, as a tenant in common of a chattel, with another, might be seized and sold by the sheriff, under an attachment; but although the sheriff seizes the whole, he can sell only an undivided moiety, and the vendee becomes a tenant in common with the other cotentant, or part owner. There seems to be no reason for any distinction between *partners* and tenants in common of a chattel. In the case of a partnership, there is a survivorship, for the special purpose of settling the partnership concerns; but the surviving

partner is merely a trustee, as to the moiety of a deceased partner. In Moody v. Payne (2 Johns. Ch. Rep. 548), the chancellor takes it to be settled law, that the interest of one partner in the copartnership property, may be taken and sold under an execution, on a judgment against such a partner, for his separate debt; and he dissolved the injunction which had been issued in that case, to stay the sale by the sheriff, who had seized the partnership property. If the partnership property may be seized and sold on *execution*, why may it not, also, be seized under an attachment, which is a kind of anticipated execution against a debtor who has withdrawn himself from the reach of the ordinary process of law? In Mersereau v. Norton, this Court considered an attachment in the same light as an execution.

T. A. Emmet, in reply. Proceedings against a bankrupt, as in Crispe v. Perrit, are on the ground of criminality; and there may be some supposed analogy, as to *criminality*, between a bankrupt and an *absconding* debtor. But the statute makes no distinction between an *absent* and absconding debtor. Both are placed on the same footing. They are not, therefore, to be regarded as criminal. Again; bankruptcy dissolves the partnership; but can the temporary absence of one partner, or his absconding to avoid legal process in a particular case, have that effect? How, then, does the case of a bankrupt apply? The consequences of applying the statute to the case of partners, may, as has been suggested, be of the most serious nature. Some of the most opulent commercial houses here, have partners resident abroad.

If the Chancellor, in Moody v. Payne, and the judges in every other case, have felt and expressed the very great inconvenience and embarrassment arising from the seizing of partnership property by execution, for the separate debt of one partner, why increase the inconvenience by suffering partnership property to be attached under this act? An execution does not, necessarily, put a stop to the partnership business; but an attachment, under which all the property, real and personal, of a partnership, with their books of account, papers, &c., is seized, must have that effect. If the act had contemplated the attachment of partnership property, surely there would have been some expressions to show such an intention; and the act would have provided, that the partnership debts should be first paid out of the property. The provisions of the act are, that the property or its proceeds, is to be divided, rateably, among all the creditors, without distinction or preference. If we look at the different sections of the act, (sec. 3, 5, 10, 20, 21,) it is apparent that partnership property was never intended to be attached.

This proceeding is not in the nature of an *anticipated* execution; it

is rather a *sequestration*. The law, in regard to executions against partnership property, is inconvenient and hard enough; but the doctrine now contended for, goes to the destruction of the partnership. It is more extensive, and more injurious, in its effects than bankruptcy. It goes farther than the bankrupt law of any commercial country in the world.

PER CURIAM. Where an *execution* is issued for the separate debt of one partner, it has been the constant practice to take the share which such partner has in the partnership property;(*a*) but it has been settled, at least since the case of Fox v. Hanbury, (Cowp. 445,) that the sheriff can sell only the actual interest which such partner has in the partnership property after the accounts are settled, or subject to the partnership debts. The separate creditor takes it in the same manner, as the debtor himself had it, and subject to the rights of the other partner.(*b*) The sheriff, therefore, does not seize the partnership effects themselves, for the other partner has a right to retain them, for the payment of the partnership debts. (Moody v. Payne, 2 Johns. Ch. Rep. 548.(*c*)

(*a*) Vide Backhurst v. Clinkard (1 Show. 169). Heydon v. Heydon (1 Salk. 392). Anon. 1 Comyn's Rep. 277. Holt, 302, 643. Pope v. Harman (Comb. 217). Tissard v. Warcup (2 Mod. 279, 280. 12 Mod. 446). Jacky v. Butler (Ld. Raym. 871).—[*Note by the Reporter.*]

(*b*) Vide, also, Eddie v. Davidson (Doug. 650, 651). Smith v. Stokes (1 East, 367). Wilson v. Gibbs & Conine (2 Johns. Rep. 282). Taylor v. Fields (4 Vesey, 396). Chapman v. Koops (3 Bos. & Pull. 289). Parker v. Pistor (3 Bos. & Pull. 288).—[*Ib.*]

(*c*) There appears to have been some difficulty as to the manner in which the separate creditor of one partner was to take his execution against the share of such partner, in the joint property of the firm; and the Courts of law and equity seem not to have clearly understood each other on the subject. According to the old cases, at law, the separate creditor took the whole of the joint property, and sold an undivided moiety of it, and applied the funds to the payment of his debt, without giving himself any concern about the rights of the other partner, or previously ascertaining what was the interest or share of each. Since the case of Fox v. Hanbury, the Courts of law have professed to follow the principles of the Courts of equity. (Croft v. Pyke, 3 P. Wms. 182. Ex parte Ruff, 6 Ves. 126, 127. Ex parte Williams, 11 Ves. 5. West v. Skip, 1 Ves. sen. 239, 242.) In Taylor v. Fields (4 Ves. 369), the facts of which case are more fully stated in a note to Young v. Keighly (15 Ves. 559, 560). Ch. Baron M'Donald, in delivering the opinion of the Court, says, that an assignee, or executor, or separate creditor, "coming in the right of one partner against the joint property, comes into nothing more than an *interest* in the partnership, which cannot be tangible, cannot be available, or be delivered, but under an account between the partnership and the partner; and it is an *item* in the account, that enough must be left for the partnership debts." In Eddie v. Davidson, the Court of K. B. directed that it should be referred to a Master to take an account of the share of the partnership effects to which the other partner was entitled, and that the sheriff (who had sold the whole partnership effects under an execution against one of the partners) should pay over to his assignees part of the money, equal to the amount of his share. But the Court of C. B. (3 Bos. & Pull. 288, 289) refused to direct a reference to their *prothonotary*, to ascertain what was the *interest* of

We have considered an attachment under the act for relief against the separate partner, in the partnership effects, the whole of which had been seized by the sheriff, or to stay the execution, until an account could be taken of the several claims on the property. They said, that all the difficulties were to be encountered in equity; that the safest line of conduct for the sheriff to pursue, was to put some person into possession of the defendant's share, as vendee, leaving him and the parties interested to contest the matter in equity, where a bill might be filed. They did not consider, that they had any authority or jurisdiction to order an account to be taken. In Dutton v. Morrison (17 Vesey, 193–205), Lord Eldon understands the rule to be, "that upon an execution against one partner, or the *quasi* execution in bankruptcy, no more of the property which the individual has should be carried into the partnership, than the *quantum* of interest, which he could extract out of the concerns of the partnership, after all the accounts of the partnership were taken, and the effects of that partnership were reduced to a dry mass of property, upon which no person, except the parties themselves, has any claim." In Watson v. Taylor (2 Ves. & Beames, 299, 300), Lord Eldon, in the course of the argument, inquired, "how the sheriff executes the writ under a judgment against one partner, according to the present doctrine of the Courts of law, that he takes the *interest* of the partner. Is not that a dissolution of the partnership?" Mr. *Cooke*, as *amicus curiæ*, said "the way in which the sheriff executes the writ in practice, is by making a bill of sale of the actual interest." Lord Eldon observed, "if the Courts of law had followed Courts of equity, in giving execution against partnership effects, I desire to have it understood, that they do not appear to me to adhere to the principle, when they suppose that the interest can be sold, before it is ascertained what is the subject of sale and purchase." King v. Sanderson (1 Wightw. 50). In The King v. Rock (2 Price's Exchcq. Rep. 198), where partnership property was seized under an *extent* for a debt due to the Crown from one of the firm, the Court refused to grant an *amoveas manus*, in the first instance, but directed a reference to the Deputy Remembrancer, to report an account of the joint and separate property, and to ascertain the clear surplus and proportion of each party; and, afterwards, security being given to answer the Crown's debt, so far as it should appear, on the account, that the Crown was entitled, they ordered an *amoveas manus* to be issued. In Moody v. Payne (2 Johns. Ch. Rep. 548), the Chancellor refused to grant an injunction, on a bill filed for that purpose, to stay the execution at law until an account was taken. He thought, that as the sheriff could sell only the interest of the one partner, subject to the rights of the partnership creditors, there would be no harm in suffering the separate creditor to go on at law; as, if any sacrifice of the interest of the separate partner should be made, by reason of the *uncertainty* of that interest, it could affect only that partner or the separate creditor, who did not raise the objection. And he thought Mr. Maddock (1 Madd. Ch. Rep. 112) was not warranted in his conclusion, that chancery would, on a bill filed by the other partner, stay the execution, until an account was taken of what was due to such separate partner. If the Court of law, then, cannot order an account to be taken between partners, and will not stay the execution to give the solvent partner time to have the account taken in equity, it follows, that the sheriff can sell only the right, title, and interest of the partner against whom the execution issues, whatever it may happen to be, when the affairs of the partnership are wound up, and the account finally taken and settled. In Baker v. Goodair (11 Vesey, 78, 85), where partnership goods had been taken, on a *foreign attachment*, and the *assignees* under a commission of bankruptcy against one of the partners, and the *garnishee*, filed a bill to restrain the proceedings on the attachment, Lord Eldon held, that the proceeding was to be restrained to give an opportunity to have the question decided by the Court, as to the application of the property among the different claimants. In Taylor v. Fields (15 Vesey, 559, note. S. C. 4 Vesey, 469), the sheriff seized all partnership effects, under an execution against one of the partners, on being indemnified by the

absent and absconding debtors, as analogous to an execution;(*a*) and in the matter of Chipman, (14 Johns. Rep. 217,) we decided that it might issue, where one of several partners had absconded, for a partnership debt. But the sheriff can take the separate property only, of the absconding debtor. He cannot seize the partnership effects, for the other partner has a right to retain and dispose of them, for the payment of the partnership debts. The right of the *trustee* appointed under this act, will attach on the *interest* only of the absconding debtor in those effects, or to his proportion of the surplus remaining, after payment of all the debts of the partnership. The case of partners, is different from that of tenants in common of a chattel.(*b*)

We shall, therefore, order the goods, books, &c., to be restored, but without cost to either party.

The following rule was entered: "*Ordered*, that the sheriff of the county of Ontario do restore to William Soulden, or to such person as he shall appoint to receive the same, the goods, books and moneys, taken by the said sheriff, under the first-mentioned attachment, and the other goods or property of the said Soulden & Smith, as partners, which he may have so taken: *And* that the sheriff of the county of Oneida do, also, restore to the said William Soulden, or to such person as he shall appoint to receive them, the books of account, and papers, taken by the said sheriff, as aforesaid, under the second attachment; and that, as to the goods taken on the said execution, and claimed, also, by the said sheriff, by virtue of the said attachment, that he do henceforth surcease all proceedings, or claims to the said goods, under or by virtue of the said warrant of attachment."

joint creditors, gave up the partnership effects, and the creditor, of the separate partner, brought an action against the sheriff for a false return. The partners having become bankrupts soon after the judgment, a bill was filed by the assignees, to be quieted in the possession of the partnership effects, and for an account, and to restrain, by injunction, the suit against the sheriff. The Court ordered the assignees to pay into court 640 pounds, without prejudice, and in default thereof, the defendant to be at liberty to proceed in his action; and it appearing, on an account taken of the interest of the separate partner, that there was no balance due to him, after payment of the partnership debts, the injunction which had been issued in the mean time, was made perpetual.—[*Note by the Reporter.*]

(*a*) In Morley v. Strombom and others (3 Bos. & Pull. 254), it was held, that where three partners, two of whom resided abroad, were sued for a partnership debt, and the resident partner appeared by himself, but refused to appear for his copartners, the sheriff, on a *distringas* against the non resident partners, to compel their appearance, might take the partnership effects, in the possession of the resident partner, though purchased and paid for by him alone; and the Court refused to relieve him, saying, that what might be taken under an execution, might be taken under a distress.—[*Note by the Reporter.*]

(*b*) Vide Mersereau v. Norton (15 Johns. Rep. 179).—[*Note by the Reporter.*]

M'CULLOH *v.* DASHIELL'S ADM'R.

In the Court of Appeals of Maryland.

JUNE, 1827.

[REPORTED, 1 HARRIS AND GILL, 96–107.]

Joint creditors, in equity, can only look to the surplus of the separate estate, after payment of the separate debts.

Separate creditors, in equity, can only seek indemnity from the surplus of the joint fund, after the satisfaction of the joint creditors.

Where the claims of joint creditors do not come into conflict with those of the separate creditors, but only with the interest of the representatives of the deceased partner, equity will decree to joint creditors a satisfaction of their claims, by considering them, as they are considered at law, both joint and several.

At law, the joint creditors may pursue both the joint and separate estate, to the extent of each, for the satisfaction of their joint demands, without restriction from a court of equity; yet when by the death of one of the partners, the legal right survives against the surviving partner, and is extinguished against the deceased partner, that court will give to the separate creditors all the advantages, thus thrown away by accident upon them.

The assets of insolvents are distributable according to equity.

APPEAL from Somerset County Court, sitting as a Court of Equity. In this case the bill of the complainant (now appellant) stated, and the parties admitted, that in 1817 Peter Dashiell and Richard Bennett were partners in trade, dealing in merchandise, under the firm of Dashiell and Bennett. That Chase and Tilyard, being indebted to the complainant, drew a bill of exchange on Dashiell and Bennett, directing them to pay to the order of the complainant $700, which was accepted by Dashiell and Bennett. That the complainant in the year 1818 instituted a suit at law against Dashiell and Bennett for the recovery of the money due on the said acceptance, and pending the suit Dashiell died intestate. That judgment was afterwards recovered against Bennett, the surviving partner, and upon the return of the execution issued on the judgment, Bennett petitioned and obtained the benefit of the act for the relief of insolvent debtors. That at the time of his petition and

discharge he had no property; and no part of the said judgment had been paid. That the defendant (the appellee) obtained letters of administration on the estate of Dashiell, and had assets in his hands to the amount of $13,061 43. That the personal estate of Dashiell is insufficient to pay his separate and private debts. That the defendant, as his administrator, had received of the partnership funds $35 93. The complainant claimed to be paid out of the assets in the defendant's hands, an equal proportion of their claim with the other creditors of Dashiell. But the County Court [Martin, Ch. J. and Robins, A. J.] refused to allow the complainant's claim, and decreed that no part of his claim should be paid, except from the partnership funds, until the separate and individual debts of Dashiell should be first paid; and that the surplus, if any, should be applied to the payment of the partnership debts, and not otherwise. From this decree the complainant appealed to this court.

The cause was argued at last June term before BUCHANAN, Ch. J., and EARLE, STEPHEN, ARCHER, and DORSEY, Js.

J. Bayly, for the Appellant, stated the question to be, Whether the complainant in the court below, and now appellant, was entitled to be paid an equal proportion of his claim, with the other creditors, out of the assets in the defendant's hands? Or whether his claim shall be postponed until all the separate and individual creditors shall have been first paid, and only admitted to a proportion of the surplus, if any?

To show that the complainant was entitled to be paid an equal proportion of his claim with the separate creditors of Dashiell, out of the assets in the hands of the defendant, he referred to the acts of 1798, ch. 101, sub ch. 8, s. 17, and 1805, ch. 110, s. 7. Murray & Sansom v. Ridley's Adm'x, 3 Harr. & M'Hen. 175. Hammersly v. Lambert, 2 Johns. Ch. Rep. 508. Tucker v. Oxley, 5 Cranch, 34, 39. Ex parte Elton, 3 Ves. 238. Stephenson v. Chiswell, Ib. 566.

R. N. Martin and *Tingle*, for the Appellee. Where there is a separate estate, and individual and copartnership creditors, the first have the first claim out of the estate. The interest which copartnership creditors have, is after the payment of individual debts. 2 Madd. Ch. 463. Partnership effects shall in the first place be applied to pay partnership debts. The separate creditors can only resort to the surplus. 1 Madd. Ch. 463. 2 Madd. Ch. 466. Ex parte Crowder, 2 Vern. 706. Ex parte Hunter, 1 Atk. 227. Ex parte Cook, 2 P. Wms. 500. Ex parte Elton, 3 Ves. 238. Ex parte Clarke, 4 Ves. 677. Ex parte Abell, Ib. 837, 839. Thomas v. Frazer, 3 Ves. 399 (note). Ex parte

Clay, 6 Ves. 813. Ex parte Reeve, 9 Ves. 590. Gray v. Chiswell, Ib. 124. Gow on Part. 270, 271, 272, 317, 367, 461. 1 Bac. Ab. tit. Bankruptcy, 460. Lane v. Williams, 2 Vern. 277, 292. Simpson v. Vaughan, 2 Atk. 31.

J. Bayly, in reply cited Murray v. Murray, 5 Johns. Rep. 60. Act of 1798, ch. 101, sub ch. 8, s. 5, 7, 10, 16. Ex parte Hodgson, 2 Bro. Ch. Rep. 5. Harrison v. Sterry, 5 Cranch, 302.

Curia adv. vult.

ARCHER, J., at the present term, delivered the opinion of the court. The bill filed in this cause states that a bill of exchange was on the 18th of August, 1817, drawn by the firm of Chase and Tilyard upon Dashiell and Bennett, copartners in trade, for the sum of $700, in favour of the complainant, and that it was by the drawees duly accepted; that a suit was instituted against Dashiell and Bennett upon the said acceptance by the complainant; that pending the action in Somerset County Court, the intestate of the defendant, and one of the firm of Dashiell and Bennett died, and judgment was obtained against Bennett, the surviving partner. That Bennett applied for and obtained the benefit of the insolvent laws of this state, having been finally discharged at November term, 1820, no part of the claim having been paid; that the said surviving partner had no property either joint or separate, wherewith satisfaction could be made of the said debt. That Parsons, the respondent, took out letters of administration on the estate of Dashiell; and prays that a decree may pass directing the administrator to pay the amount of the acceptance from the assets of the deceased, or such part thereof as, upon a just distribution of the assets, he may as one of his creditors be entitled to. The bill of exchange above referred to, the judgment, and certificate of the final discharge of Bennett, are filed as exhibits in the cause; and the following admission of counsel is contained in the record: "That the trustee of Richard Bennett, an insolvent debtor, has not received any property belonging to Bennett; that no part of the debt due to the complainant has been paid either by the trustee, or by Bennett; that the personal estate of Dashiell is insufficient even to pay his private and individual creditors; that the defendant has received of the partnership debts due to the firm of Bennett and Dashiell, $35.93. The parties moreover admit the exhibits as above stated as testimony, and waive the formality of making either the trustee, or Bennett the surviving partner, a party to these proceedings."

The question presented for the decision of this Court upon this record, is whether the complainant is entitled to be paid an equal proportion

of his claim, with the separate creditors of Dashiell, out of the assets in the defendant's hands; or whether the claim, being a joint claim, shall be postponed until all the separate creditors shall be first fully paid?

The question thus stated is one of considerable importance; and although, undoubtedly, of very frequent occurrence in the subordinate testamentary tribunals, has never, we believe, received an adjudication in the appellate court, or in any of the higher courts of original jurisdiction.

There are very few cases in the English books bearing directly upon the distribution of assets, in a case situated as this is. It has been contended in argument, that it must be governed by the principles adopted in England in the marshalling of assets in bankruptcy. And as *they* are distributed *according to equity*, if the rule can be definitively ascertained, it ought to govern here. But an examination of the authorities will show, that it has been very unsteady and fluctuating; varying frequently in form, often in substance, according to the ideas entertained by each succeeding chancellor, of the rights of the joint and separate creditors; and moulded more upon their notions of convenience to all the parties concerned, than as standing upon legal reasoning. Dutton v. Morrison, 17 Ves. 205. Amid the multitude of decisions which have taken place upon this subject it is no easy task to trace the history of the rule of distribution in bankruptcy.

But this examination will satisfy us, that amidst all the fluctuations of the rule, the principles established in the first cases occurring more than a century since, have been but for a short period materially encroached upon; and that now the leading principles of distribution, with some modifications, are what they were originally established to be.

In Ex parte Crowder, 2 Vern. 706, decided in 1715, which was an application on the part of the separate creditors, to be let in under a joint commission, the separate estate being of small value, it was decided that they might be permitted to prove their claims under the joint commission, but that the joint funds were applicable, in the first instance, to the payment of joint debts, and then the separate debts; and that the separate effects should be applied to the payment of the separate debts, and that the surplus should go to the liquidation of the joint debts. In Ex parte Cook, 2 P. Wms. 500 (in 1728), Lord Chancellor King followed the determination in Ex parte Crowder, and declared it to be settled, and that it was a resolution of convenience, that joint creditors shall be first paid out of the partnership estate, and the separate creditors out of the separate estate of each partner, and if there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be applied to pay the separate creditors; and

if there be on the other hand a surplus of the separate estate, beyond what will pay the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors. In Ex parte Hunter, 1 Atkyns, 228 (in 1742), Lord Hardwicke says, as between joint and separate creditors the joint estate shall be applied to the joint creditors, and the separate estate to the separate creditors. The rule that prevailed during the administrations of Lords King and Hardwicke, from 1715 down to the time of Lord Thurlow, was that joint creditors could not prove under a separate commission, for the purpose of receiving dividends with the separate creditors (Watson on Part. 244, Ex parte Taitt, 15 Ves. 195); but only for the purpose of going for the surplus after the satisfaction of the separate creditors. But Lord Thurlow broke in upon the established practice of the court, which had prevailed for sixty years; and in 1785, in Ex parte Hodgson, 2 Bro. Cha. Rep. 5, resolved that there was no distinction between joint and separate creditors; that they ought to be paid out of the bankrupt's estate, and his moiety of the joint estate; and that the joint creditors ought to come in *pari passu*, with the separate creditors. This resolution laid down, as it is, in broad and general terms, would appear to have broken down all the boundaries previously established, between the rights and priorities of the joint and separate creditors; yet if taken with the limitations with which it is said, by Watson on Partnership, to have been qualified, it will appear to have made this innovation only—that they should all, joint as well as separate creditors, be permitted to prove their claims against the separate estate upon a separate commission; but that it was competent for the assignees to confine the joint creditors, where there was a joint estate, to that fund exclusively, by filing a bill in equity against the other partners, and obtaining an injunction upon the order in bankruptcy. And that this was the consequence of Lord Thurlow's adjudication is apparent from Lord Rosalyn's judgment in Ex parte Elton, 3 Ves. 238. Thus the rights of the joint and separate creditors, on their respective funds where there was a joint estate, was maintained, notwithstanding the alteration thus made in the order in bankruptcy. In the case of Ex parte Elton, decided in 1796, the rule established in 1785, was deemed by the then chancellor to be an inconvenient one, because every order which he passed in bankruptcy, that the joint creditor should receive a dividend out of the separate estate, might give rise to a bill in equity, on the part of the separate creditors, to restrain this order and to secure the appropriation of the separate estate to the satisfaction of the separate debts; and it was adjudged, that a joint creditor might prove his claim under a separate commission, not for the purpose of receiving a dividend, until an account should be taken of what he had or might have received from the part-

nership effects. Thus the chancellor, in the modification which he gave to the order in bankruptcy, exercised his equity jurisdiction, and gave to each order the operation of an injunction, without the expense of a bill, whereby the joint creditor was restrained from coming on the separate fund until, in the final adjustment of the copartnership and individual accounts, equity should determine what portion of the separate funds should be allotted to the joint creditor. And he says, that the joint creditors are in the situation of a person having two funds. The court will not allow him to attach himself to one fund, to the prejudice of those who have no other, and *to neglect the other fund.* He has the law open to him, but if he comes to claim a distribution, the first consideration is, what is that fund from which he seeks it? It is the separate estate which is particularly attached to the separate creditors. Upon the supposition there is a joint estate, the answer is, apply yourself to that, you have a right to come upon it. The separate creditors have not. Therefore do not affect the fund attached to them, till you have obtained what you can get from the joint fund. Thus it would appear that the ancient order of distribution was restored with this modification, that the joint creditors might prove, but could not, as before, receive dividends without the further order of the chancellor, which should be made after the settlement of accounts, which were directed to be kept as before, separate. This important principle also seems distinctly to be set up by this decision, that where there are *no joint effects*, and no solvent partner, that the joint creditors might be permitted to come in with the separate creditors, a doctrine which appears to have been first recognised by Lord Thurlow, in Ex parte Hayden, 1 Bro. Ch. Rep. 453, for before that period it has been seen that they could only come upon the surplus. This doctrine Lord Eldon has uniformly adhered to, although it will be found that he repeatedly complains of it, as a rule producing some inconveniences, and liable to several objections, as will be seen by a reference to Ex parte Pinkerton, 6 Ves. 813 (note). Ex parte Kensington, 14 Ves. 447. Ex parte Kendal, 17 Ves. 521. Ex parte Abell, 4 Ves. 837. In the case of Ex parte Kensington, the joint creditors were forbid receiving dividends with the separate creditors, on the ground that there was one *solvent partner*, although there was *no joint estate.* That the petitioner would have been allowed had the partner been bankrupt, is the necessary inference from the case; and in the former case the joint creditors were permitted to come in where there were no joint effects, upon the ground that the solvent partner was abroad, and that therefore the difficulty was increased in resorting to him.

Such is a succinct history of the law upon this subject, and the modern doctrine has been summarily stated by Eden, in his notes to Ex parte

Hodgson, 2 Bro. Ch. Rep. 5, by Vesey, in Ex parte Taitt, in his 16th vol. 194,(*n*) and also by Maddock, in the 2d volume of his treatise on the principles and practice of the Court of Chancery, 463. They all unite in saying (and they are fully supported by the authority cited by them respectively), "that the joint creditor may prove under a separate commission, for the purpose of assenting to, or dissenting from, the commission, or of going against the surplus after the satisfaction of the separate debts, not to vote on the choice of assignees, or receive dividends with the separate creditors (except a joint creditor who is a petitioning creditor under the commission), or where there are *no joint effects*, or no solvent partner, or no separate debts, or the joint creditors will pay twenty shillings in the pound to the separate creditors."

The case of Gray v. Chiswell, 9 Ves. 124, as it is strongly illustrative of the above doctrines, and was a case, not in bankruptcy but in equity, will be particularly adverted to. A bill was filed by the creditors of Cook against the heir and executrix of Chiswell, claiming to come upon the real estate of Chiswell, for the amount of their debts, as the personal estate had been absorbed by specialty creditors. Chiswell had been a partner of Nantes; Nantes had survived him, and had become bankrupt. The joint creditors of Nantes and Chiswell proved their claims before the master. The joint estate was insolvent, being only able to *pay an inconsiderable dividend*, and the sum supposed to be raised by a sale or mortgage of Chiswell's real estate, was not more than sufficient to pay the separate creditors. A contest arose between the joint and separate creditors, the former insisting on their right to come in *pari passu* with the separate creditors, upon this fund, thus proposed to be raised out of his separate estate. But the Chancellor (Lord Eldon) refused to permit them, upon the ground that in bankruptcy it could not be done, and that the accidental death of Chiswell ought not to put the joint creditors in a better situation than they would have been, had he lived and become bankrupt. If there *be any estate* for distribution among the joint creditors, although the surviving partner is bankrupt, they are not, in bankruptcy, permitted to come in with the separate creditors. The chancellor, therefore here, as in bankruptcy, would not permit the joint creditors, who had effectuated their claims under the commission against Nantes, although they had received but an inconsiderable dividend, to come in *pari passu* with the separate creditors. There was here *some* joint estate, and then the general rule applied, that each species of creditor must be satisfied out of the fund to which his debt particularly attaches itself; and the rule has been carried to this extent, that if there be a joint fund *of any, even the smallest description* which is capable of being realized, the rule *is inflexible*, and the joint creditors will not be permitted to receive dividends from the separate estate. Ex

parte Peake, Gow. on Part. 408. Thus we perceive from the case of Gray v. Chiswell, that the rule, which is applied in bankruptcy, is extended to cases in equity.

It is difficult to say upon what the rule in equity and in bankruptcy, with the modification above stated, is founded. The joint estate is benefited to the extent of every credit which is given to the firm, and so is the separate estate in the same manner enlarged by the debt it may create with any individual, and there would be unquestionably a clear equity in confining the creditors to each estate respectively, which has thus been benefited by their transactions. So far the rule is sensible and intelligible; and although at law the joint creditors may pursue both the joint and separate estate to the extent of each, for the satisfaction of their joint demands, which are at law considered both joint and several, without the possibility of the interposition of any restraining power of a court of equity; yet when, by the death of one of the parties, the legal right survives against the surviving partner, and is extinguished against the deceased partner, a court of equity will give to the separate creditors all the advantages thus by accident thrown upon them, and will not, by adopting the rigorous rule of the law merchant, thereby injure and prejudice the separate creditor, upon whom, viewed in connexion with the separate fund, it always looks upon as meritorious and entitled to the distribution of assets to the preference. But although a court of equity, as against the separate creditors, will not adopt the law merchant, which considers the contract both joint and several; yet whatever doubts have heretofore been entertained on the subject, where the claims of these joint creditors do not come in conflict with the separate creditors, but only with the interests of the representatives of the deceased partner, it is now undeniably settled, that equity will, as against such representatives, decree to joint creditors a satisfaction of their claims, by considering them, as they are considered at law, both joint and several.

But although these distinctions are built on the solid foundations of reason and justice, it is not altogether so easy to perceive why, when there is no joint fund, and *no* solvent partner (by no solvent partner is meant bankrupt partner), the joint creditor should thereby acquire the equitable right of coming in with the separate creditors *pari passu*, upon a fund in no manner benefited by the creation of his debt. Such, however, is the settled and established rule, as we are enabled to collect it both in bankruptcy and in equity; and according to this rule the complainant could not, in this case, be permitted to seek indemnity for his claim, from the separate estate *pari passu* with the separate creditors, as it is a conceded fact in the cause, that there are joint funds, although very inconsiderable, and greatly insufficient to pay the debt of the complainant.

But were this not the fact, this court would have no difficulty in saying, that the complainant should be postponed to the separate creditors; and that whether there was any joint estate or not, he should not be permitted to divide with the separate creditors a fund insufficient to pay them. We are, therefore, disposed to adopt the ancient rule as more consonant to equity and justice, that the joint creditors can only look to the surplus, after the payment of the separate debts; and on the other hand, that the separate creditors can only seek indemnity from the surplus of the joint fund after the satisfaction of the joint creditors.

It is believed that the case of Tucker v. Oxley, 5 Cranch, 34, somewhat militates against the views which we have taken of the English law upon this subject, and it has been pressed upon the court, by the appellant's counsel, as containing principles decisive of this case. It was there determined, that under the bankrupt law of the United States (and the bankrupt law of England and that of the United States, so far as connected with the matter there decided, are nearly identical), that a joint debt may be set off against the separate claim of the assignee of one of the partners, but that such set-off could not be made at law, independent of the bankrupt system. The particular decision in this case, it is not material perhaps to examine, because it was a case at law, and the relations of the parties were materially different. It would perhaps be sufficient to say, that the Supreme Court, although they conceive a legal right exists in the joint creditors to prove and receive dividends out of the separate estate, explicitly admit, that such right it is competent for a court of equity to restrain, and to compel the exercise of such right in such manner as not to prejudice or to do injustice to others. We might in any view of the cause before us, dismiss without further observation, the case of Tucker v. Oxley; but we cannot forbear remarking, that the case upon which the court there build their opinion, that a legal right universally exists in the joint creditors upon a separate commission to come on the separate estate *pari passu* with the separate creditors, is the case where a joint creditor is the petitioning creditor, and is an excepted case from the general rule. (Vide argument of Sir Samuel Romily in Ex parte Ackerman, 14 Ves. 604, and the authorities referred to by Vesey.) Maddox in his 1st vol. 463, considers this *a singular* exception to the general rule; and the reason assigned for the adoption of the exception is, that the joint creditor, having petitioned for the commission of bankruptcy, it might be considered in the nature of a modified execution, taken out by him, as well for his own benefit as for that of the separate creditors; and that it would be against all equity to permit the separate creditors to pre-

vent the joint creditor from reaping the fruits of an execution taken out for his and their mutual benefit.

Thus, without encroaching upon any decided case, and acting in strict conformity to the settled doctrines, it must be determined, that although Bennett is a certificated insolvent, yet as the separate estate of Dashiell is insufficient to pay his individual debts, the complainant, a joint creditor of Bennett and Dashiell, cannot be permitted to come in *pari passu* with the separate creditors of Dashiell.

Decree affirmed.

The respective rights of the two classes, of joint and individual creditors, in relation to the partnership effects and to the separate estates of the partners, are different, during the time that the partnership continues, and its effects are within the control of the partners and subject to the creditors at law, and after the partnership is broken up by bankruptcy, insolvency, or death, and the estate has gone into equity for distribution. The case *In the matter of Smith* expresses the relation of the two sets of creditors at law, and during the solvency and continuance of the firm: and *M'Culloh* v. *Dashiell* states the rule in bankruptcy and equity. These may be considered separately.

1. At law, and while the partnership is going on.

The private estate of a partner is subject both to his private creditors, and to the partnership creditors, who have against it precisely the same rights; *Newman* v. *Bagley & Tr.*, 16 Pickering, 570; *Allen* v. *Wells*, 22 Id. 450; *Ladd* v. *Griswold et al.*, 4 Gilman, 25, 36; *dicta* in *Bell* v. *Newman*, 5 Sergeant & Rawle, 78, 86. But upon the partnership effects, the joint creditors have a prior claim; not by virtue of any inherent right or equity in them, but in consequence of the equity between the partners that the partnership accounts shall be settled before any separate interest is drawn out; each partner being considered as holding his interest in the joint effects, subject to a trust for the partnership creditors, and the claims of his copartner, and only the residue for his own benefit. Accordingly, the separate beneficial interest of each partner, in the joint property, in relation to his private creditors on execution or on a separate commission of bankruptcy, and to purchasers of his share, is his residuary share after the partnership accounts are settled. For a partnership debt, therefore, though there be judgment only against one partner, the entire joint property is sold absolutely; *Taylor & Fitzsimmons* v. *Henderson*, 17 Id. 453, 457: but when an execution issues against one for his individual debt, and is levied on partnership property, the rule as stated in the *Matter of Smith*, and more fully in the learned note of Mr. Johnson, applies; the property is sold subject to the partnership debts and the claims of the other partner, and the interest vested in the purchaser is just that which the partner himself had, namely, the residual interest after the settlement of the firm accounts: and this principle has been repeatedly affirmed; *United States* v. *Hack et al.*, 8 Peters, 271, 276; *Nicoll* v. *Mumford*, 4 Johnson's Chancery, 523, 525; *Averill* v. *Loucks*, 6 Barbour's S. Ct., 20; *Muir*

v. *Leitch*, 7 Id. 341; *Knox et al.* v. *Summers*, 4 Yeates, 477; *Doner, &c.* v. *Stauffer, &c.*, 1 Penrose & Watts, 198; *Snodgrass' Appeal*, 1 Harris, 471; *Pierce* v. *Jackson*, 6 Massachusetts, 242; *Commercial Bank* v. *Wilkins*, 9 Greenleaf, 28; *Filley* v. *Phelps*, 18 Connecticut, 296, 301; *Morrison* v. *Blodgett et al.*, 8 New Hampshire, 238; *Christian* v. *Ellis et als.*, 1 Grattan, 396; *White* v. *Woodward & Rand*, 8 B. Monroe, 484; *Ex parte Stebbins & Mason*, R. M. Charlton, 77; *Sutcliffe* v. *Dohrman*, 18 Ohio, 181. See also *Garbett* v. *Veale*, 5 Queen's Bench, 408.

Moreover, a court of equity will not interfere to stop an execution at law, in such a case, until the partnership accounts have been taken; *Moody* v. *Payne*, 2 Johnson's Chancery, 548; *Sitler & Johnson* v. *Walker*, 1 Freeman's Chancery (Kentucky), 77; see *Brewster* v. *Hammet*, 4 Connecticut, 540; nor, in ordinary cases, will the court out of which the execution issues, interfere on motion; see *Chapman* v. *Koops*, 3 Bosanquet & Puller, 289; and *Phillips* v. *Cook*, 24 Wendell, 390, 401, 408. This preference of the joint creditors, however, does not exist in the case of a secret partnership; *Lord* v. *Baldwin*, 6 Pickering, 348; *French et al.* v. *Chase*, 6 Greenleaf, 166; though the contrary was held in *Witter* v. *Richards*, 10 Connecticut, 37, 40.

To reconcile the various cases relating to the satisfaction of separate creditors out of partnership property, it is necessary to distinguish between a common law execution against tangible chattels, such as a *fieri facias*, and a foreign attachment, or proceeding in its nature, against a debt due to the firm, or property belonging to it in the possession of a garnishee.

According to one class of cases a foreign attachment, or proceeding in the nature of a foreign attachment, against a debt or other chose in action, and also against chattels in the possession of a garnishee, by its very nature, attaches only upon the separate *beneficial* interest of the partner in the debt, or other subject, in the hands of the garnishee; because it is a part of the proceedings to measure and adjudge what is the interest of the partner in the hands of the garnishee. It cannot, therefore, be maintained unless it be proved that the partnership is solvent, and be shown what interest the partner has in the firm effects after all the debts are paid; *Fisk et al.* v. *Herrick & Trustees*, 6 Massachusetts, 271; *Lyndon* v. *Gorham*, 1 Gallison, 367; *Church* v. *Knox*, 2 Connecticut, 514; *Barber* v. *Hartford Bank*, 9 Id. 407; *Winston* v. *Ewing*, 1 Alabama, 129: but whether a court of law will, in a foreign attachment, go thus into the partnership accounts, these cases do not appear to determine; and it must be considered doubtful, therefore, upon the cases just cited, whether a foreign attachment will lie against partnership property for a debt due by one partner. In fact, the late case of *Johnson* v. *King*, 6 Humphreys, 233, decides, that an execution creditor of one member of a partnership is not entitled to judgment, in a garnishment (or attachment of execution) proceeding, against a debtor to the partnership. "Such debt," said Reese, J., delivering the opinion of the court, "belongs to, and is assets of the partnership, primarily liable to the satisfaction of partnership debts. If a judgment were given at law, upon the garnishment proceeding against the debtor to the partnership, to satisfy the separate liability of one of the partners, it would unjustly abstract a portion of the fund primarily belonging to the objects and purposes and creditors of the concern. And, in such garnishment, nothing can be done but to give or to refuse judgment. The court has no power to impound the debt, until, by the adjustment of all the partnership affairs, it shall appear whether the separate debtor of the execution creditor has any, and what interest in the general surplus, or in the particular debt so impounded.

Such proceedings cannot take place at law." In Pennsylvania and South Carolina, and perhaps some other states, the practice in foreign attachment is different: on the attachment of a debt, a part, proportionate to the partner's interest in the concern, is adjudged to the creditor, subject in the latter state, to a refunding bond; *M' Carty* v. *Emlen*, 2 Yeates, 190; 2 Dallas, 277, Yeates, J., dissenting; *Schatzill & Co.* v. *Bolton*, 2 McCord, 479; S. C. 3 Id. 33; *Knox* v. *Schepler*, 2 Hill's So. Car. 595; and on the attachment of chattels in possession of the garnishee, the whole is seized, as on a common law execution; *Morgan* v. *Watmough*, 5 Wharton, 125. But the distinction established in the first class of cases, between a foreign attachment and a common law execution, appears to be a necessary consequence of the modern rule in regard to a partner's interest in the partnership effects: because, in foreign attachment, the court adjudges what is the partner's interest in the hands of the garnishee, and then gives its proceeds to the creditor, but on a common law execution, that interest, without its being determined what it is, is sold, and it is left to the purchaser to have its *quantum* settled. The proceeding in Pennsylvania and South Carolina, on the attachment of a debt due to the partnership, is certainly anomalous. It is either the legal or the beneficial interest of the partner that is severed and detached by the judgment against the garnishee; but the former, which is merely a right of action, cannot be divided, and the latter cannot be determined without a settlement of the accounts.

There is no doubt that the writ of attachment, existing in some of the New England States, as an ordinary mesne process, may, for an individual debt, be levied on partnership property, so far as the debtor has an interest in it, subject to the prior claims of the partnership creditors; *Douglass* v. *Winslow*, 20 Maine, 89; *Bradbury* v. *Smith*, 21 Id. 117, 122; *Dow* v. *Sayward*, 12 New Hampshire, 271, 276; but how it is to be executed is perhaps not fully settled. In New Hampshire, the writ is not to be executed by the seizure of the property, and it is only the partner's general residuary interest in the firm that is the subject of levy and sale; *Morrison* v. *Blodgett et al.*, 8 New Hampshire, 238; *Dow* v. *Sayward*. In Massachusetts, on an attachment against one tenant in common, the sheriff seizes the whole possession; *Reed* v. *Howard*, 2 Metcalf, 36, 39; and in Vermont, the property of partners is attached in the same manner; *Reed et al.* v. *Shepardson*, 2 Vermont, 120; *Whitney* v. *Ladd*, 10 Id. 165.

On a *domestic attachment*, against one partner, for either a separate, or a firm, debt, it was decided in *Matter of Smith*, that the sheriff can take the separate property only, of the absconding debtor; that he cannot seize the partnership effects, for the other partner has a right to retain and dispose of them, for the payment of the partnership debts; and that the right of the trustees will attach on the *interest* only of the absconding debtor in those effects, or to his proportion of the surplus remaining, after the payment of all the debts of the partnership: and accordingly, in that case, where on a domestic attachment against one, partnership property had been seized by the sheriff, an order of restitution was made. But *Burgess* v. *Atkins*, 5 Blackford, 337, decides that, on such a proceeding, in such a case, the sheriff seizes the whole partnership property levied on, and sells the absconding debtor's undivided interest.

In the case of a common law execution, such as a fi. fa., for an individual debt, levied on tangible chattels of the firm, the books, indeed, speak of nothing but the partner's residuary interest in the firm being transferred by the sale, yet the method by which that result is accomplished is this. The

partner's several legal interest in the chattel, as cotenant of the partnership property, is levied on, and by the sale vested in the purchaser, subject to the equitable lien of the debts due to the firm creditors and the other partners, on a settlement of accounts: see *Aldrich* v. *Wallace, &c.*, 8 Dana, 287; and per Hosmer, J., in *Church* v. *Knox*, 2 Connecticut, 514, 524. What is meant, therefore, by the language used in the books, is, that the *beneficial* interest vested in the purchaser at sheriff's sale, is only the residue of the partner's interest in the joint effects after the accounts are settled. As to the mode of execution, the sheriff must levy upon and sell the partner's interest in the chattel, and if he levies upon the whole partnership interest, he is a trespasser; *Waddell* v. *Cook*, 2 Hill's N. Y., 47; or he may be made liable in trover to the other partner; *Walsh* v. *Adams*, 3 Denio, 125, 127; and see *Gibson* v. *Stevens*, 7 New Hampshire, 352, 358; but he must take and retain custody of the chattel, and entire custody, for there is no other manner of validly executing the writ; *Moore & Co.* v. *Sample*, 3 Alabama, 319; *Whitney* v. *Ladd*, 10 Vermont, 165 (and see *Reed et al.* v. *Shepardson*, 2 Id. 120, and *Welch* v. *Clark*, 12 Id. 681, 686); *Shaver* v. *White & Dougherty*, 6 Munford, 110, 113; *Burgess* v. *Atkins*, 5 Blackford, 337, 338; *Scrugham* v. *Carter*, 12 Wendell, 131, 133; *Phillips* v. *Cook*, 24 Id. 390 (correcting whatever may have been *contra*, in *The matter of Smith*, in *Crane* v. *French*, 1 Wendell, 311, 313, and *Dunham* v. *Murdock*, 2 Id. 553; but see a doubt expressed in *Burrall* v. *Acker*, 23 Id. 606, 610); *Walsh* v. *Adams*, 3 Denio, 125, 127; *dictum* in *Church* v. *Knox*, 2 Connecticut, 514, 522; and see *Knox et al.* v. *Summers*, 4 Yeates, 477. The late case of *Johnson* v. *Evans*, 7 Manning & Granger, 240, establishes the principle, that the sheriff seizes the whole, and sells the separate interest of the partner against whom the judgment is. After the sale, the sheriff must deliver possession to the purchaser and the other partner, as tenants in common; but the purchaser holds his interest subject, for the benefit of the other partner, to the lien before mentioned, of the partnership debts. See *Walsh* v. *Adams*. But does this lien give the other partner a right at once to take entire possession to the exclusion of the purchaser? It is obvious that before the lien can be proved to exist, it must be shown that the chattel will be wanted for the payment of the debts of the firm, or the claims of the other partner: this, of course, involves matter of account, which ordinarily belongs only to courts of equity. The lien, therefore, under which the purchaser holds his interest, is properly not a legal lien, but merely an equitable subjection to an account, and an equitable lien does not imply a right of possession. Accordingly, as a general rule, where the firm is not bankrupt or insolvent, or partnership rights have not become transferred to assignees for creditors, the remedy between the other partner and the purchaser is only in equity: see *Parker* v. *Pistor*, 3 Bosanquet & Puller, 288, and see the subject discussed at large, and the cases cited, in *Phillips* v. *Cook*, 24 Wendell, 390, 401, &c.; see also, *Garbett* v. *Veale*, 5 Queen's Bench, 408. No doubt there are cases in which a court of law, on occasion of probable insolvency, or other special circumstances, will grant equitable relief, at its discretion, by controlling its own process: but this must depend on the practice of each court.

The principles applicable to this part of the subject have recently been very clearly defined, in exact accordance with the foregoing views, in *White* v. *Woodward & Rand*, 8 B. Monroe, 484, 485, published since the first edition of this work. In that case, the defendant had purchased personal property of the partnership under an execution against one part-

ner, and trover was brought by both partners. "It is well settled," said the court, "that the interest of a partner in partnership property may be sold under execution for his separate debt. As, however, partners, in equity, have a lien upon partnership effects, for the payment of all debts due by the firm, and also to secure any final balance in favour of either, the purchaser acquires by his purchase, the interest only of the partner against whom the execution issued, subject to this equitable lien. Inasmuch, however, as the purchaser would be invested with the legal title to the property, to the extent of the right of the partner whose interest had been sold, it is evident an action of trover in the name of the firm, could not be maintained against him. He would be tenant in common with the other partner as to the property purchased by him; and the partner whose interest in the property had been sold, having no right to it, could not join in an action against the purchaser for its conversion. If the purchaser should convert the property to his own use, inasmuch as he only acquires by his purchase an undivided and unascertained interest therein, subject to all partnership debts and charges thereon, the other partners would have a right, in equity, to call him to an account, and compel him to pay over the whole value of the property, except the interest purchased by him, ascertained by a settlement for that purpose. If there should be no partnership debts or charges upon the property, then he would be entitled to the undivided interest of the partner therein, whose right was sold, whatever it might be. It has been doubted, in cases of the seizure of the joint property for the separate debt of one of the partners, whether a Court of Equity would interfere, upon a bill for an account of the partnership, to restrain the sheriff from making a sale. But if it be admitted that the court ought not to interpose to prevent a sale, yet if it appeared that the vendee, being insolvent, was about to alien the property, or do any other act that could operate to the prejudice of the other partners, and prevent them from obtaining ultimate redress, a court of equity should extend its aid, as no adequate remedy would exist."

Undoubtedly, there are *dicta* in many of the books, as in *The Matter of Smith*, to the effect that the sheriff does not take possession under an execution, and that his sale does not transfer any definite interest in the chattel sold. But the whole discussion resolves itself into the question, whether a partner's interest in partnership effects, can be levied upon, at all, under a common law execution. That it can, principle, policy, and authority, agree: the first, because the partner has a legal interest in possession, which is a leviable estate; the second, because otherwise a debtor, by merely entering into a partnership, might screen all his property from his creditors; and the third, by a series of cases, and a continued practice, from the earliest times. If an execution can be sustained at all, there is no mode in which it can be done but by a seizure of the goods, and a levy and sale of the legal interest. Some judges and text-writers by not distinguishing between cases of solvency and insolvency, and between legal and equitable jurisdiction, have moulded a system on the subject which, through a departure from principles, is law sacrificed, and equity not attained. They have written as if a partnership were a legal person, distinct from the persons of the partners, and as if the ownership of the property were not in the partners as separate persons, but were vested in a *quasi* corporate union of the partners. This confusion of equitable claims with legal interests has proceeded so far in the New Hampshire cases, that not only is not a partner's interest in the partnership effects subject to seizure under a common law execution, according to the

reasoning in *Gibson* v. *Stevens*, 7 New Hampshire, 352, and *Morrison* v. *Blodgett et al.*, 8 Id 238, 251; (and see *Dow* v. *Sayward*, 14 Id., where though it is held that a partner's interest is attachable, it is left uncertain how the attachment is to be executed), but it has been decided that a partner cannot sell or mortgage his undivided interest in a specific part of the partnership property, but only his general resulting interest in the firm; *Lovejoy* v. *Bowers*, 11 Id. 404: from which it would follow that a general assignment by one partner of his separate interest in the firm effects, would not be a dissolution of the partnership, contrary to the authorities.

On the death of one partner, the survivor is entitled to exclusive possession: but upon the bankruptcy of one partner, his assignees are tenants in common with the solvent partner; *Murray* v. *Murray*, 5 Johnson's Chancery, 60, 70: the cases of *The matter of Norcross*, 5 Law Reporter, 124, and *Talcott* v. *Dudley*, 4 Scammon, 429, 435, however, assimilate the cases of bankruptcy and death, and in the former give exclusive possession to the solvent partner.

From the priority which the joint creditors have, it follows that a separate execution is postponed to a joint one; and accordingly if a separate writ is in the sheriff's hands he will be justified in returning it *nulla bona*, or in omitting to proceed, if the firm be insolvent, or a joint writ have come into his hands before the time of sale under the separate writ, because the separate creditor will have lost nothing; *Pierce* v. *Jackson*, 6 Massachusetts, 242; *Commercial Bank* v. *Wilkins*, 9 Greenleaf, 28; *Douglass* v. *Winslow*, 20 Maine, 89; *Dunham* v. *Murdock*, 2 Wendell, 553: see also, *Garbett* v. *Veale*, 5 Queen's Bench, 408: on the contrary, when joint and separate executions are in his hands at the same time, if he executes the separate writ first, it has been held that he will be liable to the joint creditor; *Trowbridge* v. *Cushman*, 24 Pickering, 310; but this seems to be very questionable.

From the principle that on a separate execution, the partner's interest is sold subject to liability for the joint debts, it follows that the money made on a separate execution goes to the separate creditor, and not to the joint creditors, who have no lien on the proceeds of the execution; *Doner, &c.* v. *Stauffer, &c.*, 1 Penrose & Watts, 198; even where there is a joint writ at the time, in the sheriff's hands; *Fenton* v. *Folger*, 21 Wendell, 676.

There appears to be no doubt that the equitable doctrine that the joint effects are pledged to the joint creditors, and that the joint creditors have a priority over separate creditors, and that the interest of the individual partner is the residue after a settlement of the accounts, has now come to be adopted as a principle of law. But this blending of two distinct systems has led to anomaly and confusion; and when questions of difficulty arise, there is no practical method of proceeding but to separate the systems again for a time, and to consider first how the matter stands at common law, and then how it stands in equity, and afterwards how far the principles of equity must be, or can be, administered at law. In the recent decision, of *Johnson* v. *Sanford*, 13 Connecticut, 461, 467, as well as in *Morrison* v. *Blodgett et al.*, 8 New Hampshire, 238, 253, it is suggested that the interference of the legislature has become requisite to remove the perplexity and confusion connected with the subject. The confusion is not in the law; it has arisen from the courts of law having adopted and attempted to manage, a principle of chancery.

2. The respective claims of the joint and several creditors, where the assets have gone into equity for distribution, are illustrated in *M' Culloh* v. *Dashiell*.

At law, as we have seen, while the prior claim of the joint creditors as against the joint estate is to a certain

extent recognised, the joint and separate creditors have equal rights against the separate estate of the partners. In equity, while the priority of the joint creditors in relation to the joint estate, is unquestionable; see *Deveau* v. *Fowler*, 2 Paige, 400; *Hutchinson* v. *Smith*, 7 Id. 26; *Washburn et al.* v. *Bank of Bellows Falls et al.*, 19 Vermont, 279; *Rice* v. *Barnard et al.*, Id. 20, 480; *Buchan* v. *Sumner*, 2 Barbour's Chancery, 168, 197; *Snodgrass' appeal* 1 *Harris*, 471, 473; *Black et al.* v. *Busk et al.*, 7 B. Monroe, 210; it has been a subject of much dispute whether the separate creditors have not a prior claim to the assets belonging to the separate estate. In bankruptcy, in England, it is a settled practice, that under a separate commission against one partner, the joint creditors are not allowed to receive any share of the separate estate, until the separate creditors are satisfied; except where there is no joint fund and no solvent partner living, and except also where the joint creditor is the petitioning creditor in the commission. Lord Loughborough spoke of this as a general principle of equity, but in the late case of *Ex parte Bauerman and Christie*, 3 Deacon, 476, 484, Erskine, C. J. declared it to be a rule adopted in the administration of assets in bankruptcy, but not in other cases. In this country, it has been considered as a general equity by some courts, but by others as a rule peculiar to bankruptcy. Indeed, in *Tuckers* v. *Oxley*, 5 Cranch, 35, Judge Marshall considered, that even in bankruptcy, the rule, when properly understood, was nothing more than the equitable principle of compelling the joint creditors, as having two funds, to exhaust the fund which was appropriated to them, before coming upon the fund to which the separate creditors also were entitled: and the same view is taken in *Bardwell* v. *Perry et al.*, 19 Vermont, 292. This much appears to be agreed, in those courts which recognise this as a principle of general equity; that the equitable exclusion or postponement of the joint creditors will not be enforced so long as those creditors have a recourse *at law* against the separate estate; that is, the equity in favour of the separate creditors will not be enforced to control or take away a right acquired by legal execution on the part of joint creditors against the separate estate; see *Allen* v. *Wells*, 22 Pickering, 450, 455; and that it is only when the legal recourse of the joint creditors against the separate estate is terminated, and they have no claim against those assets except in equity, as in the case of the death, bankruptcy (or perhaps statutory assignment in insolvency) of a partner, that the joint creditors are postponed.

In *M' Culloh* v. *Dashiell*, it is decided that upon the death of a partner, whereby his separate estate is discharged at law from the claims of the joint creditors, the latter will not be allowed to reach it in equity, until the separate creditors are satisfied; see also *Ridgely* v. *Carey*, 4 Harris & McHenry, 167; and the same general principle of equity is adopted in New York, Mississippi, Illinois, and South Carolina; *Wilder* v. *Keeler*, 3 Paige, 168; *Eyberts* v. *Wood*, Id. 518, 527; *Payne* v. *Matthews*, 6 Id. 20; *Robb and others* v. *Stevens and others*, 1 Clarke, 192; *Jackson* v. *Cornell and others*, 1 Sandford, 348; *Murray* v. *Murray*, 5 Johnson's Chancery, 60, 72; *Robbins* v. *Cooper*, 6 Id. 186, 191; *Burtus* v. *Tisdall*, 4 Barbour's Supreme Court, 572, 588; *Averill* v. *Loucks*, 6 Id. 471, 477; *Kirby* v. *Carpenter*, 7 Id. 373, 378; *Arnold & Pinckard* v. *Hamer et al.*, 1 Freeman's Chancery, 509, 516; *Oakley & Co.* v. *Rabb's executors*, Id. 546; *Ladd* v. *Griswold et al.*, 4 Gilman, 25, 36; *Woddrop* v. *Executor of John Price*, 3 Desaussure, 203; *Tunno* v. *Trezevant*, 3 Id. 264, 269, 270; *Hall* v. *Hall*, 2 M'Cord's Chancery, 269, 302. See also, *In re Warren*, Daveis, 320, 326. But the same exception is established, as in cases of bankruptcy in

England, that the joint creditors will not be postponed where there is no joint estate and no living solvent partner; *Wardlaw et al.* v. *Adm'rs and Heirs of Gray*, Dudley's Equity, 85, 94, 113; *Grosvenor & Co.* v. *Austin's Adm'r*, 6 Ohio, 103; *Sperry's Estate*, 1 Ashmead, 347.

The Supreme Court of the United States in *Murrill et al.* v. *Neill et al.*, 8 Howard's S. Ct. 414, recognised as applicable to cases of insolvency, the general rule in equity, "That partnership creditors shall in the first instance be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid;" and the excepted cases were here spoken of as eccentric variations, difficult to be reconciled with the reason or equity of the rule.

The general equitable rule, and this exception to it, were extensively discussed in the recent case of *Ladd* v. *Griswold et al.*, 4 Gilman, 25; and it was there held, that joint creditors come upon the separate estate *pari passu* with the individual creditors, if there is no joint estate and no surviving solvent partner, and that the case of there being no joint estate arises where one partner has, during his life, transferred his entire interest in the partnership effects to the other. In *Ladd* v. *Griswold et al.*, C. and R. had been partners; but the partnership had been dissolved by consent, and C. had taken all the effects of the firm and agreed to discharge all its liabilities. C. then died insolvent, leaving many of the partnership debts unpaid, and subsequently R. died insolvent; and the question arose as to the right of the partnership creditors to come upon R.'s separate estate equally with R.'s separate creditors. The court, after recognising the general doctrine that the partnership effects are appropriated to the partnership creditors, and the separate estate to the individual creditors, said, "It may, however, be necessary to look into the foundation and extent of this equitable rule, and see if it is applicable to the present case. In the case of a partnership, there is a community of interest and responsibility. Each partner has a concurrent title to the whole of the partnership property, and he is individually liable for all of the partnership obligations. He has the specific right to have the joint property faithfully applied to the payment of the joint debts; and after the debts are satisfied, he is entitled to a share of the surplus. These rights and liabilities continue, in most cases, after a dissolution of the partnership. In the case of a dissolution by the death of one of the partners, the surviving partner succeeds to the management and control of the affairs of the partnership; but the personal representatives of the deceased partner are still responsible for the debts and entitled to participate in the surplus; and they may compel the survivor to make such a disposition of the partnership effects, as will relieve them from responsibility, and enable them to receive their portion of the surplus. While the partnership is progressing, the joint creditors have, strictly, no equity against the partnership effects. They have only a cause of action against the partners, on which they may obtain judgment, and then satisfy the judgment out of the joint property, or out of the private property of the partners. The right in equity of the joint creditors to seek payment out of the partnership effects to the exclusion of the separate creditors of deceased or insolvent partners, results solely from the right of the partners, or their representatives, to have the joint estate thus applied. The rule is for the benefit and protection of the partners them-

selves. They may part with their right to have the joint property applied to the payment of the joint demands; and when they do so, the equity of the creditor is at an end. This is done, when one partner sells out his entire interest in the concern to his copartner. In such case, the purchasing partner takes the property fully discharged from the lien of his copartner; and the equity of the creditors being subordinate to the lien of the partners, the property is wholly freed from the claims of the joint creditors. What before was joint property, now becomes the separate property of one of the partners. There is no longer any joint fund for the payment of the debts, to which the joint creditors may resort through the equities of the partners. . . . If there is no joint fund to which the creditors can resort, and no solvent partner from whom payment can be enforced, they should be allowed to participate equally with the private creditors, in the estate of the deceased partner." This circuitous reasoning, to take the case out of the rule, might have been avoided, by observing that the case never fell within the rule; inasmuch as the person, whose estate was in dispute, was the surviving partner, against whose representatives and estate, of course, the joint creditors had, at law, the same direct right as the individual creditors. In *Reese & Heylin* v. *Bradford et al.*, 13 Alabama, 838, also it was held, that after a transfer of all the partnership effects by one partner to the other, the lien of priority on the part of the joint creditors upon what had been partnership property, was extinguished.

In some other states, this principle of marshalling the assets, so as to give separate creditors a priority as to the separate estate, is not received. It seems to be entirely denied in *White* v. *Dougherty et al.*, Martin & Yerger, 309, 321; and doubted, if not wholly denied, in *Grosvenor & Co.* v. *Austin's Adm'r*, 6 Ohio, 103. In Vermont, the priority of separate creditors as to the separate estate, is denied to be a general principle of equity; *Bardwell* v. *Perry et al.*, 19 Vermont, 292. In Mississippi, the principle was decided in *Dahlgren* v. *Duncan et al.*, 7 Smedes & Marshall, 280, to be abolished in that state by the operation of two statutes, one of which provides that the estate of deceased insolvents shall be distributed among all the creditors in the proportion of their claims, and the other declares all contracts and liabilities of copartners, joint and several; but Sharkey, C. J., dissented, thinking that these statutes had no bearing upon the question. In Pennsylvania, in *Bell* v. *Newman*, 5 Sergeant & Rawle, 78, one partner had died before the other, and the survivor being indebted on partnership account, and also on private account, his administrator had in his hands some joint and some separate assets; and it was decided, partly on a ground of equity, and partly under a statute directing equality of distribution, that the separate creditors should first receive out of the separate estate as much as the joint creditors would receive from that partner's share in the joint property, and then that the separate property should be divided among both classes equally *pro rata*. In *Sperry's Estate*, 1 Ashmead, 347, the very able opinion of King, President, inclines against the general principle, further than as obliging the joint creditors to exhaust their fund before they come upon the separate estate: but the point decided was, that the separate and joint creditors should be paid rateably out of the separate estate, in the hands of an administrator, where there is no joint fund and no solvent partner. But neither of these decisions is conclusive as to the non-existence of the general principle of equity; for *Sperry's Estate* came within a recognised exception, and *Bell* v. *Newman*, was not a case within the application of the principle; (as that principle is explained in *M' Culloh* v. *Dashiell*, *Wilder* v. *Keeler*, and *Arnold*

and Pinckard v. *Hamer et al.;*) the estate to be distributed being the estate of the surviving partner, against which the claims of the joint creditors were as purely legal as those of the separate creditors. The general principle, therefore, in a case proper for its application, as where the estate of the partner first deceased, is in question, and there is some joint property, or a solvent partner living, is perhaps still open in Penusylvania. The opinion of Gibson, C. J., in *Bell* v. *Newman*, was in favour of the general principle as founded in equity. See, also, *Snodgrass' appeal*, 1 Harris, 471. In *Morris's Adm'r* v. *Morris's Adm'r, et als.*, 4 Grattan, 294, this principle was much discussed, and the court was equally divided upon the question of its adoption as a general rule in equity.

In Massachusetts, the statute of 1838, c. 163 (cited 22 Pickering, 456), enacts as the rule for distributing insolvent estates, that the net proceeds of the separate estate shall go to the separate creditors, and of the joint estate to the joint creditors. In Louisiana, in *Morgan* v. *His Creditors*, 8 Martin, N. S. 599 (4 Cond. Lou. 631), it was decided that the new code of Louisiana, while it established the superior equity of the joint creditors, as to the joint property, had abolished the principle recognised in the civil code, of a superior equity in the separate creditors as to the separate estate.

Of real estate held by a commercial partnership.

MARY COLES ADMINISTRATRIX OF STEPHEN COLES AGAINST WILLET COLES.

In the Supreme Court of New York.

JANUARY, 1818.

[REPORTED, 15 JOHNSON, 159–161.]

At law, *when real estate is held by partners, for the purposes of the partnership, they do not hold it as partners, but as tenants in common, and the rules relative to partnership property do not apply in regard to it; therefore, one partner can sell only his individual interest in the land, and when both partners join in a sale and conveyance, and only one receives the purchase-money, the other partner may maintain an action against him for his proportion.*

THIS was an action of assumpsit for money had and received. The cause was tried before Mr. J. Yates, at the New York Sittings, in November, 1816.

It was proved, on the part of the plaintiff, that in January, 1813,

Stephen Coles, deceased, and Willet Coles, the defendant, sold, and conveyed to one Meinell, two lots of ground in Ferry Street, in New York, for 9,000 dollars, of which sum the purchaser paid 7,000 dollars into the hands of the defendant, and with the remaining 2,000 dollars paid off a mortgage on the premises which had been given for the individual benefit of the defendant. The plaintiff, also, gave in evidence the following letter from the defendant to the intestate, dated New York, December 29th, 1812.

"Dear Father. Brother Stephen has returned and informs me that he left the deed that you gave him for the house and still-house, with you: to make the conveyance lawful, it is absolutely necessary that the deed should be recorded here. I have no other object in wishing the property conveyed to Stephen, than to secure you a comfortable maintenance. The failure of H. F. may put it out of my power to do so in any other way; please, therefore, to send the deed by the first opportunity. I have had an application to buy the still-house, for 9,000 dollars; if you think it best, I will do so, and put the money in bank stock; you may rely on my wish to see you provided for, let whatever may happen to your affectionate, but unfortunate son, &c. P. S. I shall convey my part to Stephen for your use also. Don't forget to send the deed."

A partnership had existed between the intestate and defendant, in relation to the business of the still-house; and the business had been carried on under the partnership name to about the time of the sale, although it appeared that the defendant had, long before, been requested by the intestate to give notice of dissolution, but which he had, in fact, never done.

The counsel for the defendant moved for a nonsuit on the ground that this was a partnership transaction, and required the investigation of partnership accounts. The motion was overruled by the judge, and further evidence was produced on the part of the defendant, to show the existence of a partnership down to the time of sale. The judge charged the jury, that in his opinion, the letter from the defendant to the intestate was sufficient ground for the jury to find a verdict for the plaintiff for the half of the 9,000 dollars, with interest; and a verdict was found accordingly.

The defendant moved to set aside the verdict, and for a new trial.

T. A. Emmet, for the plaintiff.

R. Bogardus, contra.

PER CURIAM. The motion for a new trial must be denied. The testimony on the part of the plaintiff shows, very satisfactorily, that the intestate was only entitled to a moiety of the land sold, and he can, of course, claim only one-half of the consideration money. The letter of the 29th December, 1812, might admit of a construction that the intestate was the sole owner of the land. But the other proof, and the conveyance which was given by both Stephen and Willet Coles show, beyond any reasonable doubt, that they were joint owners or tenants in common.

It is to be inferred from the case that the mortgage for 2,000 dollars, was upon this land; though that is not very clearly stated. The defendant, at all events, admitted that this mortgage was his own private debt, and no part of it ought, of course, to be paid out of that portion of the consideration money due to the intestate, Stephen Coles. The defendant is, therefore, bound to account to the plaintiff for the one-half of the 9,000 dollars (the full amount of the consideration), together with the interest from the time it was received.

No objection can be made to the recovery, on the ground of any existing partnership between Stephen and Willet Coles. They were tenants in common, not partners, in this land. The principles and rules of law applicable to partnerships, and which govern and regulate the disposition of the partnership property, do not apply to real estate. One partner can convey no more than his own interest in houses, or other real estate, even where they are held for the purposes of the partnership. (Wats. Partners, 67.) There may be special covenants and agreements entered into between partners, relative to the use and enjoyment of real estate owned by them jointly, and the land would be considered as held subject to such covenants; but nothing of that kind appears in the present case: and, in the absence of all such special covenants, the real estate owned by the partners must be considered and treated as such, without any reference to the partnership. These are principles fully established by the cases of Thornton v. Dixon (3 Brown's Ch. Rep. 199), and Balmain v. Shore (9 Ves. jun. 500). Willet and Stephen Coles must, therefore, be considered as tenants in common of the lands sold and conveyed by them; and there can be no doubt, that where two tenants in common sell and convey their land, and all the money is received by one, the other can maintain an action for money had and received, for his moiety, against the other.

Motion for new trial denied.

THOMAS D. DYER *v.* MOSES CLARK, ADMINISTRATOR, AND OTHERS.

In the Supreme Judicial Court of Massachusetts.

MARCH TERM, 1843.

[REPORTED, 5 METCALF, 562–582.]

Real estate purchased by partners, out of partnership funds, to be used and applied to partnership purposes, and considered and treated by the partners as part of the partnership stock, is to be deemed, so far as the legal *title is concerned, as estate held in common, and not in joint tenancy; but as to the beneficial interest, it is considered* in equity, *as affected with a trust for the partnership, until the accounts are settled and the debts of the firm are paid.*

(*a*) SHAW, C. J. This is a suit in equity by the surviving partner of the firm of Burleigh & Dyer, established by articles of copartnership under seal, for the purpose of carrying on the business of distillers. The principal question is one which has arisen in several other cases, and is this: whether real estate, purchased by copartners, from partnership funds, to be held, used, and occupied for partnership purposes, is to be deemed in all respects real estate, in this Commonwealth, to vest in the partners severally as tenants in common, so that on the decease of either, his share will descend to his heirs, be chargeable with his wife's dower, and in all respects held and treated as real estate, held by the deceased partner as a tenant in common; or, whether it shall be regarded as *quasi* personal property, so as to be held and appropriated as personal property, first to the liquidation and discharge of the partnership debts, and to the adjustment of the partnership account, and payment of the amount due, if any, to the surviving partner, before it shall go to the widow and heirs of the deceased partner. This is a new question here, and comes now to be decided for the first time.

There are some principles bearing upon the result which seem to be well settled, and may tend to establish the grounds of equity and law, upon which the decision must be made. It is considered as established law, that partnership property must first be applied to the payment of partnership debts, and therefore that an attachment of part-

(*a*) This was a bill filed by the surviving partner against the administrator, widow, and children of a deceased partner. It has been necessary to omit the arguments of counsel, which are reported at much length, and with great ability, by Mr. Metcalf.

nership property for a partnership debt, though subsequent in time, will take precedence of a prior attachment of the same property for the debt of one of the partners. It is also considered, that however extensive the partnership may be, though the partners may hold a large amount and great variety of property, and owe many debts, the real and actual interest of each partner in the partnership stock is the net balance which will be coming to him after payment of all the partnership debts and a just settlement of the account between himself and his partner or partners. 1 Ves. sen. 242.

The time of the dissolution of a partnership fixes the time at which the account is to be taken, in order to ascertain the relative rights of the partners and their respective shares in the joint fund. The debts may be numerous, and the funds widely dispersed and difficult of collection; and therefore much time may elapse before the affairs can be wound up, the debts paid, and the surplus put in a condition to be divided. But whatever time may elapse before the final settlement can be practically made, that settlement, when made, must relate back to the time when the partnership was dissolved, to determine the relative interest of the partners in the fund.

When, therefore, one of the partners dies, which is *de facto* a dissolution of the partnership, it seems to be the dictate of natural equity, that the separate creditors of the deceased partner, the widow, heirs, legatees, and all others claiming a derivative title to the property of the deceased, and, standing on his rights, should take exactly the same measure of justice as such partner himself would have taken, had the partnership been dissolved in his lifetime; and such interest would be the net balance of the account, as above stated.

Such, indeed, is the result of the application of the well-known rules of law, when the partnership stock and property consist of personal estate only. And as partnerships were formed merely for the promotion of mercantile transactions, the stock commonly consisted of cash, merchandise, securities, and other personal property; and therefore the rules of law, governing that relation, would naturally be framed with more especial reference to that species of property. It is therefore held, that on the decease of one of the partners, as the surviving partner stands chargeable with the whole of the partnership debts, the interest of the partners in the chattels and choses in action shall be deemed so far a joint tenancy, as to enable the surviving partner to take the property by survivorship, for all purposes of holding and administering the estate, until the effects are reduced to money, and the debts are paid; though for the purpose of encouraging trade, it is held that the harsh doctrines of the *jus accrescendi*, which is an incident of joint tenancy, at the common law, as well in real as personal estate, shall not apply to such partnership property; but, on the contrary,

when the debts are all paid, the effects of the partnership reduced to money, and the purposes of the partnership accomplished, the surviving partner shall be held to account with the representatives of the deceased for his just share of the partnership funds.

Then the question is, whether there is anything so peculiar in the nature and characteristics of real estate, as to prevent these broad principles of equity from applying to it. So long as real estate is governed by the strict rules of common law, there would be, certainly, great difficulty in shaping the tenure of the legal estate in such form as to accomplish these objects. Should the partners take their conveyance in such mode as to create a joint tenancy, as they still may, though contrary to the policy of our law, still it would not accomplish the purposes of the parties; first, because either joint tenant might, at his option, break the joint tenancy and defeat the right of survivorship, by an alienation of his estate, or (what would be still more objectionable) the right of survivorship at the common law would give the whole estate to the survivor, without liability to account, and thus wholly defeat the claims of the separate creditors, and of the widow and heirs of the deceased partner.

But we are of opinion, that the object may be accomplished in equity, so as to secure all parties in their just rights, by considering the legal estate as held in trust for the purposes of the partnership; and since this court has been fully empowered to take cognizance of all implied as well as express trusts, and carry them into effect, there is no difficulty, but on the contrary great fitness, in adopting the rules of equity on the subject, which have been adopted for the like purpose in England and in some of our sister States. And it appears to us, that considering the nature of a partnership, and the mutual confidence in each other, which that relation implies, it is not putting a forced construction upon their act and intent, to hold that when property is purchased in the name of the partners, out of partnership funds and for partnership use, though by force of the common law they take the legal estate as tenants in common, yet that each is under a conscientious obligation to hold that legal estate, until the purposes for which it was so purchased are accomplished, and to appropriate it to those purposes by first applying it to the payment of the partnership debts, for which both his partner and he himself are liable, and until he has come to a just account with his partner. Each has an equitable interest in that portion of the legal estate held by the other, until the debts obligatory on both, are paid, and his own share of the outlay for partnership stock is restored to him. This mutual equity of the parties is greatly strengthened by the consideration, that the partners may have contributed to the capital stock in unequal proportions, or indeed that one may have advanced the whole. Take the case of a capitalist, who is willing to put in money, but wishes

to take no active concern in the conduct of business, and a man who has skill, capacity, integrity, and industry to make him a most useful active partner, but without property, and they form a partnership. Suppose real estate, necessary to the carrying on of the business of the partnership, should be purchased out of the capital stock, and on partnership account, and a deed taken to them as partners, without any special provisions. Credit is obtained for the firm, as well on the real estate as the other property of the firm. What are the true equitable rights of the partners, as resulting from their presumed intentions, in such real estate? Is not the share of each to stand pledged to the other, and has not each an equitable lien on the estate, requiring that it shall be held and appropriated, first to pay the joint debts, then to repay the partner who advanced the capital, before it shall be applied to the separate use of either of the partners? The creditors have an interest, indirectly, in the same appropriation; not because they have any lien legal or equitable (2 Story on Eq. § 1253), upon the property itself; but on the equitable principle, which determines that the real estate, so held, shall be deemed to constitute part of the fund from which their debts are to be paid, before it can be legally or honestly diverted to the private use of the partners. Suppose this trust is not implied, what would be the condition of the parties, in the case supposed, in the various contingencies which might happen? Suppose the elder and wealthy partner were to die: "The legal estate descends to his heirs, clothed with no trust in favour of the surviving partner: The latter without property of his own, and relying on the joint fund, which, if made liable, is sufficient for the purpose, is left to pay the whole of the debt, whilst a portion and perhaps a large portion of the fund bound for its payment, is withdrawn. Or suppose the younger partner were to die, and his share of the legal estate should go to his creditors, wife or children, and be withdrawn from the partnership fund; it would work manifest injustice to him who had furnished the fund from which it was purchased. But treating it as a trust, the rights of all parties will be preserved; the legal estate will go to those entitled to it, subject only to a trust and equitable lien to the surviving partner, by which so much of it shall stand charged as may be necessary to accomplish the purposes for which they purchased it. To this extent, and no further, will it be bound; and subject to this, all those will take who are entitled to the property; namely, the creditors, widow, heirs, and all others standing on the rights of the deceased partner.

It may happen that real estate may be so purchased by partners, and out of partnership funds, in such manner as to preclude such implied trust, and indicate that the parties intended to purchase property to be held by them separately for their separate use; as where there is such

an express agreement at the time of the purchase, or a provision in the articles of copartnership, or where the price of such purchase should be charged to the partners respectively in their several accounts with the firm. This would operate as a division and distribution of so much of the funds, and each would take his share divested of any implied trust. If in the conveyance, the grantees should be described as tenants in common, it would be a circumstance bearing on the question of intent, though perhaps it might be considered a slight one: because those words would merely make them tenants in common of the legal estate, which, by operation of law, they would be without them. But, as we have already seen, such legal estate is not at all incompatible with an implied trust for the partnership.

The result of this part of the case seems to us to be this; that when by the agreement and understanding of partners, their capital stock and partnership fund consist, in whole or in part, of real estate—inasmuch as it is a well-known rule governing the relation of partnership, that neither partner can have an ultimate and beneficial interest in the capital until the debts are paid and the account settled; that both rely upon such rule and tacitly claim the benefit of it, and expect to be bound by it: the same rule shall extend to real estate. The same mutual confidence, which governs the relation in other respects, extends to this; and, therefore, when real estate is purchased as part of the capital, whether by the form of the conveyance the legal estate vests in them as joint tenants or tenants in common, it vests in them and their respective heirs, clothed with a trust for the partners, in their partnership capacity, so as to secure the beneficial interest to them until the purposes of the partnership are accomplished. It follows, as a necessary consequence, that such partnership real estate cannot be conveyed away and alienated by one of the partners alone, without a breach of such trust; and that such a conveyance would not be valid against the other partner, unless made to one who had no notice, actual or constructive, of the trust. But, if a person knows that a particular real estate is the partnership property of two or more, and he attempts to acquire a title to any part of it from one alone, without the knowledge or consent of the other, there seems to be no hardship in holding that he takes such title at his peril, and on the responsibility of the person with whom he deals.

But we think the same conclusion is well supported by authorities, although there has been some diversity of opinion amongst the earlier cases.

The adjudged cases were so fully examined by the counsel in their arguments, that it is unnecessary to state them in detail. The principles, which have already been suggested as the grounds on which we

decide the present case, were applied in Phillips v. Phillips, 1 Mylne & Keen, 649; Broom v. Broom, 3 Mylne & Keen, 443; Sigourney v. Munn, 7 Connect. 11; and Hoxie v. Carr, 1 Sumner, 173. In these cases, all the previous decisions on the subject were carefully considered. See also 3 Kent. Com. (4th ed.) 36–39. 1 Story on Eq. §§ 674, 675. 2 ib. § 1207. Collyer on Part., 76. Cary on Part., 27, 28. Houghton v. Houghton, 11 Simons, 491.

It has been supposed that the case of Goodwin v. Richardson, 11 Mass. 469, stands opposed to the decision now made. I do not think it does. That case was decided in 1814, before equity powers existed in this Commonwealth, on the general subject of trusts. It was in terms a question as to the vesting of the real estate; and the court were bound to decide the case for the defendant, if they found, upon the facts, that the estate in question had vested in the partners, on foreclosure as tenants in common. Had they decided the other way, they must have decided that partners, taking real estate in satisfaction of a partnership debt, by foreclosing a mortgage, would hold the estate as joint tenants, with right of survivorship at law, without liability to account—a principle directly opposed to the St. of 1785, c. 62, respecting joint tenancy; because in that case and at that time the real estate must descend and vest according to the rules of law, and there was no court of equity competent to require the surviving partner to account with the representatives of the deceased party.

In that case, as it happened, both the separate estate and the partnership estate were insolvent, and therefore good justice would have been done, in deciding that the plaintiff should recover for the benefit of the partnership creditors. But the court were deciding upon a rule of law, which must apply to all cases, and they could not have decided that for the plaintiff without holding that all such estate, held by partners, should be deemed joint estate, with a right of survivorship at law, and without liability to account; a rule opposed to the plainest principles of equity, and to the spirit, if not to the letter, of the statute respecting joint tenancy. The court were dealing solely with a question of law, in determining a legal estate, and intimate that a court of equity might make joint real estate applicable, as personal, to the payment of partnership debts. We consider, therefore, that that decision is not opposed to the decision, upon equitable principles, to which we now propose to come.

On the facts of the present case, we are of opinion that the real estate in question was a part of the capital stock purchased out of the partnership funds, for the partnership use, and for the account of the firm. The partners entered into articles, as distillers. The business required a large building and fixtures, which they purchased and paid

for in part out of the joint funds, and gave notes in the partnership name for the remainder of the price, and the estate was regarded by them as partnership effects. The repairs and improvements were also charged to joint account. These are all decisive indications of joint property.

The plaintiff has received a sum in rents and profits that have accrued since his partner's death. The defendant, Clark, as administrator of Burleigh, the deceased partner, has sold an undivided half of the property as his, under a license, and with the assent of the plaintiff. The widow joined to release her dower, for a nominal sum. But we cannot perceive that the right of the widow is distinguishable from that of the creditors and heirs of the deceased partner. As far as this estate was held in trust by her deceased husband, she was not entitled to dower. For all beyond that, she will be entitled, because he held it as legal estate, unless she is barred by her release; of which we give no opinion.

The plaintiff is entitled to a decree charging the amount of rents and profits in his hands, and so much of the proceeds of the sale made by the administrator, as will be sufficient to discharge the balance of the partnership account; and the rest of the proceeds will remain in the hands of Clark, the administrator of Burleigh, to be distributed according to law.

The principle stated in *Coles* v. *Coles* that *at law*, real estate owned by a partnership is held by them subject in all respects to the ordinary incidents of land held in common, is universally admitted; see *dicta* in *Hoxie* v. *Carr et al.*, 1 Sumner, 174, 182; *Sigourney* v. *Munn*, 7 Connecticut, 11, 19; *Burnside & others* v. *Merrick & others*, 4 Metcalf, 537, 541; and *Buchan* v. *Sumner*, 2 Barbour's Chancery, 168, 198. "Out of the Court of Chancery," said Cowen, J., in the recent case of *Lawrence* v. *Taylor*, 5 Hill's N. Y., 108, 111, "real estate, though belonging to partners and employed in the partnership business,—the title standing in their joint names—is deemed to be holden by them as tenants in common or joint tenants for all purposes:" and see to the same effect, *per* Bronson, J., in *The Madison County Bank* v. *Gould*, Id. 309, 313.

In equity, however, it is competent to the partners, by agreement, express or implied, to affect real estate with a trust as partnership property, and thereby to render it, in equity, subject to the rules applicable to partnership property, as between the partners themselves and all claiming through them. The ground of this doctrine appears to be a special interference of equity, in favour of commerce, whereby the trust is separated from the legal estate, and the latter being left to pass according to the nature of real property, the trust estate is made subject to the rules of partnership personal property, so far as concerns the interest of the partners

in relation to one another and to those who are in privity with them. The legal title, however, is affected in equity only to the extent of changing joint tenancy into tenancy in common, which is nothing more than a destruction of the incident of survivorship; see *Deloney* v. *Hutcheson*, 2 Randolph, 183, 186; *Smith* v. *Jackson*, 2 Edwards, 28, 30; *Buchan* v. *Sumner*, 2 Barbour's Chancery, 168, 198. The basis of this equitable lien or trust is the agreement and intention of the parties. It is not produced by a superior equity in any class of third persons, but is exclusively an equity between the partners, resulting from their relation of copartnership, and administered in favour of the partners themselves and such third persons as equity subrogates to the rights of one partner against the other, and against such persons only as are considered as standing in the place of the one against whom it exists, as, his heirs, widow, and perhaps individual creditors. These are the results deducible from the recent case of *Dyer* v. *Clark*, and from *Pierce's Adm'r, &c.* v. *Trigg's Heirs*, 10 Leigh, 408, and *Howard and others* v. *Priest and another*, 5 Metcalf, 582, where the subject is thoroughly discussed. In the last of these cases, the rule is expressed by Shaw, C. J., to be, that real estate purchased out of partnership funds, to be used and applied to partnership purposes, and considered and treated by the partners as part of the partnership stock, is to be deemed, as far as the legal title is in question, as estate held in common and not in joint tenancy; but as to the beneficial interest, it is held in trust, each holding his property in trust for the partnership, until the partnership account is settled, and the partnership debts are paid. It is a trust arising from the actual or implied agreement of the partners, and the mutual relation in which they stand to each other. (See Baxter, App. Brown, Resp., 7 Manning & Granger, 198.)

The ground of equitable interference, as has been observed, is the agreement or intention of the parties to make the land a part of the stock in trade. It is admitted, in all the cases, that an express agreement by the partners, that real estate purchased by them, shall be considered as partnership stock, will render it so, as between them, to the extent of the agreement; *dictum* of Tilghman, C. J., in *M'Dermot* v. *Laurence*, 7 Sergeant & Rawle, 438, 441; *dictum* of Hosmer, C. J., in *Sigourney* v. *Munn*, 7 Connecticut, 11, 20, and of Church, J., in *Frink* v. *Branch*, 16 Connecticut, 261, 270; *dicta* in *Coles* v. *Coles*, and in *Smith* v. *Jackson*, 2 Edwards, 28. But such an agreement may be implied from the circumstances of the purchase, and the conduct of the parties. If land is bought with partnership funds, and is brought into the business of the firm, and used for its purposes, it will be considered as partnership stock, in whose name soever the legal title may be; unless there be distinct evidence of an intention to hold it separately, such as an express agreement in the articles of copartnership, or at the time of the purchase, or, the fact that the price is charged to the partners respectively in their several accounts with the firm; for, such arrangements would operate as a division and distribution of so much of the funds, and each would take his share devested of any implied trust; but the mere circumstance that the conveyance was to them expressly "as tenants in common," would not, of itself, be sufficient to rebut the trust; *Dyer* v. *Clark*; *Howard and others* v. *Priest and another*, 5 Metcalf, 582; *Burnside and others* v. *Merrick and others*, 4 Id. 537, 541; *Hoxie* v. *Carr et al.*, 1 Sumner, 174, 181, 186; *Buchan* v. *Sumner*, 2 Barbour's Chaucery, 168, 199; *Smith* v. *Tarlton*, Id. 336; *Delmonico* v. *Guillaume*, 2 Sandford, 366. And there is no difference between a purchase from a third person, and a purchase from a partner; if the partnership funds be advanced to one of the

partners for lands on which to carry on the business, or which is the same thing, if he gets credit on the books of the firm for the land, intending to vest it in the business, it thereby becomes, in equity, the property of the partnership, though he may retain the legal property in himself; *Boyers* v. *Elliott*, 7 Humphreys, 204, 208. But it seems that neither one of these circumstances, alone, namely, the land's being purchased with partnership funds, nor its being used in and for the partnership business, will conclusively render it partnership stock. The fact that the purchase is out of partnership funds is not a decisive circumstance: one partner may withdraw, with the knowledge and consent of the others, a portion of the partnership funds for a separate purchase on his own account, and all may join in a purchase of real estate, for purposes wholly independent of the partnership, intending to hold their shares severally on their individual account: under such circumstances, the fact that the payment is made from partnership funds, will not change the nature and operation of the purchase; *Hunt & Co.* v. *Benson*, 2 Humphreys, 459; *Dyer* v. *Clark; Wheatley's Heirs* v. *Calhoun*, 12 Leigh, 265, 273; and the single fact that the purchase is made with partnership funds, will not, when the purchase is unconnected with the business of the firm, be sufficient to convert it into partnership stock, without some further evidence of an agreement, express or implied, to that effect; *Smith* v. *Jackson*, 2 Edwards, 28; *Cox* v. *McBurney*, 2 Sandford's S. Ct., 561, 566; *Wooldridge* v. *Wilkins et al.*, 3 Howard's Mississippi, 360, 372; *dictum* of Hosmer, C. J., in *Sigourney* v. *Munn*, 7 Connecticut, 11, 17. As to the other point, whether the appropriation of land to the uses of the partnership, without its being purchased with partnership funds, will operate to render it partnership property, it was held by one judge in *Deloney* v. *Hutcheson*, 2 Randolph, 183, 187, that it could not, on the ground that a resulting trust arises without writing, only where at the time of the purchase, money is advanced by another; and see *Wheatley's Heirs* v. *Calhoun*, 12 Leigh, 265, 273. But this equitable doctrine, in fact, does not proceed so much upon the principle of a resulting trust, as on that of an equitable lien created by an agreement on sufficient consideration: and the difficulty in the case does not arise from the failure of the equity, because the transaction may be regarded as an increase to that extent, of the contribution to the stock in trade; but the difficulty is as to the evidence and extent of the parties' intention. It seems to be settled, that the mere fact that property held by the members of the firm as tenants in common is used in and for the partnership business, or a mere agreement to use it for partnership purposes, is not of itself sufficient to convert it into partnership stock: there must be some evidence of further agreement to make it partnership property. In the late case of *Frink* v. *Branch*, 16 Connecticut, 261, B. owning land with a factory upon it, conveyed one-half of it to S., with whom on the same day he entered into partnership as a manufacturer: by subsequent conveyances, S.'s interest became vested in several persons, who formed another partnership with B. in the same business, using the factory in their business, and making some improvements upon it out of the partnership funds: in their articles of copartnership, this property was referred to as being owned by the partners in common, B. owning one-half, and the other partners the other half; and in reference to the withdrawal of one member of the firm, the articles contained the following clause: "When the whole concern of said company shall be settled up and divided according to the respective rights of the partners, so far as concerns the partner withdrawing; and in case either partner shall wish to dispose of his share

of the real estate owned by said company, he shall give the other partners the first offer of it." B. subsequently mortgaged his half of this land and factory for a debt of his own; and the firm becoming insolvent, the contest was between the mortgagee and the creditors of the firm, who claimed to have a lien in equity upon the land as partnership property. But the decision was against the partnership creditors; and the court said, "This property was not purchased with common funds; nor was any common capital withdrawn from the power of creditors to make the purchase; nor was there any agreement that the property thus owned in common, should become partnership stock, or constitute any part of the capital of the company. It was agreed by parol only, that this property should be improved, by the company, in the prosecution of its business; but this agreement extended only to its temporary use. It did not, nor could it, affect the title to the land, even as between the parties, much less as the rights of others might be involved."

With regard to the object and extent of this equitable conversion, the principle appears to be this. In the case of land held in common, at law, the several interests of the owners are definite and ascertained: in case of partnership property, the several share of each partner is the residue of interest after the debts of the firm are paid, and the claims of the other partner are satisfied. The purpose of equity is to transform the interest of the partners for this object and to this extent, only; to affect the legal estate of either partner with a lien in favour of the joint creditors and the other partner.

The persons in favour of whom, and against whom, this trust or lien will be recognised, are easily ascertained by a reference to these objects. The lien will be enforced in favour of a continuing or surviving partner, and in favour of the creditors of the firm, who are considered as subrogated to the equities of the partners between one another, whether the creditors act in their own persons, or claim through an assignee of the firm, or the surviving or acting partner seeks to recover for their benefit: and against a retiring partner, his personal representatives, heirs, and widow; See *Greene* v. *Greene*, 1 Hammond, 535; *Sumner* v. *Hampson and others*, 8 Id. 328; *Heirs et als. of Pugh* v. *Currie*, 5 Alabama, 446; *Dyer* v. *Clark; Howard and others* v. *Priest and another; Burnside and others* v. *Merrick and others; Buchan* v. *Sumner*, 2 Barbour's Chancery, 168, 200; but in *Smith* v. *Jackson*, 2 Edwards, 28, 36, the right of dower to the extent to which the deceased partner had the legal title coupled with a beneficial ownership was held to be paramount. It will be enforced against a purchaser from the partner or his representatives, with notice, actual or constructive, that the real estate is partnership property; *Edgar* v. *Donnally*, 2 Munford, 387; *Hoxie* v. *Carr et al.*, 1 Sumner, 174, 192; but not against a *bonâ fide* purchaser or mortgagee without notice; *M'Dermot* v. *Laurence*, 7 Sergeant & Rawle, 438; *Forde* v. *Herron*, 4 Munford, 316; *Frink* v. *Branch*, 16 Connecticut, 261, 271; *Buchan* v. *Sumner*, 2 Barbour's Chancery, 168, 198; *dictum* in *Dyer* v. *Clark*, 5 Metcalf, 562, 580. Whether in case of insolvency it will be enforced against the separate creditors of one partner, is a matter of some uncertainty. If the separate creditors have notice, before becoming creditors, that the land is partnership property, there is no reason why they should not be postponed to the joint creditors, as in *Divine, &c.* v. *Mitchum*, 4 B. Monroe, 488; and see *Martin* v. *Trumbull*, Wright, 387: and *Dyer* v. *Clark*, and *Burnside and others* v. *Merrick and others*, *Winslow* v. *Chiffelle*, Harper's Equity, 25, and *Boyers* v. *Elliott*, 7 Humphreys, 204, are express to the general principle that when land is partnership property, it

is subject to the rule which in case of insolvency appropriates the joint estate to the joint creditors; but in all these cases, the real estate was in the possession and use of the firm as partnership property which might have been considered as operating as constructive notice of the partnership trust, and it is impossible to say that that did not form an essential part of the decision of the court in those cases. The authority of these cases extends to the principle that land purchased with partnership funds and used in the partnership business, is partnership stock as against the separate creditors. In *Hale* v. *Henrie*, 2 Watts, 143, under the recording acts of Pennsylvania, it was held that where the title on record is to the partners as tenants in common, the legal interest of one will be liable to his creditors, unless the intention to bring the real estate into the partnership stock is manifested by deed or writing placed on record, that purchasers or creditors may not be deceived; but if notice of the partnership title be put on record, the joint creditors will have a preference; *Lancaster Bank* v. *Myley*, 1 Harris, 544, 550; see also *Kramer* v. *Arthurs*, 7 Barr, 165, 170; and see *Forde* v. *Herron*, which perhaps stood upon the right of a creditor rather than a purchaser. In *Blake* v. *Nutter*, 19 Maine, 16, and *Goodwin* v. *Richardson, Adm'r*, 11 Massachusetts, 469, 475, also, the right of the separate creditor was upheld; but these were cases at law, in which it was expressly admitted that in equity the rule might be different. There is undoubtedly great force in the suggestion made in *Hale* v. *Henrie:* and if there be a conveyance to partners as tenants in common, and no notice in the deed that the land is partnership property, and the land be not used as partnership property, no case goes so far as to say that a private agreement between the partners could affect the land with a lien in favour of the joint creditors, to the postponement of the separate creditors; and such an extension of the lien it is believed, would be opposed to settled rules of equity. And see the reasoning in *Frink* v. *Branch*, 16 Connecticut, 261, 271.

Whether real estate held as partnership stock is to be considered as converted into personalty as between the heir and administrator of a deceased partner, has been discussed but not settled: see the English cases reviewed in *Randall* v. *Randall*, 7 Simons, 271; and see *Houghton* v. *Houghton*, 11 Id. 491; *Hoxie* v. *Carr et al.*, 1 Sumner, 174, 183; *Pierce's Adm'r, &c.* v. *Trigg's Heirs*, 10 Leigh, 408, 421; *Delmonico* v. *Guillaume*, 2 Sandford, 366, 368; *Buchan* v. *Sumner*, 2 Barbour's Chancery, 168, 201. The subject has become confused from not attending to a distinction between this case and those before considered. A conversion as between the heir and personal representative, will not be effected by an agreement between the partners to consider their land as partnership stock, in relation to creditors, nor result from the operation of the lien previously mentioned. It can be effected only through the medium of another agreement, express or implied, that the land shall be sold as partnership stock, upon the dissolution of the firm by the death of one partner. An express covenant of that nature will be enforced in favour of the surviving partner, and the proceeds of the sale will go to the administrator of the deceased partner; and this is the extent of the authority of *Townsend* v. *Devaynes*, before Lord Eldon; Jacob's Roper on Husband and Wife, 1, p. 346. Probably, also, it would be enforced on application of the administrator himself. The difficulty is in determining from what circumstances such an agreement may be implied. The mere circumstances, that the land is bought with partnership funds, and used for partnership purposes, it is supposed, will not be sufficient to convert the land into personalty as be-

tween the heir and administrator. *Buchan* v. *Sumner*, 2 Barbour's Chancery, 168, 201. See *Yeatman* v. *Woods*, 6 Yerger, 20, citing *M'Alister* v. *Montgomery*, 3 Haywood, 94; and see *Smith et al.* v. *Wood*, Saxton's Chancery, 76, 82. "When all the claims against the partnership have been satisfied," it was said in a late case, "the partnership account adjusted, and the object of the trust fulfilled, in case, where the partners have not either by an express or implied agreement, indicated an intention to convert their lands into personal estate; no solid reason can be assigned, why the real estate should not be treated in a court of equity, as at law, according to its real nature, and consequently chargeable with the widow's dower." *Goodburn & wife* v. *Stevens et al.*, 5 Gill, 2, 27. And see *Lang's Heirs* v. *Waring*, 17 Alabama, 145. But where an agreement, that the real estate of the firm should be sold on the death of one partner, exists, or can be implied, such a conversion may be enforced by the administrator as against the heir.

It is a consequence of the principle of land being affected with a trust as partnership property, that when one partner disposes of his separate interest in land held as partnership stock, to a purchaser having notice, he sells only his residuary interest after the partnership debts, and the share of the other partner, are paid. But though in equity land is thus affected with trusts in the nature of personal estate, the land does not become personal property in such a way as to give one partner an implied power to dispose of the whole partnership interest in it. As regards the power of disposition, land held as partnership stock is not subject to the rule which makes each partner the agent of the firm. Neither can sell more than his own undivided interest, unless he have from the other a sufficient special authority for the purpose; *Anderson & Wilkins* v. *Tompkins et al.*, 1 Brockenbrough, 457, 463; *Tapley* v. *Butterfield*, 1 Metcalf, 515, 518. An authority to convey must, probably, be in writing, under the Statute of Frauds, but an authority to contract to convey need not be, and if such a contract be made by one in the name of the firm, and be authorized or ratified by the other by parol, expressly or impliedly, it will bind the firm; *Lawrence* v. *Taylor*, 5 Hill's N. Y. 108, 112. See *Pitts* v. *Waugh et al.*, 4 Massachusetts, 424.

Interest.

SELLECK AND OTHERS *v.* FRENCH.

In the Supreme Court of Errors of the State of Connecticut.

JUNE, 1814.

[REPORTED, 1 CONNECTICUT, 32–35.]

In an action of book-debt for certain advancements made by the plaintiff for the defendant's use, it appearing that there had not been mutual dealings between the parties, that the debt was due, and payment had been unreasonably delayed; it was held that interest was allowable, though the account was unliquidated, and there had been no agreement to pay interest, nor could it be claimed by virtue of any particular custom.

In what other cases interest may be allowed.

THIS was an action of book-debt, brought by French against the plaintiffs in error, as administrators of the estate of James Selleck, deceased. In the Superior Court, the cause was referred to auditors, who found that the deceased was indebted to the plaintiff in the sum of 135 dollars 71 cents; which sum was composed of 99 dollars 63 cents principal, and 36 dollars 8 cents interest. From a remonstrance to the auditor's report, and the finding of the Court thereon, it appeared that the plaintiff's account was unliquidated; that there had been no agreement to pay interest; and that the plaintiff was not a merchant, and had no right to charge interest by virtue of any particular custom. An allegation in the remonstrance that there were mutual dealings between the parties was found to be not true. The Court accepted the report of auditors, and rendered judgment for the plaintiff accordingly. To reverse that judgment the present writ of error is brought.

R. M. Sherman and *Bissell*, for the plaintiffs in error, contended that interest ought not to have been allowed. They cited De Haviland v. Bowerbank, 1 Campb. 50. De Barnales v. Fuller & al., 2 Campb. 426. Gordon v. Swan, 12 East, 419. Walker v. Constable, 1 Bos. & Pull. 307. Blaney v. Hendrick & al., 3 Wils. 206. S. C. 2 Bla. Rep. 761. 2 Com. Contr. 206. 2 New Rep. 206, n. (1), (Day's edit.) Swift's Ev. 84, 85.

J. Backus, for the defendant in error.

SWIFT, J. This was an action of book-debt; and the only question arising in this case is, whether interest ought to be allowed.

It appears that a sum was due to the plaintiff for advancements; that there had been no mutual dealings; that the debt had not been liquidated by the parties; and that there was no special agreement or custom to pay interest. Interest was allowed by the Court; and to this the defendant objects, because there was no contract or custom to pay it.

Interest by our law is allowed on the ground of some contract express or implied to pay it, or as damage for the breach of some contract, or the violation of some duty.

1. Interest will be allowed in all cases where there is an express contract to pay it.

2. The law will imply a contract to pay interest where such has been the usage of trade, or the course of dealings between the parties. Where it is known to be the custom of merchants or others to charge interest on their accounts for goods sold after a certain term of credit, the law will presume the purchaser promises to pay such interest. So where in accounts settled interest has been charged and allowed, and the account afterwards continued, it will be presumed that interest was agreed to be paid.

3. Where there is a written contract to pay money or other thing on a day certain, and the contract is broken, then interest is allowed by way of damage for the breach, as in the case of notes and bills of exchange. Though a policy of insurance contains no certain day on which the losses are to be paid, yet interest will be computed from the time the money becomes due.

4. Where goods are sold and delivered, to be paid for on a day certain, and are charged on book, interest will be allowed after the term of credit has expired. If partial payments are made, interest will be allowed on the balance, though the account is unliquidated.

5. Where one has received money for the use of another, and it was his duty to pay it over, interest is recoverable for the time of the delay; but if the holder of money for another is guilty of no neglect or delay, he will not be chargeable with interest.

6. Where money is obtained by fraud or deceit, and the party injured, waiving the tort, brings his action on the implied promise, interest will be allowed as damages.

7. Where an account has been liquidated, and the balance ascertained by the parties, interest will be allowed thereon, unless there should be some agreement to delay the payment.

8. Where articles are delivered, or services are performed, and charged on book, and no time of payment agreed on; yet if it appear from the nature of the transaction that they were to be paid for in a reasonable time, and not to rest on book as a mutual account; then if payment be unreasonably delayed, interest will be recoverable as damages, though partial payments have been made, and the account has not been liquidated. If one should make advances for the benefit and at the request of another, or a mechanic should perform some considerable piece of work, as building a house, or a farmer should sell the produce of his farm, as his wheat, beef, &c., it could not be presumed that they were to rest on the footing of a mutual account on book, but that payment was to be made when the advancements were closed, the work completed, and the produce delivered; of course, interest would be chargeable on such accounts if unreasonably delayed, though partial payments have been made, and the accounts were unsettled; for here has been a breach of contract.

9. But where there are current accounts founded on mutual dealings, unless there be some promise or usage to pay interest, it will not be allowed; for in such cases no time of payment is stipulated, each party is making payment, the balance is constantly varying, it is understood that the demands are to remain on book, and the presumption is that interest is not to be allowed; such is the case of farmers, and mechanics, in their mutual intercourse.

Such are the principles which have been long established in this state. In England there have been contradictory decisions; but it has been lately decided, that interest ought to be allowed only, where there is a written contract for the payment of money on a day certain, as on bills of exchange, and promissory notes; or where there has been an express contract; or where a contract can be presumed from the usage of trade, or course of dealings between the parties; or where it can be proved that the money has been used, and interest actually made. De Haviland v. Bowerbank, 1 Campb. 50. De Bernales v. Fuller & al., 2 Campb. 426. Interest has been refused in actions for money obtained by fraud (Crockford v. Winter, 1 Campb. 129); for money received to the plaintiff's use (De Bernales v. Fuller & al., 2 Campb. 426); for goods sold and delivered payable at a certain time (Gordon v. Swan, 2 Campb. 429, n.); on liquidated accounts, and on policies of insurance (Kingston v. M'Intosh, 1 Campb. 518). But where goods have been sold to be paid for on a certain day in a bill of exchange, if the bill is not delivered, interest is allowed, because the bill would have drawn interest. Becher v. Jones, 2 Campb. 428, n. Porter & al. v. Palsgrave, 2 Campb. 472. Boyce & al. v. Warburton, 2 Campb. 480. These rules do not appear to be either founded in justice, or consistent with each other.

There is the same reason to allow interest for not paying money by the time it is due in the case of policies of insurance as of notes and bills of exchange; in the case of parol as of written contracts. Why should a man be liable to pay interest on a contract to deliver a *bill of exchange* in payment for goods on a certain day, and not be liable on a contract to pay the *money* for goods on a certain day? It is as valuable to receive money in hand, as a bill drawing interest. Why should the defendant be liable to pay interest, if it can be proved that he has made interest by the use of it, and not liable if he has made none? It is immaterial to the plaintiff what use the defendant has made of the money; the injury to him is the being kept out of the use of it himself.

In this case, it appears that there were not mutual dealings; the advancements were all on the part of the plaintiff. It is not denied, that the debt was due, and the payment unreasonably delayed; of course, the defendant became liable to pay the interest, though the account was not settled, and there was no promise or usage to pay it.

The other judges were of the same opinion.

Judgment affirmed.

In addition to the principal case, the reader will find the subject of interest discussed at large in *Reid* v. *Rensselaer Glass Factory*, 3 Cowen, 393; S. C. on error, 5 Id. 589; *Peirce et al., Ex'rs* v. *Rowe*, 1 New Hampshire, 179; *McIlvaine* v. *Wilkins*, 12 Id. 474, 479; *Ex'rs of Pawling*, v. *Adm'rs of Pawling*, 4 Yeates, 220; *Troubat* v. *Hunter*, 5 Rawle, 257; *Bainbridge & Co.* v. *Wilcocks*, Baldwin, 536; *Hammond* v. *Hammond*, 2 Bland's Chancery, 367–384. The remarks hereafter following refer to the law as established in this country; for in England the subject of interest has been viewed differently, in many respects. See *Attwood* v. *Taylor*, 1 Manning & Granger, 280, n. (b), 332.

Interest is a compensation for the detention or use of money. The right to it, as to other compensation, rests on two grounds: one of them, an actual agreement (1), express, or (2) implied in fact, to allow it; the other, damages given by law (3) for a default in the payment of a debt, or (4) for a use or benefit derived from the money of another. There are differences between the case where interest is due by agreement, and the case where it is due as damages: and the liability, in damages, for the wrongful detention of a debt, is a distinct principle from liability to make compensation for a use or benefit derived from the money of another.

The different methods in which interest may become due, may be considered in order.

1. An agreement to pay it, either generally, or at specified times.

An express agreement to pay interest, will give a valid title to recover it, although the principal debt be not due at the time when the interest is

made payable; *Fake* v. *Eddy's Ex'r*, 15 Wendell, 76, 80; *Stearns et al.* v. *Brown et ux.*, 1 Pickering, 530, 533; *Edgerton* v. *Aspinwall*, 3 Connecticut, 445, 449; and an agreement to pay interest half-yearly or quarter-yearly on a note payable a year after date, is valid and enforceable; *Mowry* v. *Bishop*, 5 Paige, 98, 100; *Wilcox* v. *Howland*, 23 Pickering, 167, 168. If due by simple contract, assumpsit will lie for the interest as it falls due; *Greenleaf* v. *Kellogg*, 2 Massachusetts, 568; *Cooley* v. *Rose*, 3 Id. 221: and in case of a bond conditioned for the payment of a sum at a future day, with interest to be paid annually from the date, it was decided in *Sparks* v. *Garrigues*, 1 Binney, 152, that upon default made in the payment of a year's interest, an action of debt on the bond might be brought, and judgment entered for the penalty, and execution awarded for the interest due, with leave to move the court for execution on the falling due of the principal, or of future instalments of interest; though probably now under *Longstreth & Cook* v. *Gray*, 1 Watts, 60, there must be a scire facias for the future instalments of interest on a bond without warrant. An instrument payable at a future day with interest, carries interest from the date; *Winn* v. *Young*, 1 J. J. Marshall, 51; *English et al.* v. *Watkins*, 4 Pike, 200; *Ewer* v. *Myrick*, 1 Cushing, 16; *Roffey* v. *Greenwell*, 10 Adolphus & Ellis, 222; and if payable at a future day with three per cent. interest from the date, it carries that interest till the day of payment, and after that carries lawful interest; *Ludwick* v. *Huntzinger*, 5 Watts & Sergeant, 51, 60. An agreement to pay money at a certain time after date, and if not then paid, to pay interest from the date, is according to the best authorities, a valid agreement, and in case of default, interest may be recovered from the date; *Rumsey, &c.* v. *Matthews*, 1 Bibb, 242; *Gully* v. *Remy*, 1 Blackford, 69; *Horner* v. *Hunt*, Id. 214; *Satterwhite* v. *M'Kie*, Harper's Law, 397; *Alexander* v. *Troutman*, 1 Kelley, 469, in which last case the subject is well discussed: but in contradiction to this, it was decided in *Dinsmore* v. *Hand*, Minor, 126, and *Henry & Winston* v. *Thompson, &c.*, Id. 209, that upon such an agreement, interest is in the nature of a penalty, and is not recoverable; and see to a similar purport, *Mayo* v. *Judah*, 5 Munford, 495, and *Waller* v. *Long*, 6 Id. 71: it was admitted, however, in these cases, that an agreement to pay at a certain time a certain sum with interest, and if paid punctually, the interest to be remitted or lowered, was a valid agreement for interest in case of default; and the same point was decided in *Ely* v. *Witherspoon*, 2 Alabama, 131. In *Daggett* v. *Pratt*, 15 Massachusetts, 177, several notes were payable at distant days; some with interest at three per cent. per annum if paid at maturity, "if not, six per cent. interest to be paid;" and one payable without interest "until the note is out, if not paid then, lawful interest until paid;" and the notes, not being paid at maturity, these were held to take effect as valid agreements for interest from the date of the notes. In *Howe* v. *Bradley*, 19 Maine, 31, interest due by agreement on a negotiable note payable some years after date, was held to be so far a mere incident to the debt, that an endorser was liable for the interest on notice of the non-payment of the principal: but one judge dissented. As to the question whether a promise to pay interest on a debt due, is a consideration for an agreement to give time, though it has been said in some cases that an agreement to pay interest on a debt legally carrying interest is not a consideration; see *Reynolds* v. *Ward*, 5 Wendell, 501; *Gahn* v. *Niemcewicz*, 11 Id. 312: yet in other cases this distinction has been taken, that an agreement to pay interest on a debt due, for a certain specified time, as, for six months, is a legal consideration, because as, otherwise, the prin-

cipal might have been paid at any time, the creditor was not secure of his interest for a single day; and though this was held in a case where the original contract did not stipulate for interest, yet it was said that the same reason would apply where it did: *Bailey* v. *Adams*, 10 New Hampshire, 162; see also *Crosby* v. *Wyatt*, Id. 318, 323, and *Merrimack Co. Bank* v. *Brown*, 12 Id. 321, 325. Where money is lent, upon an agreement to be paid on a day certain, with lawful interest, payable at appointed times, the creditor cannot pay the principal before the appointed time, nor can he stop the interest, by tendering the principal before that time; for the time is a part of the contract, and is made so for the benefit of the creditor; *Ellis* v. *Craig*, 7 Johnson's Chancery, 7.

2. An agreement *implied* from the custom of a place or trade, or from the course of dealing between the parties, or the usage of one, known and acquiesced in by the other, will give a right to interest, where interest would not otherwise be chargeable, as in open current accounts; *Liotard* v. *Graves*, 3 Caines, 226, 234, 245; *Williams* v. *Craig*, 1 Dallas, 313, 315; *Koons* v. *Miller*, 3 Watts & Sergeant, 271; *Meech* v. *Smith*, 7 Wendell, 315, 318; and see *Dodge* v. *Perkins*, 9 Pickering, 369, 385.

3. Compensatory damages for a default made in the payment of a debt.

In England, now, by St. 3 & 4 Wm. 4, c. 42, s. 28, the jury may, if they thall think fit, allow interest, not exceeding the current rate, on all debts or sums certain, payable at a certain time or otherwise, from the time when they were payable, if payable by a written instrument, at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will he claimed from the date of such demand until the term of payment. See *Harper* v. *Williams*, 4 Queen's Bench, 219, 234. But in England, before this statute, the general rule was, that interest was not recoverable, unless expressly reserved by the contract, or the payment of it was to be implied from the course of dealing between the parties, or from the usage of trade: See *Fruhling* v. *Schroeder*, 2 Bingham's N. C. 77, 79. The case of *Arnot* v. *Redfern*, 3 Bingham, 353, allowing the jury to give interest for the wrongful detention of a debt, seems to have been overruled in *Page* v. *Newman*, 9 Barnewall & Cresswell, 378.

In this country, the general principle has long been settled, that if a debt ought to be paid at a particular time, and is not then paid, through the default of the debtor, compensation in damages, equal to the value of the money, which is the legal interest upon it, shall be paid during such time as the party is in default. Interest is considered as incident, legally, to every debt certain in amount, and payable at a certain time. In *People* v. *New York*, 5 Cowen, 331, 334, the general principle was stated, "that whenever the debtor knows precisely what he is to pay, and when he is to pay, he shall be charged with interest, if he neglects to pay:" and a similar rule is laid down in *Dodge* v. *Perkins*, 9 Pickering, 369, 385. In *Crawford et al.* v. *Willing et al.*, 4 Dallas, 286, 289, the court said, "whatever may have been the doctrine in former times, we have traced, with pleasure, the progress of improvement, upon the subject of interest, to the honest and rational rule, that, wherever one man retains the money of another, against his declared will, the legal compensation, for the use of money, shall be charged and allowed;" and in *Obermyer* v. *Nichols*, 6 Binney, 159, 162, Tilghmau, C. J., said that interest is now allowed, generally, in all cases, where one person detains the money of another unjustly and against his will, and that it is con-

sidered as a compensation for the damages sustained by the plaintiff, in consequence of the defendant's breach of contract.

In all cases, the question seems to be, whether the debtor is legally in default. When a bond, note, or other instrument is expressly payable at a time certain, the debtor is in default if he does not pay at that time, and interest runs from the day of payment; *Jacobs* v. *Adams, Executor*, 1 Dallas, 52. And if a note be payable at a fixed time, as at one day after date, and there be a subjoined agreement that suit shall not be brought so long as the maker is alive, or the payee is satisfied that he is solvent, interest still runs from the time the debt is legally due; *Powell, Adm'r.*, v. *Guy*, 3 Devereux & Battle, 70; *Rollman, Adm'r.* v. *Baker, &c.*, 5 Humphreys, 406. Where an obligation was payable "in the month of June next," it was decided that interest did not commence until after the last day of the month; *Pollard* v. *Yoder*, 2 Marshall's Kentucky, 264, 267. Where a note is for the payment of a sum in several annual instalments, interest is payable on the instalments as they become due, and not annually on the whole sum; *Bander* v. *Bander*, 7 Barbour's S. Ct. 560. A note or bond payable, without any time specified, is in law payable immediately; *Sheehy* v. *Mandeville*, 7 Cranch, 208, 217; and interest runs from the day of the date: *Farquhar* v. *Morris*, 7 Term, 124; *Francis* v. *Castleman*, 4 Bibb, 282; *Collier* v. *Gray*, Overton, 110; *Rogers* v. *Colt*, 1 Zabriskie, 19. But where a note or bond is payable on demand, or on request, although it is suable at once, yet the debtor is not considered in default until demand is made, and therefore interest runs only from the time of a demand *in pais*, or of suit brought, which is a judicial demand; *Dodge* v. *Perkins*, 9 Pickering, 369, 386; *Hunt* v. *Nevers*, 15 Id. 500, 505; *Breyfogle* v. *Beckley*, 16 Sergeant & Rawle, 264; *Bartlett* v. *Marshall*, 2 Bibb, 467, 471; *Patrick* v. *Clay*, 4 Id. 246; *Dillon* v. *Dudley*, 1 Marshall's Kentucky, 66; *Nelson* v. *Cartmel's Adm'r.*, 6 Dana, 7; *Cannon* v. *Beggs*, 1 M'Cord, 370; *Wells* v. *Abernethy*, 5 Connecticut, 222, 228; *Scudder et al.* v. *Morris*, Pennington, 419 *o*; *Vaughan* v. *Goode*, Minor, 417; or something equivalent to a demand; *Etheridge* v. *Binney*, 9 Pickering, 272, 279: and the rule that interest runs from the time of demand applies to a note payable on demand for money lent on the day of the date; *Schmidt* v. *Limehouse*, 2 Bailey, 276; *Pullen* v. *Chase*, 4 Pike, 210, confirmed in *Walker* v. *Wills*, 5 Id. 167, which allowed interest from the date of a note payable on demand, proceeded on the construction of a statute. In cases of a contingent liability, such as that of a surety, the party is not considered as in default until notice or demand, and interest does not begin to run till then. Thus, on a guaranty of the payment of notes, not exceeding in all, a certain amount, that should be discounted by a bank for another, it was decided that the party was liable to the extent of the guaranty, for all unpaid notes, with interest from the time that notice of non-payment was given; *Washington Bank* v. *Shurtleff*, 4 Metcalf, 30, 33. The same principle applies to an action on the bond of a surety in an indemnity bond: for though it is said in some cases, in a general way, that judgment may be entered for the penalty, with interest from the time of the first breach, or the time it is due by the breach; *Carter* v. *Carter*, 4 Day, 30, 36; *Lewis* v. *Dwight*, 10 Connecticut, 96, 103; *United States* v. *Arnold et al.*, 1 Gallison, 348, 360; S. C., 9 Cranch, 104; *Perit* v. *Wallis*, 2 Dallas, 252; and see *Judge of Probate* v. *Heydock et als.*, 8 New Hampshire, 492, 494: yet it is to be understood that, in general, interest, as against the surety, begins to accrue on the penalty, and on the debt if less than the penalty,

only from the time of a demand on the surety or notice to him, in pais, or by suit, or something equivalent to a demand or notice; *Bank of the United States* v. *Magill et al.*, Paine, 662, 670; S. C., 12 Wheaton, 512; *Mower* v. *Kip*, 6 Paige, 89, 92; *Heath* v. *Gay*, 10 Massachusetts, 371; *Boyd* v. *Boyd*, 1 Watts, 365, 369; *State* v. *Bird*, 2 Richardson, 99; *Campbell* v. *Bruen*, 1 Bradford's Surrogate, R. 225, 234; such as an order of the court fixing his liability, in case of an administration bond; *Richardson* v. *Richardson & Spann*, 1 McMullan's Equity, 103. Bail are liable for interest on the judgment, from the return of the *ca. sa.*, for they are fixed from that time, and are bound to take notice of the proceedings of the court; *Constable* v. *Colden*, 2 Johnson, 480. Where a note is stipulated not to be payable until the payee shall do some act, notice of the performance of the act must be given before interest begins to accrue, as the act lies more in the knowledge of the party who is to do it; *Hodges* v. *Holeman*, 2 Dana, 396; but where there is an agreement to pay money on the happening of a particular event, not particularly within the power or knowledge of the creditor, interest begins to run from the time when the event occurs, without a necessity for notice; accordingly, where on a sale of land, and a partial payment, an engagement was given to pay the residue of the purchase-money on extinction of the wife's dower by release or death, it was decided that interest ran from the wife's death, and not merely from notice of it, the occurrence being equally within the knowledge of either party; *Troubat* v. *Hunter*, 5 Rawle, 257. In *Lang* v. *Brailsford*, 1 Bay, 222, and *Adm'rs. of Ash* v. *Ex'rs. of Brewton*, Id. 243, the distinction was taken, that where a bill of exchange, payable at so many days, is accepted generally, the acceptor is liable for interest from the expiration of the time without a demand, but that where it is made or accepted payable at a particular banking house, a demand must be made at that place, to entitle the party to interest: but in *Miller* v. *Bank of Orleans*, 5 Wharton, 503, this distinction was not supposed to exist, and it was held that the acceptor of a bill payable at a bank was liable for interest, though the bill was not presented for payment at the bank, if he had not funds in the bank ready to be appropriated to the payment of the bill; and was not liable if he had. Interest is due from the state as from individuals; *Respublica* v. *Mitchell*, 2 Dallas, 101; *The People* v. *The Canal Commissioners*, 5 Denio, 401; but unless expressly agreed to be paid, is due in general only from the time of demand; *Attorney-General* v. *Cape Fear Navigation Co.*, 2 Iredell's Equity, 444, 455; *Milne* v. *Rempublicam*, 3 Yeates, 102: See *Adams* v. *Beach*, 6 Hill's N. Y. 272; and *Auditor* v. *Dugger et al.*, 3 Leigh, 241: See also, *Pawlet* v. *Sandgate*, 19 Vermont, 622, 633.

There has been much discussion with regard to the allowance of interest on rent arrere: and the distinction appears to be between rent, in the strict sense, as a real estate in the person reserving it, and a personal contract to pay a certain sum as rent. In the former view, interest is not due on rent in arrear, because rent issues out of the land, and because it is demandable on the land, and because the landlord has in his own hands the means of taking it by distress or entry. Accordingly, when the landlord proceeds against the land by real remedy, he does not recover interest on the rent in arrear. On a distress, therefore, interest cannot be distrained for, but only the precise rent due; *Lansing* v. *Rattoone*, 6 Johnson, 43; *Longwell & Eye* v. *Ridinger*, 1 Gill, 57 (but see *Albright* v. *Pickle*, 4 Yeates, 264); and if the landlord enter under a clause giving a right to re-enter and hold till the arrears of rents are discharged, he can hold only till the arrears, without interest, are paid; and therefore, in

Pennsylvania, the lien of arrears of rent, which is created by that clause of re-entry, extends only to the arrears and not to interest upon them; *Bantleon* v. *Smith*, 2 Binney, 146, 153; *Dougherty's Estate*, 9 Watts & Sergeant, 189: see *Gaskins* v. *Gaskins and others*, 17 Sergeant & Rawle, 390. But where a personal action, as covenant or debt, is brought for rent agreed to be paid at a certain time, it stands like any other debt due at a time certain, and interest accrues after the time fixed for payment; *Clark* v. *Barlow*, 4 Johnson, 183; *Van Rensselaer* v. *Jones*, 2 Barbour, 644, 665; *Dennison* v. *Lee & Wife*, 6 Gill & Johnson, 383, 386; *Obermyer* v. *Nichols*, 6 Binney, 159, 162; *Buck* v. *Fisher*, 4 Wharton, 516; *Honore* v. *Murray*, 3 Dana, 31; *Elkin & Perry* v. *Moore*, 6 B. Monroe, 462; the limitations mentioned in *Obermyer* v. *Nichols*, being apparently no others than those which qualify the right to interest on all debts. In Virginia, however, without regard to this distinction, the principle established is, that interest is not due on rent as a matter of law; *Cooke* v. *Wise*, and *Newton* v. *Wilson*, 3 Hening & Munford, 483: *Skipwith* v. *Clinch, Ex'r, and others*, 2 Call, 253; but that under circumstances it may be given by the jury; *Dow* v. *Adam's Administrators*, 5 Munford, 21, 23; *Mickie* v. *Wood*, 5 Randolph, 571; see *Kyles* v. *Roberts's Ex'or*, 6 Leigh, 495; see *Mulliday* v. *Machir's Adm'r*, 4 Grattan, 2, 9. In New York, it had been held in one case, that in covenant for rent arrear, payable in wheat, interest was not recoverable, *Ex'ors of Van Rensselear* v. *Adm'rs of Platner*, 1 Johnson, 276; but afterwards it was decided that in covenant for rent payable in wheat on a certain day, interest on the value of it on the day was to be allowed; *Lush* v. *Druse*, 4 Wendell, 313, 317; and the latter decision has been confirmed in *Van Rensselaer's Executors* v. *Jewett*, 5 Denio, 135; S. C. on error, 2 Comstock, 135. See *Philips et als.* v. *Williams, &c.*, 5 Grattan, 259, 264.

Interest is incident at law to judgments; *Gwinn* v. *Whitaker*, 1 Harris & Johnson, 754, 755; (although the reverse has been held in South Carolina; *Trenholm* v. *Bumpfield*, 3 Richardson, 376); yet, independently of statutes, the only remedy by which it can be recovered, is an action of debt on the judgment; scire facias, writ of execution against property, and commitment on execution, being remedies only for the amount of the judgment. In an action of debt, interest may be recovered from the time of the entry of the judgment, as damages for the detention; *Sayre* v. *Austin*, 3 Wendell, 496; *Williams, Administrator*, v. *American Bank and others*, 4 Metcalf, 317, 322; *Fishburne, Ex'or of Snipes* v. *Sanders*, 1 Nott & M'Cord, 242; *Norwood* v. *Manning*, 2 Id. 395; *Administrator of Pinckney* v. *Singleton, Ex'or*, 2 Hill's So. Car. 343; *Hodgdon* v. *Hodgdon*, 2 New Hampshire, 169; even where it is the judgment of a justice of the peace of another state; *Mahurin* v. *Bickford*, 6 New Hampshire, 568, 572: and the rule applies where the original judgment is for a cause of action that does not bear interest, as for unliquidated damages; *Klock* v. *Robinson*, 22 Wendell, 157; *Lord* v. *The Mayor, &c., of New York*, 3 Hill's N. Y. 427; *Marshall* v. *Dudley*, 4 J. J. Marshall, 244; *Harrington* v. *Glenn*, 1 Hill's So. Car. 79; or is for a penalty, and the judgment with the interest, exceeds the penalty; *Smith* v. *Vanderhorst and Wife*, 1 M'Cord, 328. But at common law, on an execution on a judgment, interest cannot be levied, because the execution must pursue the judgment, and there is nothing on the record to authorize the collecting of interest; and this applies even where the judgment has been reduced by partial payments, and the amount which the plaintiff orders to be collected is less than the face of the judgment; *Watson* v. *Fuller*, 6 Johnson, 283; *Mason* v. *Sudam*, 2 John-

son's Chancery, 172, 180; but a qualification of this exists, in the case of a bond with a penalty, for here the cautionary judgment is for the whole penalty, which at law is the debt, to be discharged, according to the statute of 4 Anne, c. 16, by bringing into court all the principal money and interest due on the bond, together with costs; *Thomas* v. *Wilson*, 3 M'Cord, 166. As a consequence of the right to levy execution only for the judgment and not for the interest, a judgment is a lien on lands only for the principal amount and not interest upon it; *De La Vergne* v. *Evertson*, 1 Paige, 182; *Mower* v. *Kip*, 6 Id. 89, 91: but see *M'Clung* v. *Beirne*, 10 Leigh, 395, 400. But the right to include in an execution on a judgment, interest as well as principal, is now given by statute in most states, as in New York, Pennsylvania, South Carolina, Kentucky, &c., &c.; see *Sayre* v. *Austin*, 3 Wendell, 496; *Berryhill* v. *Wells*, 5 Binney, 56, 59; *Thomas* v. *Wilson*, 3 M'Cord, 166; *Administrators of Kirk* v. *Executors of Richbourg*, 2 Hill's So. Car. 352; *Chamberlain* v. *Maitland & Co.*, 5 B. Monroe, 448, 449; *Martin* v. *Kilbourne*, 11 Vermont, 93; *Ijams & Carr* v. *Rice*, 17 Alabama, 404. A commitment on execution also, is, at common law, a remedy only for the amount of the judgment, and when that is satisfied, the person cannot be detained for the additional interest: *Allen* v. *Adams & Allen*, 15 Vermont, 16; *Bowen* v. *Huntington*, 3 Connecticut, 423, 426; and yet, as was held in the latter case, in an action on the case against the sheriff for an escape, interest on the judgment may be recovered in damages. On a scire facias on a judgment no interest can be recovered, for it merely revives the judgment for its original amount; *Hall* v. *Hall*, 8 Vermont, 156; *Allen* v. *Adams & Allen*. In Pennsylvania, however, under the statute of 1700, interest is an incident to all judgments; *Fitzgerald* v. *Caldwell's Executors*, 4 Dallas, 251; *The Commonwealth* v. *Miller's Administrators*, 8 Sergeant & Rawle, 452, 457; *Mohn* v. *Hiester*, 6 Watts, 53; and a judgment in scire facias, includes interest on the original judgment, and every such judgment carries interest; *Fries* v. *Watson*, 5 Sergeant & Rawle, 220; *Meason's Estate*, 5 Watts, 464. And even a judgment in scire facias against a garnishee in foreign attachment, gives interest on the judgment in the foreign attachment, although the first judgment included interest; *Flanagin* v. *Wetherill*, 5 Wharton, 280, 286.

In England, also, by St. 1 & 2 Vict. c. 110, s. 17, every judgment debt carries interest, at four per cent., from the time of entering up the judgment until it is satisfied, and the interest may be levied under a writ of execution on the judgment. See *Fisher* v. *Dudding*, 3 Manning & Granger, 238.

In England, before the Statute 3 and 4 Wm. 4, c. 42, a distinction had been taken between instruments of a commercial nature, such as bills of exchange, and other contracts; that, on the latter, interest is not due without an agreement for it express or implied, though on the former it is by the usage of trade; see *Gordon* v. *Swan*, 2 Campbell, 429, note; S. C. 12 East, 419; (as to the evidence of an agreement, see *Marshall* v. *Poole*, 13 East, 98; *Davis* v. *Smyth*, 8 Meeson & Welsby, 399); and upon this, a distinction between written and verbal contracts was adopted in South Carolina, not as reasonable, but as supposed to be established by authority; *Ryan* v. *Baldrick*, 3 M'Cord, 498; *Ferrand* v. *Bouchell*, Harper, 83, 86; *Farr* v. *Farr*, 1 Hill's So. Car. 393; in England, however, the distinction does not appear to have been between written and verbal contracts, but between written instruments of a commercial nature, and those not of a commercial nature: in *Page* v. *Newman*, 9 Barnewall & Cresswell, 378, it was decided "that

interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments." In this country, elsewhere than in South Carolina, no such distinctions exist, and interest is allowed on all liquidated demands from the time that payment ought to have been made; see *Reid* v. *Rensselaer Glass Factory*, 3 Cowen, 393, 422; *Dodge* v. *Perkins*, 9 Pickering, 369, 385; *Cartmill* v. *Brown, Ad'mr*, 1 Marshall's Kentucky, 576. In Maryland, the rule is said to be, that on written contracts to pay on a certain day, and on bonds, and where there is a contract to pay interest, and where money has been used, interest is due of course, but that in all other cases, it is at the discretion of the jury; *Newson's Adm'r* v. *Douglass*, 7 Harris & Johnson, 418, 453; *Karthaus* v. *Owings*, 2 Gill & Johnson, 431, 445; *Comegys* v. *The State*, 10 Id. 176, 186.

The question of interest on contracts generally, whether written or unwritten, depends upon, first, whether the amount due is ascertained precisely; and secondly, whether a day of payment is fixed.

As a general principle, interest is not due in law, on unliquidated damages, or uncertain demands; because the amount due is not ascertainable but by the concurrence of both parties, or the assessment of a jury, and because there is no time fixed for payment; *Youqua* v. *Nixon et al.* Peters's C. C. 224; *Still* v. *Hall*, 20 Wendell, 51; *Adm'r of Conyers* v. *Magrath*, 4 M'Cord, 392. Yet there are many cases in which, though the demand is for unliquidated damages, the amount that ought to have been paid, and the time at which it ought to have been paid, are sufficiently certain to put the party in default for not paying, and to render him liable for interest. It is therefore commonly said, that the allowance of interest on unliquidated damages, is discretionary with the jury: and this is so far true, that the considerations on which the giving of interest depends, are in such cases to be applied by the jury, because the application commonly depends on circumstances to be found by them: yet the action of the jury must be regulated by the principles of law belonging to the subject; their discretion being a discretion within the law, and according to the facts. And there are many cases, in which the title to interest is so determinate, that interest enters into the legal measure of damages, and is to be given by the jury as of course. Thus, in an action on a policy of insurance, in case of a partial loss, interest is to be assessed in the damages from the time when payment ought to have been made, after proof of loss; *Anonymous*, 1 Johnson, 315; *Vredenbergh* v. *Hallett & Bowne*, 1 Johnson's Cases, 27; *Obermyer* v. *Nichols*, 6 Binney, 159, 166; *Oriental Bank* v. *Tremont Ins. Co.*, 4 Metcalf, 1, 9. So, in an action for breach of an executory agreement to deliver articles on a certain day, the measure of damages is the value of the articles on the day when they ought to have been delivered, with interest from that time; *Enders* v. *Board of Public Works et als.*, 1 Grattan, 365, 390; *Younger* v. *Givens*, 6 Dana, 1; *Meason* v. *Phillips*, Addison, 346, approved in *Edyar* v. *Boies*, 11 Sergeant & Rawle, 445, 452: and the rule is the same where the consideration has been paid, if the plaintiff declares on the executory contract, for the breach of it; but if he proceeds upon a rescission of the contract, in a count for money had and received, he may recover back the consideration money with interest; *Smethurst* v. *Woolston*, 5 Watts & Sergeant, 106; *Wells* v. *Abernethy*, 5 Connecticut, 222, 227. See *West* v. *Pritchard*, 19 Id., 212. On a covenant of seisin, warranty, quiet enjoyment, or against incumbrances, the measure of damages

is the consideration money, with interest; and where the purchaser is evicted by title paramount, the interest begins from the time when the consideration money was paid, or was payable and bore interest; but where the eviction does not relate back, as in case of an incumbrance, and the purchaser has been in perception of profits that cannot be recovered from him, interest runs only from the eviction: and the consideration money is made the measure of damages, apparently because it expresses the value of the land at the time of the sale; for legal principle seems to require that that value should be the measure of damages where the plaintiff declares for a breach of the contract, and not for money had and received: see *Pitcher* v. *Livingston*, 4 Johnson, 1; *Smith* v. *Pitkin*, 2 Root, 46; *Castle* v. *Peirce*, Id. 294; *Mitchell* v. *Hazen*, 4 Connecticut, 496, 516; *Wells* v. *Abernethy*, 5 Id. 222; *Triplett et al.* v. *Gill et al.* 7 J. J. Marshall, 438, 440; *Herndon* v. *Venable*, 7 Dana, 371, 373; *Hovey* v. *Newton*, 11 Pickering, 421; *Culp* v. *Fisher*, 1 Watts, 494, 502; *Patterson* v. *Stewart*, 6 Watts & Sergeant, 527; *Earle* v. *Middleton*, 1 Cheves' Law, 127; *Thompson's Ex'or* v. *Guthrie's Adm'r*, 9 Leigh, 101; *Wilson* v. *Spencer*, 11 Id. 261, 276; *Davis & others* v. *Smith & others*, 5 Georgia, 276, 285: in Connecticut, however, it appears that a distinction exists between a covenant of seisin and of warranty, as to the principal measure of damages; *Sterling* v. *Peet*, 14 Connecticut, 245, 254. In like manner, on a charge for work and labour, or for goods sold, where there is no term of credit, interest is due from the time of demand of payment, where an excessive amount was not demanded, or from the time of suit brought; *Gammell* v. *Skinner*, 2 Gallison, 45; *McIlvaine* v. *Wilkins*, 12 New Hampshire, 474, 482, 484; *Feeter* v. *Heath*, 11 Wendell, 478, 484; see *Newell* v. *Ex'r of Keith*, 11 Vermont, 214, 220. And, generally, in all cases of unliquidated demands where the defendant has been guilty of fraud, injustice, or delinquency, it is discretionary with the jury, subject of course to the control of the court, to allow interest from the time that payment ought to have been made, and to withhold it if he was not in fault; *Delaware Ins. Co.* v. *Delaunie*, 3 Binney, 295, 301; *Uhland* v. *Uhland*, 17 Sergeant & Rawle, 265, 270; *Watkinson* v. *Laughton*, 8 Johnson, 213, 217; *Amory* v. *M'Gregor*, 15 Johnson, 24, 38; *Dox* v. *Dey*, 3 Wendell, 356, 361, 362; *Morford* v. *Ambrose, &c.*, 3 J. J. Marshall, 688, 692; *Young's Ex'rs* v. *Singleton*, 6 Id. 316, 320; *Stark's Adm'r* v. *Price*, 5 Dana, 140; *Noe* v. *Hodges*, 5 Humphreys, 103; *Black's Ex'rs* v. *Reybold*, 3 Harrington, 528. In these cases of unliquidated damages, though the jury may, according to their discretion, take the interest into their account as part of the damages, yet it is incorrect, if they give interest in the name of interest: *Ancrum* v. *Slone*, 2 Spears, 594; *Hull* v. *Caldwell*, 6 J. J. Marshall, 208; but if interest be so given, it may be released, and the verdict will stand good; *Holmes* v. *Misroon*, 3 Brevard, 209. The rule on the whole subject is thus laid down with great precision by Judge Washington: "It is generally in the discretion of the jury to give interest in the name of damages; although it is not conformable to legal principles, to allow it on unliquidated and contested claims, sounding in damages;" *Willings et al.* v. *Consequa*, Peters C. C. 172, 179; *Gilpins* v. *Consequa*, Id. 86, 95. In Massachusetts, it appears to be the practice, in assumpsit, where the demand does not bear interest, to compute interest from the date of the writ to the time of the assessment: see *Williams, Administrator*, v. *American Bank and others*, 4 Metcalf, 317, 321.

When an action of assumpsit is brought upon a series of charges of the same kind, the right to interest depends, not on the form of the count,

whether it demands a precise sum as due by agreement, or demands only unliquidated damages, but upon the contract itself whether it fixed the amount due and the time of payment, or did not. Thus, in assumpsit for use and occupation, if the amount claimed for each year be a mere unliquidated demand, sounding entirely in damages, which are not ascertained until the finding of the jury on a quantum valebat, interest on the sum assessed by the jury for the annual rent will not be given; *Skirving* v. *Stobo*, 2 Bay, 233; but in an action of use and occupation on a special agreement to pay a certain rent, interest will be allowed, for the demand is liquidated, the sum specified, and the period of occupation certain; *Williams* v. *Sherman*, 7 Wendell, 109, 112; and so on an agreement to pay so much a month as wages to a master of a ship, interest runs from the time when the money falls due; *Still* v. *Hall*, 20 Wendell, 51; but upon a claim upon a mere quantum meruit, interest is not to be allowed on the damages found.

A running account, where the items are on one side, does not bear interest, while open and unliquidated, unless there be some agreement, express or implied, that interest shall be allowed: and this applies to goods sold and delivered on credit; *Henry* v. *Risk*, 1 Dallas, 265; *Van Beuren* v. *Van Gaasbeck*, 4 Cowen, 496; *Tucker* v. *Ives*, 6 Id. 193; *Wood* v. *Hickok*, 2 Wendell, 501; *Catlin* v. *Aiken*, 5 Vermont, 177, 180; *Polhemus* v. *Annin*, Coxe, 176; *Bishop* v. *Ross*, Rice, 21; *Johnson* v. *Bennett*, 1 Spears, 209; *Shewel* v. *Givan*, 2 Blackford, 313; *South* v. *Leavy*, Hardin, 518; *Harrison* v. *Handley*, 1 Bibb, 443: and to services rendered on a quantum meruit; *Murray* v. *Ware's adm'r*, 1 Bibb, 325; *Brewer* v. *Tyringham*, 12 Pickering, 547, 549; *Goff* v. *The Inhabitants of Rehoboth*, 2 Cushing, 476, 478; *Doyle's adm'rs* v. *St. James's Church*, 7 Wendell, 178; *Cloud* v. *Smith & Adriance*, 1 Texas, 102; including such charges as a forwarding merchant's for freight, wharfage and storage; *Trotter* v. *Grant*, 2 Wendell, 413; but not to accounts for money lent, paid or advanced, which always bear interest; *Liotard* v. *Graves*, 3 Caines, 226, 234, 238, 243, 245; *Reid* v. *Rensselaer Glass Factory*, 3 Cowen, 393; 5 Id. 589; *Lessee of Dilworth* v. *Sinderling*, 1 Binney, 488, 494. But if there be an agreement that interest shall be charged on the items of an account, or if it be the uniform usage of the trade, or the creditor's custom known and acquiesced in by the debtor, to charge it, all of which are evidence of an agreement, interest will be allowed; *Meech* v. *Smith*, 7 Wendell, 315, 318; *Esterley* v. *Cole*, 1 Barbour, 236; *Esterly* v. *Cole*, 3 Comstock, 502; *Williams* v. *Craig*, 1 Dallas, 313, 315: and so if the account be liquidated, as it is where an account is rendered and assented to, or acquiesced in, or not objected to within a reasonable time, interest begins to run; *Liotard* v. *Graves*, 3 Caines, 226, 234; *Walden* v. *Sherburne*, 15 Johnson, 409, 425; *Elliott* v. *Minott*, 2 M'Cord, 125. The reason why an open account does not carry interest is not so much because the amount due is not ascertained, though that may sometimes concur as an additional reason, as because when there is only an implied agreement to pay, it is an agreement to pay on demand after the consideration is rendered, and because whenever credit is given, the creditor acquiesces in the non-payment, as in the case of a note payable on demand, and the debtor is not in default until either a demand has been made, or a time appointed for payment. Accordingly, the general rule is, that in an action for goods sold and delivered, or services rendered, in account, where no express term of credit is proved, interest will be allowed from the time of a demand, or presentment of the account, or of the commencement of the suit, and not

from any earlier period; *Barnard* v. *Bartholomew*, 22 Pickering, 291, 294; *Amee* v. *Wilson*, 22 Maine, 116, 120; *Gray* v. *Van Amringe*, 2 Watts & Sergeant, 128; *Moore* v. *Patton, Donegan & Co.*, 2 Porter, 451, 454: and if a demand is required to give a right to interest, it must be a separate and distinct demand for a debt or sum of money, which is afterwards admitted or proved to be due; *Goff* v. *The Inhabitants of Rehoboth*, 2 Cushing, 476, 478: but if there be an express promise to pay at a certain time, or an express understanding between the parties that the accounts are to be considered due at a particular date after they are incurred, or there be an established usage of trade, or a custom in the plaintiff's dealings, by which the defendant is affected, to give a certain length of credit, this becomes a part of the contract, and interest is to be allowed after the express or implied term of credit has expired; *Moore* v. *Patton, Donegan & Co.*; *Marr's Ex'ix* v. *Southwick, Cannon and Warren*, 2 Porter, 351, 376; *M'Allister* v. *Reab*, 4 Wendell, 484, 490; S. C. on error, 8 Id. 109, 112, 118; *Knox et al.* v. *Jones*, 2 Dallas, 193; *Crawford et al.* v. *Willing et al.*, 4 Id. 286, 289; *Obermyer* v. *Nichols*, 6 Binney, 159, 162; *Raymond* v. *Isham*, 8 Vermont, 258, 263; *Phenix* v. *Prindle*, Kirby, 207; and even without an agreement of this kind, and perhaps without a demand, if there be an unreasonable and vexatious delay in making payment, interest may be allowed; *Williams* v. *Craig*, 1 Dallas, 313, 316; *Wills* v. *Brown*, Pennington, 548; and see the decision in the principal case: and in general where the circumstances are such as to call for a discretion, it is in the discretion of the jury to allow interest in the name of damages; *Eckert* v. *Wilson*, 12 Sergeant & Rawle, 393, 398. But when evidence of a usual term of credit in the creditor's place of residence, or in his dealings, is relied on, it has been held that there must be something to show an assent or acquiescence in it, express or implied, on the part of the debtor; and such usage could not prevail where the circumstances negative a knowledge and assent to it on the part of the debtor, because a man is entitled to have his rights determined by his own contract or by the law, and he cannot without proof or probability be considered as agreeing to any usual term of credit; *Amee* v. *Wilson*, 22 Maine, 116, 120; *Searson* v. *Heyward & Co.*, 1 Spears, 249. In Philadelphia, however, the practice of merchants to charge interest on their accounts after six months, is so well established, that it will be judicially taken notice of, as part of the law, and will affect persons from the country dealing with city merchants; *Koons* v. *Miller*, 3 Watts & Sergeant, 271. In South Carolina, it is the practice not to allow interest on an account for goods sold or work done, although a time be fixed for payment, unless there be an agreement, express or implied, to pay interest; *Knight* v. *Mitchell*, Constitutional R., 668; but this proceeds on the principle before adverted to, peculiar to that court among American courts, that interest is incident only to written contracts. See *Ferrand* v. *Bouchell*, Harper's Law, 83.

In open mutual accounts, between merchant and merchant, except on money advances, no interest is allowed; as is remarked in the principal case, and in *Newell* v. *Griswold*, 6 Johnson, 45; until a balance is struck, and notice of it given; *Kane* v. *Smith*, 12 Johnson, 156; *Crawford et al.* v. *Willing et al.*, 4 Dallas, 286, 289; *Raymond* v. *Isham*, 8 Vermont, 258, 263: see *Consequa* v. *Fanning*, 3 Johnson's Chancery, 587, 601. See *Reid* v. *Rensselaer Glass Factory*, 3 Cowen, 393; S. C. on error, *Renss. Glass Factory* v. *Reid*, 5 Id. 589.

As to the allowance of interest, in accounts between partners; see *Stoughton* v. *Lynch*, 1 Johnson's Chancery, 467; *Beacham* v. *Eckford's Executors*, 2 Sandford, 117, 126; *Miller* v. *Lord*,

11 Pickering, 11, 26; *Winsor* v. *Savage*, 9 Metcalf, 347, 352; *Hollister* v. *Barkley*, 11 New Hampshire, 502, 511; *Honore* v. *Colmesnil*, 7 Dana, 199, 202; *Hodges et al.* v. *Parker et al.*, 17 Vermont, 242; *Reynolds et al.* v. *The Heirs and Adm'rs of Mardis*, 17 Alabama, 32. A general rule on the subject is, that if one partner, without the knowledge or consent of the others, withdraws a part of the partnership funds from the legitimate business of the firm, and fraudulently misapplies it to his own use, interest shall be charged against him from the time that he abstracted the money; but if the money was withdrawn with the consent of the other partners, interest shall not be charged, except from the time that an account has been demanded and refused, the party being in default only from that time; *Solomon* v. *Solomon, Ex'x.*, 2 Kelly, 18.

In trover, and case and trespass when brought for the recovery of property converted or destroyed, the legal measure of damages is the value of the chattel, with interest from the time of the conversion or trespass; *Beals* v. *Guernsey*, 8 Johnson, 446, 453; *Bissell* v. *Hopkins*, 4 Cowen, 53; *Hyde* v. *Stone*, 7 Wendell, 354, 358; *Taylor* v. *Knox's Ex'rs.*, 1 Dana, 391, 400; *Kennedy* v. *Whitwell et al.*, 4 Pickering, 466; *Johnson* v. *Sumner*, 1 Metcalf, 172, 179. In an action sounding purely in tort, as in case for fraud, or trespass for assault and battery, interest ought not to be given; *Ormsby & Castleman* v. *Johnson*, 1 B. Monroe, 80, 82; but if it be given in the verdict, it may be stricken out as surplusage, and a new trial need not be granted; *Brugh* v. *Shanks*, 5 Leigh, 598, 605; in *Hogg* v. *Zanesville Canal & Manufacturing Co.*, 5 Ohio, 410, 424, however, it was held by a majority of the court, that in an action of tort for fraudulent acts, causing a destruction of property, interest, eo nomine, might be given in the damages. Where an agent or trustee, by his negligence or misfeasance with regard to property in his hands, but without a conversion of it to his own use, makes himself liable for its value, he is liable without interest from the time when he became chargeable; but if he has made a private advantage to himself out of the property, he will be liable to interest; *Dawes* v. *Winship et al.*, 5 Pickering, 97, note; *Thompson* v. *Stewart*, 3 Connecticut, 172, 184; *Rootes* v. *Stone*, 2 Leigh, 650: see *Ricketson et al.* v. *Wright et al.*, 3 Sumner, 336: and see *Short* v. *Skipwith*, 1 Brockenbrough, 104. But if it was his duty to make money and pay it over immediately, and he becomes answerable for the money, he is liable also for interest upon it. On this ground, in an action on the case against a sheriff for negligence in collecting an execution, or for an escape, but not in debt for an escape, the measure of damages includes interest on the debt; *Bowen* v. *Huntington*, 3 Connecticut, 423, 426; *Thomas* v. *Weed*, 14 Johnson, 255; but see *Gibson* v. *Governor, &c.*, 11 Leigh, 600; and *Clifford et al.* v. *Cabiness*, 1 Dana, 384.

In England, by St. 3 and 4 Wm. 4, c. 42, s. 29, the jury may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of conversion or seizure, in all actions of trover or trespass de bonis asportatis, and over and above the money recoverable in all actions on policies of assurance.

A specific legacy carries interest from the death of the testator; a general legacy carries interest only from the time it, is payable, unless another intention appear in the will; *Jones* v. *Ward*, 10 Yerger, 161, 168; *Stephenson* v. *Axson and Mitchell*, 1 Bailey's Equity, 274, 278; *Huston's Appeal*, 9 Watts, 473, 475, 477; *Graybill and Butts* v. *Warren*, 4 Georgia, 528; *Beal and Wife* v. *Crafton*, 5 Id. 301, 311. Where a general legacy is given to any one except a child, and no time

is fixed for its payment, or it is directed to be paid as soon as convenient or practicable, it is always considered as payable one year after the testator's death, and carries interest from that time, unless otherwise specially directed; and this rule of construction does not yield to any impossibility of getting the fund in so as to make payment by the end of the year; *Martin* v. *Martin*, 6 Watts, 67; *Hoagland* v. *Executors of Schenck*, 1 Harrison, 370, 375; *Shobe* v. *Carr*, 3 Munford, 10, 18; *Ingraham* v. *Postell's Ex'rs*, 1 M'Cord's Chancery, 94, 98; *Gillon* v. *Turnbull*, Id. 148, 152; *Huston's Appeal;* see *Hallett & Walker, Ex'rs*, v. *Allen, &c.*, 13 Alabama, 555: but a legacy to a child, not otherwise provided for in the will, though it be not payable till twenty-one, or other future time or event, carries interest from the death of the testator; *Miles* v. *Wister*, 5 Binney, 477, 479; *Magoffin Adm'r* v. *Patton and others*, 4 Rawle, 113, 119; *Allen* v. *Crosland*, 2 Richardson's Equity, 68: but the rule in favour of a child does not extend to a grandchild; *Lupton* v. *Lupton*, 2 Johnson's Chancery, 614, 628; *Huston's Appeal;* nor to the widow, or any other person but a lawful child; *Gill's Appeal*, 2 Barr, 221; and it does not apply in the case of a child, if other provision be made for it in the will; *Williamson* v. *Williamson*, 6 Paige, 299, 300. As to the chancery jurisdiction of decreeing maintenance to infant legatees, including grandchildren; see *Corbin* v. *Wilson*, 2 Ashmead, 178; *Newport* v. *Cook*, Id. 332; *Morris* v. *Fisher*, Id. 411; *Blackburn* v. *Hawkins*, 1 English, 51, 57. In the case of *Williamson* v. *Williamson*, p. 305, however, the rule *of* allowiug interest from the testator's death was supposed to extend to the case of a legacy to the widow *in lieu of dower:* but this extension is denied in *Church at Acquakanonk* v. *Ex'rs of Ackerman et al.*, Saxton, 40, 43, and *Spangler's Estate*, 9 Watts & Sergeant, 135, 141. It has been held in some cases, that if the fund out of which the legacy is made payable, be productive, as land yielding rents or profits, or a bond bearing interest, the legacy will carry interest from the testator's death; *Ingraham* v. *Postell's Ex'ors*, 1 M'Cord's Ch. 94, 99; this may be so, where the legacy is expressly made to issue out of such a fund, because such a legacy may, in some cases, be specific, or in the nature of a specific legacy: but it is not so where the legacy is general, and the fund for its payment, merely, is productive; *Church, &c.* v. *Ex'rs of Ackerman et al.*, Saxton, 40; and *Hilyard's Estate*, 5 Watts & Sergeant, 30, 31. In *Williamson* v. *Williamson*, 6 Paige, 299, 304, it was decided, that on a bequest to any one of a life estate in a residuary fund (or, of the use of a residue for life), where no time is prescribed in the will for the commencement of the interest, or the enjoyment of the use or income of such residue, the legatee is entitled to the interest or income of the clear residue, as afterwards ascertained, to be computed from the time of the death of the testator; but in *Eyre* v. *Golding*, 5 Binney, 472, it was held that there is a difference between a legacy to one of a sum of money for term of life, and a bequest of a sum to be paid annually for life: that in the former case, the legacy not being payable till the end of a year from the testator's death, carries no interest for that year, but that in the latter, the first payment of the annuity must be made at the end of the first year, or the intention of the testator is not complied with: the time must be counted immediately from his death, or the legatee will not receive the annuity annually during life. And this is confirmed in *Hilyard's Estate*, 5 Watts & Sergeant, 30, and decided to be applicable to a bequest of "the interest and income," for life, of a fund directed to be put out at interest; a contrary rule prevailing where there is a bequest of an income or annuity,

from that which applies to a bequest of the *corpus*, and the legatee of interest for life being allowed it from the death of the testator: and to the same effect is *Spangler's Estate*, 9 Id. 135, 141. If the bequest be of a certain annual sum, that sum will be payable for the year succeeding the testator's death; but if of the interest on a fund, only the interest actually made, will be given; see *Spangler's Estate*. In *Williamson* v. *Williamson*, the bequest appears to have been of the use of the residue for life; and it seems very doubtful, whether on such language the decision was correct. See the whole subject of interest on legacies, discussed in *Bitzer's Ex'or* v. *Hahn and Wife*, 14 Sergeant and Rawle, 232.

The general rule is that interest is not payable on the arrears of an annuity bequeathed by will, unless under special circumstances; *Isenhart* v. *Brown*, 2 Edwards, 341, 347; *Adams's Adm'r* v. *Adams's Adm'r*, 10 Leigh, 527; but under special circumstances it may, as when the annuity is in lieu of dower; *Beeson's Adm'rs* v. *Beeson's Ex'or*, 1 Harrington, 394, 399, note; *Houston* v. *Jamison's Adm'r*, 4 Id. 330. See *Philips et als.* v. *Williams, &c.*, 5 Grattan, 259, 264. In Pennsylvania it has been decided that an annuity to a daughter or widow of the testator, charged on land, and an agreement to pay an annuity or annual sum to the widow in lieu of her dower for her maintenance and support, carry interest; *Addams* v. *Heffernan*, 9 Watts, 530, 543; *Stewart* v. *Martin*, 2 Id. 200; *Knettle* v. *Crouse*, 6 Id. 123; *Reed* v. *Reed*, 1 Watts & Sergeant, 235, 239; *Smyser* v. *Smyser*, 3 Watts & Sergeant, 437, 438; unless there are special circumstances defeating the title to it; *Gaskins* v. *Gaskins and others*, 17 Sergeant & Rawle, 390: see *Woodward* v. *Woodward*, 2 Richardson's Equity, 23. In South Carolina, interest was decided to accrue on the arrears of an annuity, from the time that the money become due; *Stephenson* v. *Axon and Mitchell*, 1 Bailey's Equity, 274, 278.

On taxes, interest is, in general, not chargeable; *Danforth* v. *Williams, Ex'r*, 9 Massachusetts, 324; at least not before demand.

4. In cases of demands arising from the payment or receipt of money, the liability for interest rests upon two distinct grounds; the wrongful detention of money that ought to be paid; and a use or benefit derived from the money of another. Cases of money lent, and money paid, laid out, and expended, depend chiefly on the latter: cases of money had and received, on both. In this country, the principle that the use of money belonging to another, though lawfully in the hands of the person using it, makes him chargeable with interest, is as well settled as the principle that raises a liability to interest from the wrongful detention of money due. In *Lewis* v. *Bradford*, 8 Alabama, 632, 634, the court recognised "the general proposition, that where one receives interest from the money of another, or derives an advantage from its use, he shall pay interest to the owner." In *Miller* v. *Bank of Orleans*, 5 Wharton, 503, 505, Gibson, C. J., said, that "it is a rule, with scarce an exception, that he who has derived a benefit from the use of another's money shall pay for it;" and in *Sims* v. *Willing and others*, 8 Sergeant & Rawle, 103, 110, the same judge remarked, that interest should be considered as demandable in every case where one man has used, or been benefited by, the application of the money of another.

On money lent, interest, in this country, is always recoverable; because the defendant has had a use from the plaintiff's money; *Rapelie et al.* v. *Emory*, 1 Dallas, 349; *Lessee of Dilworth* v. *Sinderling*, 1 Binney, 488, 494. For the same reason, on money paid, for account, or to the use or benefit, or at the request of another, interest is allowed from the time of payment, and not merely from the time of

notice or demand; *Weeks* v. *Hasty*, 13 Massachusetts, 218; *Gibbs* v. *Bryant*, 1 Pickering, 118, 121; *Ilsley* v. *Jewett*, 2 Metcalf, 168, 175; *Milne* v. *Rempublicam*, 3 Yeates, 102; *Sims* v. *Willing and others*, 8 Sergeant & Rawle, 103, 109; *Hastie & Patrick* v. *De Peyster and Charlton*, 3 Caines, 190, 195, 197; *Miles, &c.* v. *Bacon*, 4 J. J. Marshall, 457, 463; *Breckinridge* v. *Taylor*, 5 Dana, 110, 114; *Goodloe* v. *Clay*, 6 B. Monroe, 236, 238; *Thompson* v. *Stevens*, 2 Nott & M'Cord, 494, 497; *Buckmaster* v. *Grundy et al.*, 3 Gilman, 626, 634; *Aikin* v. *Peay*, 5 Strobhart, 15, 18. Money advanced by a factor or agent, bears interest from the time it is paid; *Cheeseborough & Campbell* v. *Hunter*, 1 Hill's So. Car. 400; *Smetz* v. *Kennedy*, Riley, 218, 221; *Taylor* v. *Knox's Ex'rs*, 1 Dana, 391, 399; S. C., 5 Id. 466. Money lent, and money paid, carry interest, when they form matter of account, as well as when they are detached transactions; *Reid* v. *Rensselaer Glass Factory*, 3 Cowen, 393; S. C. on error, 5 Id. 589, where this subject is extensively discussed. It is a settled rule, however, that advancements by a father to his children, do not bear interest; *Osgood* v. *Breed's Heirs*, 17 Massachusetts, 356; *Hall et ux.* v. *Davis et al.*, 3 Pickering, 450; *Green* v. *Howell*, 6 Watts & Sergeant, 203, 208; except from the time when the property is divisible among them; *Oakey, ex parte*, 1 Bradford's Surrogate R. 281. See *Yundt's Appeal*, 1 Harris, 575, 581. In England, "the general rule is, that interest is not due by law for money lent, unless from the usage of trade or the dealings between the parties, a contract for interest is to be implied;" per Abbott, C. J., in *Shaw* v. *Picton*, 4 Barnewall & Cresswell, 715, 723; *Page* v. *Newman*, 9 Id. 378; and the rule is the same in regard to money paid at the request of another; *Carr* v. *Edwards*, 3 Starkie, 132.

According to the English practice, in an action for money had and received, nothing but the net sum, without interest, can be recovered; *Walker* v. *Constable*, 1 Bosanquet & Puller, 306, 307; *Tappenden & others* v. *Randall*, 2 Id. 467, 472; *Depcke* v. *Munn*, 3 Carrington & Payne, 112; *Fruhling* v. *Schroeder*, 2 Bingham's N. C., 77; but in *Pease* v. *Barber*, 3 Caines, 266, where the naked question was presented, whether, in this action, interest could be recovered, it was decided that it can, and that whether it will be allowed or not, must depend on the circumstances of the case: there may be cases, it was said, where the defendant ought to refund the principal merely, and others in which he ought, *ex æquo et bono*, to refund the principal with interest, and each case will depend upon the justice and equity arising out of its peculiar circumstances: and this principle has ever since been followed in American courts; *Marvin* v. *McRae*, 1 Cheves's Law, 61; *Porter* v. *Nash*, 1 Alabama, 452, 456, &c. The right to interest depends upon whether the defendant used the money, or was in default in not paying it over. A stakeholder in whose hands money remains ready to be paid over, a trustee by the mere fact of having the *cestui que trust's* money in his hands, and a mere receiver, bailee, or depositary of money, without default, and where there has been no use of the money and no benefit derived from it, is not liable for interest; *Wood* v. *Robbins*, 11 Massachusetts, 504, 506; *Johnson* v. *Eicke*, 7 Halsted, 316, 319; *Knight* v. *Reese*, 2 Dallas, 182; *Taylor* v. *Knox's Ex'rs*, 1 Dana, 391, 398; S. C., 5 Id. 466; *Bell's Adm'rs* v. *Logan*, 7 J. J. Marshall, 593, 594; *Johnson* v. *Haggin*, 6 Id. 581; *Vance's Adm'r* v. *Vance's Distributees*, 5 Monroe, 521, 525. But whenever one has used the money of another, or has had money in his hands which he ought to pay over, he is chargeable with interest. The question turns on the fault of the party. See *Dodge* v. *Perkins*, 9 Pickering, 369, 386, where the subject is examined at length.

Wherever the plaintiff's money has

come to the hands of the defendant, wrongfully, he is liable for interest from the time that it came to his hands. Accordingly, in an action for money had and received, interest is to be allowed from the receipt of the money where it has been obtained from the plaintiff by extortion, or by fraud and imposition; *Goddard* v. *Bulows*, 1 Nott & M'Cord, 45; *Wood* v. *Robbins*, 11 Massachusetts, 504; *Winslow* v. *Hathaway et al.*, 1 Pickering, 211; or, being due to the plaintiff by a third person is wrongfully received by the defendant, and illegally withheld; *Greenly* v. *Hopkins*, 10 Wendell, 96; or is the proceeds of the plaintiff's property tortiously sold by the defendant; *Chauncey et al.* v. *Yeaton*, 1 New Hampshire, 151, 157; or has been received by the defendant in payment of a debt incurred at an illegal game from a person who being a bailee of the plaintiff's money, fraudulently applied it to this purpose; *Mason* v. *Waite*, 17 Massachusetts, 560; because, as is observed in the last case, where one has received the money of another, and has not a right conscientiously to retain it, the law implies a promise that he will pay it over.

In like manner, where money, coming lawfully to the defendant's hands, is wrongfully retained by him after he ought to pay it over, he is liable for interest from the time that he ought to have paid it over. It is a settled rule, said Radcliff, J., in *Lynch* v. *De Viar*, 3 Johnson's Cases, 303, 310, that money received to the use of another, and improperly retained, always carries interest. Wherever money due, or belonging to one man, is received by another, and held unlawfully, or against the other's consent, or converted to the receiver's use, interest is chargeable; *Simpson et al.* v. *Feltz*, 1 M'Cord's Chancery, 213, 220; *Black* v. *Goodman & Miller*, 1 Bailey, 201, 202; *Rapelie et al.* v. *Emory*, 1 Dallas, 349; *Shipman* v. *Miller, &c.*, 2 Root, 405. Thus, a public officer retaining money in his hands after it ought to be paid over by him, is chargeable with interest from such time as it is wrongfully detained; *The People* v. *Gasherie*, 9 Johnson, 71; *Slingerland* v. *Swart*, 13 Id. 255; *Lawrence* v. *Murray*, 3 Paige, 400; *The Board of Justices* v. *Fennimore*, Coxe, 242; *Hudson* v. *Tenney et a.*, 6 New Hampshire, 457. On a sale of chattels, it is the duty of the sheriff to bring the money into court on the return-day of the execution; if he neither pays it into court, nor to the execution creditors, but retains the money in his hands, he is liable for interest; *Crane* v. *Dygert*, 4 Wendell, 675; see *McDowell* v. *Jefferson*, 3 Harrington, 25; and in an action on the sheriff's recognisance by a lien creditor, to recover money that ought to have been paid to him, but was paid to another, interest is recoverable; *Reed* v. *Reed*, 1 Watts & Sergeant, 235, 239; but a sheriff is not liable for interest where he has not had the money in his hands, or the money is detained in court by a contest between the creditors; *Stewart* v. *Stocker*, 13 Sergeant & Watts, 199, 205; and see *Beetim* v. *Buchanan*, 4 Watts, 59. In like manner, where one having a control of another's money, unlawfully diverts it to his own use, he is liable to interest; in *Commonwealth* v. *Crevor*, 3 Binney, 121, where money made by the sheriff, was, by agreement of the litigant parties, deposited in bank, and the sheriff in violation of the agreement, took it out of the bank, it was held that the sheriff was liable for interest from the time that he took the money out.

There are many cases, of this kind, which cannot be referred to a particular class, but must be decided upon an application, according to the circumstances, of the general principles on which a liability to interest depends, viz., the wrongful withholding of a debt due, and the use of money belonging to another. Thus in *Delaware Insurance Co.* v. *Delaunie*, 3 Binney, 295, 301, the defendant had been paid

money, of which a part was received for account of the plaintiff, but the amount due to the plaintiff depended on a disputed account; "Interest, in actions like the present," said Tilghman, C. J., "is not a matter of course, but depends on the conduct of the parties. If the defendant has delayed payment improperly, he is chargeable with interest. On the other hand, the plaintiff may forfeit his claim to interest, by unreasonable behaviour. If the defendant offers to pay as much as in justice he ought, and the plaintiff refuses to receive it, and brings an action, it would be wrong that the defendant should pay full interest after being driven to the expense of defending himself against an unjust suit. But in the present case, the fault does not seem to lie altogether on either side. The plaintiff insisted on too much, and the defendant offered too little. There was a necessity, therefore for a suit. That being the case, and there being no reason to suppose that the defendant has not made use of the money, we think he should be chargeable with interest."

In an action to recover back money paid by mistake, or on a consideration which has failed, the question of interest depends, in like manner, upon the fault of the defendant. Where money was paid on a contract for the sale of land, which the defendant refused to perform, it was decided that the money should be recovered with interest; *Gillett* v. *Maynard*, 5 Johnson, 85, 88. But where money is paid and received by common mistake, and no fraud can be imputed to either party, interest will not be allowed except from the time when the mistake was explained, and a demand made; *Simons* v. *Walter*, 1 M'Cord, 97; *King & another* v. *Diehl & another*, 9 Sergeant & Rawle, 409, 422, explaining *Brown* v. *Campbell*, 1 Id. 176. Accordingly, where lands were sold by a testator, and the purchase-money was paid to his executors, and the will that appointed them was afterwards set aside, and suit brought to recover back the money, the court held that interest should not be allowed from the time of payment, but they said that if there had appeared on the part of the executors, anything like a *suppressio veri* or *suggestio falsi*, the decision might have been different; *Jacobs* v. *Adams*, 1 Dallas, 52. And where an administrator, supposing that the estate was solvent, paid a debt in full, and upon the estate afterwards proving insolvent, brought an action to recover back the excess beyond the rateable part to which the creditor was entitled, he was allowed to recover the excess with interest only from the time of demand; *Wolker* v. *Bradley*, 3 Pickering, 261; see *Stevens, Administrator*, v. *Goodell*, 3 Metcalf, 34, 39. Upon a similar distinction, it has been held that, in an action to recover back taxes paid under an illegal assessment, the party is entitled to interest on the amount paid, from the time of payment, if the taxes were paid under protest or denial of right; but that if there was no protest, or denial of liability to pay them, at the time of paying, interest should be given only from the time of demanding repayment, or from the date of the writ; *Boston and Sandwich Glass Co.* v. *City of Boston*, 4 Metcalf, 181, 190. In like manner, in an action to recover back usury paid, it has been held, that interest is due only from the time that the party has reclaimed the money by demand or suit brought; because the money was paid to be used by the defendant as his own money, and not as the plaintiff's money, and the plaintiff had a perfect right to permit him to do so, and the defendant was not in default for not refunding; *Wood* v. *Gray's Ex'rs*, 5 B. Monroe, 92, 93; *Sharp* v. *Pike's Ad'r*, Id. 155, 159. So where an account in a bank was overdrawn by accident, and there was no wrong in obtaining the money and no default in retaining it, interest is not chargeable; *Hubbard and others* v. *Charlestown Branch Rail Road Co.*, 11 Metcalf, 124, 128.

An ordinary factor or receiving agent, receiving money for his principal, and bound to be ready to pay on order or demand, is not liable for interest, before a demand made, unless he uses the money, or has received special instructions to remit as fast as the money is received, or is in default for not rendering an account; *Williams* v. *Storrs*, 6 Johnson's Chancery, 353, 358; *Crane* v. *Dygert*, 4 Wendell, 675, 679; *Lever* v. *Lever*, 2 Hill's Chancery, 158, 164; *Rowland* v. *Martindale*, 1 Bailey's Eq., 226. If he has engaged to account at certain times, interest runs from such times, if he does not account; *Wardlaw et al.* v. *Gray, &c.*, Dudley's Equity, 85, 113; and without any such agreement, it is the duty of an agent to keep his principal informed of the state of the agency, and to account with him on demand, or in a reasonable time without any demand, and a refusal to account, or a neglect to render an account for an unreasonable time, renders a demand of payment unnecessary, and interest is chargeable from the time that the agent is in default; *Dodge* v. *Perkins*, 9 Pickering, 369, 387, 393; *Ellery* v. *Cunningham and another*, 1 Metcalf, 112, 116; *Bedell* v. *Janney et al.*, 4 Gilman, 194, 202; and the same rule applies to an attorney who has collected money for a client; he is liable to interest from the time the money should have been paid, which is ordinarily from the time of demand, but will be from the receipt of the money if the attorney neglects to give notice of the collection and converts the money to his own use, or otherwise applies it illegally; *Nisbet* v. *Lawson*, 1 Kelly, 275, 287. In *Anderson and others* v. *The State of Georgia*, 2 Id. 370, 375, a collecting agent was decided to be liable for interest from the time that he ought to have paid over; see *Boyd* v. *Gilchrist*, 15 Alabama, 849, 854. If an agent have directions to apply to particular objects, money coming into his hands, and does not make such application, he is bound to pay interest; *Harrison et al.* v. *Long*, 4 Desaussure, 111, 113. See *Short* v. *Skipwith*, 1 Brockenbrough, 104.

It has been stated, before, that a depositary, or mere bailee, of money is not, by the fact of having money in his hands, liable for interest. The liability of a trustee to interest, depends upon the money being held or appropriated, according to, or in violation of, the purposes of the trust: (see *Rapalje* v. *Norsworthy's Ex'ors*, 1 Sandford, 400, 404.) The principle is, that a trustee shall not make any advantage to himself out of the trust fund; and that all profits which he has made, or might, and ought to, have made, belong to the cestui que trust: see *Mc Nair* v. *Ragland et al.*, 1 Devereux' Equity, 517, 524; *Sparhawk and others* v. *Adm'r of Buell and others*, 9 Vermont, 42, 82. If there is a trust to invest, or a trust to receive and pay over, and the trust is not performed, interest is always charged against the trustee; and the general rule is, to charge for a mere neglect, simple interest on the amount which the trustee has neglected to invest or pay over: but for intentional violation of duty and a corrupt use of the money in the business of the trustee, to charge compound interest, or at least to make rests, according to the circumstances of the case, in the computation of interest, that being the measure in Chancery of profits not disclosed; *Schieffelin* v. *Stewart*, 1 Johnson's Chancery, 620; *Evertson* v. *Tappen*, 5 Id. 498, 517; *Ackerman* v. *Emott*, 4 Barbour's Supreme Court, 627, 649; *In re Thorp*, Daveis, 290; *Harland's Accounts*, 5 Rawle, 323; *Dyott's Estate*, 2 Watts & Sergeant, 557, 565; *Robbins* v. *Hayward et al.*, 1 Pickering, 528, note; *Jennison* v. *Hapgood*, 10 Id. 79, 104; *Boynton* v. *Dyer*, 18 Id. 2, 7; *Wright* v. *Wright*, 2 M'Cord's Chancery, 185, 200; *Myers* v. *Myers*, Id. 214, 266; *Garrett ex'or., &c.* v. *Carr et ux. &c.*, 1 Robinson's Virginia, 197, 213; *Moore's Ex'or.* v. *Beauchamp, &c.*, 5 Dana, 70, 78;

Montjoy and wife v. *Lashbrook et al.*, 2 B. Monroe, 261; *Clemens* v. *Caldwell*, 7 Id. 171, 176; *Bryant* v. *Craig*, 12 Alabama, 355; *Fall* v. *Simmons & others*, 6 Georgia, 265, 271; *Peyton et al.* v. *Smith*, 2 Devereux & Battle's Equity, 326, 339; *Torbet's Heirs* v. *McReynolds et al.*, 4 Humphreys, 215; *Voorhees* v. *Stoothoff*, 6 Halsted, 145. Where there are annual receipts and annual disbursements, see the rules adopted, as to the computation of interest, and the statement of the account, in *De Peyster* v. *Clarkson*, 2 Wendell, 78; *Vanderheyden* v. *Vanderheyden*, 2 Paige, 287; *Boynton* v. *Dyer*, 18 Pickering, 2; *State* v. *Layton et al.*, 3 Harrington, 469, 479; *Granberry's Executor* v. *Granberry*, 1 Washington, 246; *Burwell's Ex'ors.* v. *Anderson, adm'r., &c.*, 3 Leigh, 348, 359; *Jackson's heirs* v. *Jackson's adm'r.*, 1 Grattan, 144; *Voorhees* v. *Stoothoff*, 6 Halsted, 145; *Davis' admr.* v. *Wright, admr.*, 2 Hill's So. Car. 560; *Massey* v. *Massey and others*, 2 Hill's Chancery, 492, 497; *Brown* v. *Vinyard*, 1 Bailey's Equity, 460, 462; *Schnell* v. *Schroder*, Id. 335, 342. A guardian is a trustee to invest, or to pay over, as the case may be; and is subject to the rule above stated, as to interest, simple or compound; *Ryan* v. *Blount et al.*, 1 Devereux's Equity, 382; *Spack* v. *Long*, 1 Iredell's Equity, 426; *Hughes &c.* v. *Smith*, 2 Dana, 251. But there is a difference between the case of a guardian, and an administrator during the period lawfully allowed to him for the settlement of the estate; it being the duty of the latter to hold the money ready to be paid according to the demands upon the estate, and it being neither his duty nor right to invest; *Carrol, &c.* v. *Connet*, 2 J. J. Marshall, 195, 202; *Karr's adm'r* v. *Karr*, 6 Dana, 3, 5; *Boynton* v. *Dyer*, 18 Pickering, 2, 7; *Knight* v. *Loomis*, 30 Maine, 204, 210. The general rule now established is, that administrators, or executors in the character of administrators, are not chargeable with interest, except where they have received interest, or used the money, or retained it unreasonably after they ought to pay it out to claimants, or to account to the court; *Wyman* v. *Hubbard et al.*, 13 Massachusetts, 232; *Stearns et al.* v. *Brown et ux.*, 1 Pickering, 530; *Boynton* v. *Dyer*, 18 Id. 2, 7; *Williams, administrator*, v. *American Bank and others*, 4 Metcalf, 317, 324; *The State* v. *Mayhew*, 4 Halsted, 70, 77; *Voorhees* v. *Stoothoff*, 6 Id. 145; *Lake, adm'r*, v. *Park, ex'r*, 4 Harrison, 109; *Darrel* v. *Eden and wife*, 3 Desaussure, 241; *Turney* v. *Williams*, 7 Yerger, 173, 213. In the application of this rule, the practice appears to be, not to hold them prima facie chargeable with interest, during the time that the law allows them for getting in the estate and settling their accounts, which is generally one year after the testator's death; see *Fox* v. *Wilcocks*, 1 Binney, 194; but they will still be charged, if it be proved that they have received interest or have used the money, during that time, those facts rendering every depositary of money liable for interest; *Verner's Estate*, 6 Watts, 250; see *Findley* v. *Smith*, 7 Sergeant & Rawle, 264, 268; *Commonwealth* v. *Mateer and others*, 16 Id. 416, 421. After that period, the administrator is liable prima facie for all money coming to his hands after a reasonable time, which is generally six months, or at least on the annual balance in his hands; *Merrick's estate*, 1 Ashmead, 305; see *Boynton* v. *Dyer*, 18 Pickering, 2, 8; and can discharge himself only by showing that he appropriated it duly to the purposes of the estate; or, if he retained the money, that he retained it idle in his hands, according to his duty, and *bona fide*, to await the event of suits brought, or likely to be brought, against the estate; *Lamb* v. *Lamb*, 11 Pickering, 371, 375; *Wilson* v. *Wilson*, 3 Gill & Johnson, 20, 24; *Pace* v. *Burton*, 1 M'Cord's Chancery, 247; *Lafont* v. *Ricard*, 1 Bailey's

Equity, 487; *Arnett* v. *Linney*, 1 Devereux' Equity, 369; *Grattan* v. *Appleton et al.*, 3 Story, 755, 766; *Burtis* v. *Dodge*, 1 Barbour's Chancery, 78, 90; *Hasler* v. *Hasler*, 1 Bradford's Surrogate, R. 249, 252; or can show as against a distributee or legatee, that no demand was made and refunding bond tendered, (where that is required before suit brought to give a right of action) and in case of a minor, no guardian appointed; and also that he has not used the money; *Patterson* v. *Nichol*, 6 Watts, 379, 382; *Handy* v. *The State*, 7 Harris & Johnson, 43, 46; *Thompson, Ex'or* v. *Sanders, &c.*, 6 J. J. Marshall, 94, 99; *Overstreet* v. *Potts and wife*, 4 Dana, 138; *Cavendish* v. *Fleming*, 3 Munford, 198, 201; *Sparhawk and others* v. *Adm'r of Buell and others*, 9 Vermont, 42, 82: but see *Flintham's Appeal*, 11 Sergeant & Rawle, 16; and *Bourne's ex'or* v. *Meehan's ad'mr*, 1 Grattan, 292; and *Hallett & Walker, Ex'ors*, v. *Allen, &c.*, 13 Alabama, 555, 558; and if any of these can be shown, he is not liable. In short, the liability of administrators and executors depends upon their performing or neglecting their duty, under the circumstances of the case; *Adm'rs of Slade* v. *Heirs of Slade*, 10 Vermont, 192, 195; *Wood's ex'or* v. *Garnett*, 6 Leigh, 271; *Chase* v. *Lockerman*, 11 Gill & Johnson, 186, 208; *Bitzer's executor* v. *Hahn and wife*, 14 Sergeant & Rawle, 232, 239. They are liable to interest if they neglect unreasonably, or refuse to account, for it will be presumed that they used the money; *Moore's ex'or* v. *Beauchamp, &c.*, 5 Dana, 70, 78; *Lyles* v. *Hatton et ux.*, 6 Gill & Johnson, 122, 135; *Comegys* v. *The State*, 10 Id. 176, 186. It has been held that an administrator is liable for interest, where by his wrongful acts he disappoints claimants, as by a mispayment; *Jones* v. *Ward*, 10 Yerger, 161, 163: and generally, interest is to be charged on all sums received by an administrator and not applied to the purposes of the estate; *M'Caw* v. *Blewit*, 1 Bailey's Equity, 98, 102. But where administrators are not in default, they are not chargeable with interest; accordingly it has been held that they are not subject to interest on funds in their hands during the pendency of their accounts in the court, on exceptions or appeal, because it could not be paid over before final confirmation; *Hoopes* v. *Brinton*, 8 Watts, 73; unless during the interval, they make use of the money; *Stearns et al.* v. *Brown et ux.*, 1 Pickering, 530, 533; but after final settlement, and an order for distribution, they become liable for interest without a demand; *Henry et al.* v. *State, &c.*, 9 Missouri, 778; *Brinton's Estate*, 10 Barr, 408, 412. Where an administrator, after settling the estate, becomes, or acts as, guardian, or an executor is, by will, clothed with a trust to invest, they become liable, as guardians, or trustees to invest, are; and are chargeable with interest, simple or compound, if they do not invest; *Karr's Adm'r* v. *Karr*, 6 Dana, 3, 5; *Smith* v. *Lampton and wife*, 8 Id. 69, 73; *Adams* v. *Spalding*, 12 Connecticut, 350, 360; *Bitzer's Executor* v. *Hahn and wife*, 14 Sergeant & Rawle, 232.

As a general rule, and without special circumstances, an administrator is not entitled to interest on money advanced by him beyond the funds of the estate in his hands, because it is in his power to put himself in cash from the estate, and it is not his duty by law to advance his own funds for the benefit of the estate; *Storer* v. *Storer*, 9 Massachusetts, 37: at least, interest will not be allowed, when there are funds which might have been made subject to the control of the administrator; *Evarts* v. *Nason's Estate*, 11 Vermont, 122, 128: but under special circumstances, when the administrator has not been guilty of unreasonable delay, and the advance of money has been meritorious, and beneficial to the estate, he will be allowed interest; *Rix* v. *Smith*, 8 Ver-

mont, 365, 366; *Liddel* v. *M'Vickar*, 6 Halsted, 44, 47: and in *Jennison* v. *Hapgood*, 10 Pickering, 79, 102, it was held that an executor advancing money to redeem a mortgage, and prevent a foreclosure, was entitled to interest. In *Lessee of Dilworth* v. *Sinderling*, 1 Binney, 488, it was held that a trustee advancing money, beneficially to the estate, was entitled to interest; and in *Barrell et al.* v. *Joy*, 16 Massachusetts, 221, 227, to compound interest: but in *Walker's Estate*, 3 Rawle, 243, 250, and *Evertson* v. *Tappen*, 5 Johnson's Chancery, 498, 517, it was held, that compound interest was never to be allowed in favour of an executor or trustee. A guardian who advances money for his ward, in a case where it is proper for him to do so, was held, in *Hayward* v. *Ellis*, 13 Pickering, 272, 278, to be entitled to interest; but see, *contra*, *M'Cracken's Heirs* v. *M'Cracken's Ex'ors.*, 6 Monroe, 342, 351. An assignee making payments before any funds could come to his hands, was allowed interest, in *Prichett* v. *Ex'rs. of Newbold et al.*, Saxton, 572, 575.

It is a *general* rule, that a vendee under a contract, or articles, for a purchase, let into possession of land and a perception of the profits, or otherwise having a valuable occupation of the land, is bound to pay interest on the unpaid purchase-money: though the circumstances be such, that without such possession he would not be liable for interest; *Selden* v. *James*, &c., 6 Randolph, 465; *Brockenbrough et al.* v. *Blythe's Ex'ors. et al.*, 3 Leigh, 619, 647; *Oliver's Ex'or.* v. *Hallam's Adm'r.*, 1 Grattan, 298; *Rutledge* v. *Smith and others*, 1 M'Cord's Chancery, 399, 403; *Boyce*, &c. v. *Prichett's H's*, 6 Dana, 231, 232; *Cullum* v. *Bank*, 4 Alabama, 22, 37; *Hepburn & Dundas* v. *Dunlop & Co.*, 1 Wheaton, 179, 201: See *Curtis et al.* v. *Innerarity et al.*, 6 Howard's S. Ct. 146: but in several cases in Pennsylvania it has been held that if the circumstances show that the vendor was guilty of unreasonable or vexatious delay, or that the payment was delayed for reasonable grounds, interest will not be allowed; *M'Cormick* v. *Crall*, 6 Watts, 207, 212; *Kester* v. *Rockel*, 2 Watts & Sergeant, 365, 371; see *M'Kennan* v. *Sterrett*, 6 Watts, 162, which almost entirely breaks down the rule: and these cases seem to be fully sustained by *Stevenson* v. *Maxwell*, 2 Sandford, 274, 277, &c., which decides that a purchaser in possession is not to pay interest, without an agreement for it, where he is not in default, or where the vendor is in default.

As to the allowance of interest to the creditors of an insolvent estate, in the hands of an assignee or administrator, see *Williams, Administrator*, v. *American Bank and others*, 4 Metcalf, 317; *Brown and others* v. *Lamb and another*, 6 Id. 203; *Atlas Bank* v. *Nahant Bank*, 3 Id. 581; *Ellicott* v. *Ellicott*, 6 Gill & Johnson, 36. In deeds of assignment for the benefit of creditors with preferences, the right to interest depends on the intention and language of the assignor in the deed; if the deed provides for only the amount of the principal debt, specifically, interest will not be allowed; *Murphy's Appeal*, 6 Watts & Sergeant, 223. When, by statute, preference is given to one class of debts over another, in the distribution of an estate, the preference includes interest on the preferred class; *Schultz's Appeal*, 11 Sergeant & Rawle, 182.

Upon the ground, that interest is not due when the debtor is not in default, and has not had the use of the claimant's money, it is a settled principle, that where the payment of a debt, and the use of a fund, are prevented by the interposition of law, or the act of the creditor, interest does not accrue during the continuance of such prevention. A garnishee, or trustee in an attachment process, is not liable for interest on the amount attached, while he is, *bonâ fide*, and without fraud or collusion, restrained

from payment, by the legal operation of a foreign attachment or trustee process; *Fitzgerald* v. *Caldwell*, 1 Yeates, 274: S. C., 2 Dallas, 215; *Sickman* v. *Lapsley*, 13 Sergeant & Rawle, 224, 226; *Prescott* v. *Parker*, 4 Massachusetts, 170; *Oriental Bank* v. *Tremont Ins. Co.*, 4 Metcalf, 1. But this rule, in the case of a fund in the garnishee's hands, proceeds upon the principle that the fund is in the custody of the law, and is not used by the garnishee, which is presumed *prima facie* from the service of the writ; but if the answers show that the money is used by the garnishee, or is so mixed up with his general funds as to form part of his trading capital, the reason of the rule ceases, and interest will be charged; *Adams et al.* v. *Cordis*, 8 Pickering, 260, 268; and the presumption that the funds are not used, does not exist where the attachment is laid by the garnishee on funds in his own hands, and interest in this case will be allowed; *Willings & Francis et al.* v. *Consequa*, Peters, C. C. 303, 321. If a defendant in an action, controverts his indebtedness, and the debt is attached by the plaintiff's creditors, and judgment is afterwards had in the original case, interest will of course be due, as the attachment was obviously not the cause of the payment being withheld; *Georgia Insurance & Trust Co.* v. *Oliver*, 1 Kelly, 38. In the case of an attachment of a debt, a distinction has been taken in Massachusetts between the cases where interest is due by agreement, and where it is due as damages for the detention of a debt; and it has been held that where an attachment is laid on a debt which bore, or would bear, interest by agreement or usage between the garnishee and the defendant in the action, the garnishee will be liable to the attaching creditor for interest, unless the use of the money be actually prevented, but that he will not be liable where there was no agreement for interest between the parties, unless in case of collusion, or unreasonable delay and negligence in making answers; *Adams et al.* v. *Cordis*; *Oriental Bank* v. *Tremont Ins. Co.*, 4 Metcalf, 1, 8, 11.—In like manner, where the payment of a debt, or the payment over, and use of money, are prevented by a court of chancery upon a bill of injunction against the debtor, or the holder of the money, interest is not demandable during the time that the injunction is in force; *Osborn* v. *U. S. Bank*, 9 Wheaton, 739, 837; *Le Branthwait* v. *Halsey*, 4 Halsted, 3; and in *Stevens* v. *Barringer*, 13 Wendell, 639, where an endorsee filed a bill to enjoin the payee and a third person, and obtained an injunction forbidding the defendants in the bill to receive payment, and the maker to pay them or any other person, and served the injunction on the maker, it was held, that, though the maker, not being a party to the suit, was not bound by the injunction, and might have made payment to the endorsee, still, that as the maker of the note detained the money at the request of the plaintiff, under a command supposed by both to be obligatory, the debtor was within the equity of the principle, that one who compels a person to retain money in his hands, shall not compel that person to pay interest for it during such time as the payment of the principal was prevented: see also *Gillespie* v. *The Mayor, &c., of New York*, 3 Edwards, 512, 514: and in both of these cases it was declared that the fact that the debtor used the money with which he would have paid the debt, made no difference in his liability. In Virginia and some other states, the rule appears to be, that if an attachment or injunction be laid on a debt which would bear interest between the parties, or if money attached or enjoined, be held and used, (and if held, it will be presumed to be used,) interest is chargeable, and the debtor or fund-holder, if he wishes to relieve himself, should pay the money into court: *Templeman* v. *Fauntleroy*, 3 Randolph, 434, 447, and cases

cited; and see to a similar effect, *Shackleford* v. *Helm, &c.*, 1 Dana, 338; and *T. & J. Kirkman et al.* v. *Vanlier*, 7 Alabama, 218, 230: and this appears to be the true rule on this subject.—A class of cases occurred after the Revolutionary War, in which it was held that interest was not demandable for the period during the war, where the creditor was in the enemy's country, or with the enemy, and had no known agent in this country competent to receive payment and give a valid discharge, because as all intercourse was prohibited by the existence of the war, the payment of the principal was prevented by law; *Hoare* v. *Allen*, 2 Dallas, 102; *Foxcraft & Galloway* v. *Nagle*, Id. 132; Mr. Jefferson's Letter to Mr. Hammond, 1 American State Papers, 249, and 2 Dallas, 104, note; *Ex'ors Blake* v. *Ex'ors of Quash*, 3 M'Cord, 340; *Dickinson* v. *Legare and others*, 1 Desaussure, 537, 542; *Davis, Adm'r*, v. *Wright, Adm'r*, 2 Hill's So. Car. 560, 568; *Brewer* v. *Hastie & Co.*, 3 Call, 22; *Chamberlain* v. *Brown*, 2 Bland's Chancery, 221 note; *Christie* v. *Hammond*, Id. 645 note; *Bordley* v. *Eden*, 3 Harris & M'Henry, 167; but see *Paul et ux.* v. *Christie*, 4 Id. 161: even if the creditor was not an alien enemy; *M' Call* v. *Turner*, 1 Call, 133; *Osborne* v. *Mifflin*, cited in 2 Dallas, 102: but the rule was held not to apply where the creditor, though a subject of the enemy, remained in the country of the debtor, or had a known agent there authorized to receive the debt, as the law did not prohibit or prevent payment in such a case; *Conn et al.* v. *Penn et al.*, Peters, C. C. 497, 524; see also *Hawkins's Ex'ors* v. *Minor, &c.*, 5 Call, 118. The mere absence of the creditor, out of the country or beyond seas, not in time of war, will not suspend interest where it is otherwise due; *Schaeffer's Estate*, 9 Sergeant & Rawle, 263; though perhaps *M' Call* v. *Turner*, 1 Call, 133, is to be considered as going upon that general principle; and see *Fine's Adm'r, &c.*, v. *Cockshut et al.*, 6 Call, 16. In *Ogden, Adm'r of Cornell*, v. *King*, Cameron & Norwood, 446, it was decided that if the creditor is in the country at the time a debt accrues due, his subsequent absence will not stop the interest, though interest is suspended during war between the country of the creditor and debtor; but in *Child* v. *Devereux*, 1 Murphey, 398, it was held that where the creditor absconded, and concealed his place of abode, and the debtor was ready to pay him, and used due diligence to discover his residence, interest did not accrue.

A tender of the amount due, will stop the accruing of interest; *Raymond & others* v. *Bearnard*, 12 Johnson, 274, 276; *Cockrill* v. *Kirkpatrick*, 9 Missouri, 697, 704; but tender of a less sum will not stop the interest on that sum; *Shobe* v. *Carr*, 3 Munford, 10. And not only will a legal tender stop the interest, but an offer to pay on a reasonable condition, such as the giving up of the security, and a tender after action brought, will have the same effect, if the debtor does not afterwards use the money; *Dent* v. *Dunn*, 3 Campbell, 296; *Suffolk Bank* v. *Worcester Bank*, 5 Pickering, 106; but if the condition be unreasonable, or the debtor continue to use the money, interest will continue to accrue; *Rector* v. *Mark*, 1 Missouri, 288; *Boyce, &c.*, v. *Pritchett's H's*, 6 Dana, 231, 232. In *Miller* v. *Bank of Orleans*, 5 Wharton, 503, a bill payable on 31st August, 1837, was accepted by the defendant payable at a bank, but was not presented at the bank at that time, and the defendant did not know in whose possession it then was; on 31st August, 1837, the defendant had in the bank, money for the payment of the bill, and kept it there until 1st February, 1838, when he drew it out and used it in his business; the bill was presented for payment on the 3d July, 1839; it was held, that the acceptor was liable for interest after 1st February, 1838, when

he drew the money out, but not before; and the Court said, "While the defendant kept funds in the bank to meet the particular demand, he prevented interest, the deposit being equivalent to a tender;" . . . but "even tendered money subsequently used, bears interest."

Where interest is not strictly due as a matter of law, the right to it may be effected by equitable circumstances tending to show that the debtor was not in fault, or that the creditor was in fault: "In many instances a balance may be due to the plaintiff, and yet it may appear that he has acted so unreasonably, by insisting on more than was due, and driving the defendant to the expense of a suit, as may well justify the jury in refusing any allowance for interest. So it may appear from the conduct of the plaintiff, that he gave the defendant reason to suppose that interest was not expected, and this conduct may have induced the defendant to delay the payment of the principal;" per Tilghman, C. J., in *Obermyer* v. *Nichols*, 6 Binney, 159, 162.

Interest is not allowed against an infant; *Taft & Co.* v. *Pike*, 14 Vermont, 405, 410.

Interest, whether due by express agreement, or given by law as damages, is due according to the rate allowed by the law of the place where the contract is made; because, where it is not otherwise indicated, it will be presumed that the contract was to be performed there; *Arrington* v. *Gee*, 5 Iredell's Law, 590, 595; *Winthrop* v. *Carleton*, 12 Massachusetts, 4, 6; *Hosford* v. *Nichols*, 1 Paige, 221, 225; *Burton* v. *Anderson*, 1 Texas, 93; a judgment when sued on in another state, bears interest according to the law of the state where the original record was; *Ralph* v. *Brown*, 3 Watts & Sergeant, 395, 401. But where a contract is made with reference to the laws of another country and to be performed there, interest is to be calculated according to the law of the place where the contract is to be performed, unless it be otherwise stipulated in the contract; *Fanning* v. *Consequa*, 17 Johnson, 511; *Scofield* v. *Day*, 20 Id. 102; *Stewart* v. *Ellice*, 2 Paige, 604; *Boyce and Henry* v. *Edwards*, 4 Peters, 112, 123; *Archer* v. *Dunn*, 2 Watts & Sergeant, 328, 365; *Mullen* v. *Morris*, 2 Barr, 85; *Pecks et al.* v. *Mayo, Follett et al.* 14 Vermont, 33; *Healy* v. *Gorman*, 3 Green, 328; *Thomas* v. *Beckman*, 1 B. Monroe, 29, 34; *Cooper* v. *Sandford*, 4 Yerger, 452; *Dickinson* v. *The Branch Bank at Mobile*, 12 Alabama, 54, 56. According to the best authorities, in the absence of proof of the law of the place where the contract was made or to be performed, it will be presumed to be the same with the law of the forum; *Leavenworth* v. *Brockway*, 2 Hill's N. Y. 201, 203, note; *Forsyth et al.* v. *Baxter et al.*, 2 Scammon, 10, 12; *Wood & others* v. *Corl*, 4 Metcalf, 203, 204, 206: but by some courts it has been held, that when a note is made, or is payable in another state, there can be no recovery of interest, without proof of the rate of interest allowed there: *Evans* v. *Clark*, 1 Porter, 388; *Dickinson* v. *The Branch Bank of Mobile*, 13 Alabama, 54, 57; *Pawling's Adm'r* v. *Sartain*, 4 J. J. Marshall, 238; but now by statute in Kentucky, six per cent. is presumed to be the rate of interest in other states, when no proof is given to the contrary; *Thomas* v. *Beckman*, 1 B. Monroe, 29, 34. The legal rate of interest in another state cannot be proved by parol; the law establishing it, must be produced: *Talbot* v. *Peeples et al.*, 6 J. J. Marshall, 200; see *Burton* v. *Anderson*, 1 Texas, 93. Though a foreign contract bears foreign interest till judgment, yet the judgment upon it bears interest according to the law of the place where the judgment is obtained; *Verree & Paul* v. *Hughes*, 6 Halsted, 91, 92.

Where the rate of interest is altered by law during the accruing of the

interest, see *Bullock* v. *Boyd et al.* 1 Hoffman, 294, 300; *Thorntons* v. *Fitzhugh*, 4 Leigh, 209.

If a debt be due, either by contract, or upon a judgment, and interest have accrued upon it, and there be a payment of the amount of the debt, the creditor may still proceed for the amount of the interest, for it is to be considered that the payment was first applied by the law in discharge of the interest, so that the surplus is in fact principal; *People* v. *New York*, 5 Cowen, 331; *Fishburne* v. *Sanders*, 1 Nott & M'Cord, 242: *Norwood* v. *Manning*, 2 Id. 395; but where the money is paid and received as full satisfaction of the principal debt, a distinction arises between the case where the interest is due as damages for the non-payment of the principal, and where it is due by express agreement: in the former case, if the creditor accepts the money in full satisfaction of the principal debt, without requiring interest from the time the debt was payable, he cannot afterwards sustain an action for the incidental damages arising from the debt not being paid when due; but where there is an express agreement to pay the interest as well as the principal, performance of one part of the agreement would be no bar to an action for the non-performance of another part; *Fake* v. *Eddy's Ex'r*, 15 Wendell, 76, 80; *Gillespie* v. *The Mayor, &c. of New York*, 3 Edwards, 512, 514; *Stone* v. *Bennett*, 8 Missouri, 41, 43; *Hodgdon* v. *Hodgdon*, 2 New Hampshire, 169; see *Stearns et al.* v. *Brown et ux.*, 1 Pickering, 530, 533; *Comparet* v. *Ewing*, 8 Blackford, 328, and *Howe* v. *Bradley*, 19 Maine, 31, 36, 39. If debt be brought on a judgment, and afterwards the defendant pay the whole amount of the judgment, the plaintiff may still proceed for interest, for by bringing suit, he has an inchoate right to interest; but it might be otherwise, if paid before suit brought; *Administrator of Pinckney* v. *Singleton, Ex'or*, 2 Hill's So. Car. 343.

On a contract containing a special promise to pay interest, interest may be demanded in the declaration; but where the interest is due only as damages, interest *eo nomine* must not be demanded. In indebitatus assumpsit, if a promise to pay on demand *with interest* is alleged, an express promise must be proved; *Tappan et al.* v. *Austin*, 1 Massachusetts, 31. In debt on a judgment, or on a decree not directing interest after its date, a count setting out the judgment or decree, and demanding interest, or the amount with interest, is demurable; *Shelton's Ex'ors* v. *Welsh's Adm'rs*, 7 Leigh, 175, 179; *Benton* v. *Burgot*, 10 Sergeant & Rawle, 240.

In all actions in which interest is allowed, the interest is to be assessed according to the practice of the court, up to the time of rendering the verdict, or to the next term, or to such other time when by the course of the court, judgment would be entered; *Frith* v. *Leroux*, 2 Term, 57, 58; *Vredenbergh* v. *Hallett & Bowne*, 1 Johnson's Cases, 27. As to interest after the verdict and till the entry of judgment or taxation of costs, the general rule is, that if no delay has been created by the defendant, no interest is allowed; *The People* v. *Gaine*, 1 Johnson, 343; *Pawling's Adm'r* v. *Sartain*, 4 J. J. Marshall, 238; but where delay has been made by the defendant, as by proceedings to obtain a new trial, if the original cause of action was a contract carrying interest, interest on the amount of the verdict till the entry of judgment or taxation of costs will be allowed; *Vredenbergh* v. *Hallett & Bowne*, 1 Johnson's Cases, 27; *Vail* v. *Nickerson*, 6 Massachusetts, 262; *Williams, Administrator*, v. *American Bank and others*, 4 Metcalf, 317, 322; see *The Fitchburg R. R. Co.* v. *The Boston & Maine R. R.*, 3 Cushing, 60, 90, and *Parker* v. *The Same*, Id. 107, 121; but not in an action of tort, not even, it is said, in trover; *Henning* v. *Van Tyne and M'Gowan*, 19 Wendell, 101; but

quære; see *Bissell* v. *Hopkins*, 4 Cowen, 53. In Pennsylvania, however, it is said that on a verdict, when there is a motion for a new trial, which is not granted, interest is not given during the delay; *Hoopes* v. *Brinton*, 8 Watts, 73. See *Lord* v. *The Mayor, &c., of New York*, 3 Hill's N. Y. 427, 430, *note*.

On a writ of error, the allowance of interest in the judgment of affirmance, by way of damages, is generally discretionary with the court above; and where the cause of action in the court below was a tort, not allowing interest, it is not in the course to allow interest; *Gelston* v. *Hoyt*, 13 Johnson, 561, 590; but in trover, in which interest on the value from the time of the conversion is allowed in the damages, interest may be given; *Bissell* v. *Hopkins*, 4 Cowen, 53: it is difficult, however, to see why the character of the original cause of action should affect the right to interest on a debt liquidated and due by verdict and judgment. When the record returns, interest can be given in the court below, only according to the direction in the judgment of affirmance; *Hoyt* v. *Gelston*, 15 Johnson, 221. See *Anon.*, 2 Cowen, 579; *Lord* v. *The Mayor, &c., of New York*, 3 Hill's N. Y. 427. In Pennsylvania, where, upon the construction of the statute of 1700, interest is a legal incident of every judgment, on the affirmance of a judgment on a writ of error, interest is given on the original judgment till affirmance, and then the aggregate amount bears interest; and costs bear interest from the time they are paid; *M'Causland's Administrators* v. *Bell*, 9 Sergeant & Rawle, 388. By st. 3 & 4 Wm. 4, c. 42, s. 30, a court of error, if the judgment of the court below be affirmed, is directed to allow interest for such time as execution has been delayed by the writ of error, for the delaying thereof.

Bail in a recognizance on a writ of error, are not liable for interest on the judgment before affirmance, where the judgment has been affirmed without interest, and this probably whether by the terms of the recognizance, they are bound for damages as well as for the judgment and costs, or are bound only for the judgment and costs; *Butcher* v. *Norwood*, 1 Harris & Johnson, 485, 487; *Smith* v. *Canfield*, 1 Root, 372: but after affirmance, when they become fixed for the debt they are liable for interest; *Frith* v. *Leroux*, 2 Term, 57, 59. In *Kenan, Ex'x*, v. *Care*, 10 Alabama, 867, it is said to be a general rule that where the principal is liable for interest, the bail is so likewise.

On a sale on execution, where interest is allowed to be collected on execution, interest is to be calculated to the return-day of the writ, and not later; *Strohecker* v. *Farmers' Bank*, 6 Watts, 96, 100.

Courts of equity follow the law and its analogies, in respect to interest; *Moore, &c.*, v. *Pendergrast's Heirs*, 6 J. J. Marshall, 534; *Taylor* v. *Knox's Ex'ors*, 5 Dana, 466, 471; *Hammond* v. *Hammond*, 2 Bland's Chancery, 307, 370. On debts, on which interest would be given as damages, at law, interest is decreed by a chancellor down to the time of the decree, but ought not to be directed down to the time of payment; *Deanes* v. *Scriba & others*, 2 Call, 415, 420; *Williams* v. *Wilson*, 1 Dana, 157, 159; *Dawson, &c.*, v. *Clay's Heirs*, 1 J. J. Marshall, 165, 166. Interest is allowed on all sums liquidated by decree or order of the court of chancery, and on its confirmation of a master's or an auditor's report from the date of the report, as on a new principal, in analogy to a judgment; *Hammond* v. *Hammond*, 2 Bland's Chancery, 307, 371; *Hunn* v. *Norton*, Hopkins, 344. In a suit against a surety on an administration bond, where money has been decreed to be paid by the administrator to creditors or distributees, by a Judge of Probate, interest is to be calculated on the decree from the time of demand from the surety; *Heath* v. *Gay*, 10 Massachusetts, 371. When chancery

awards execution against property fraudulently conveyed, interest on the judgment is given; *Beall* v. *Silver*, 2 Randolph, 401: and see *Ryckman* v. *Parkins*, 5 Paige, 543, 547; *Laidley* v. *Merrifield*, 7 Leigh, 346, 358. On judicial sales of real estate for the payment of debts, interest on the debts ceases at the return day of the order of sale; *Ramsey's Appeal*, 4 Watts, 71, 73: see *Carlisle Bank* v. *Barnett*, 3 Watts & Sergeant, 248, 252, 253; *Collier* v. *His Creditors*, 12 Robinson's Louisiana, 399, 404.

(*Interest on interest.*)—An agreement to pay interest on interest is not usurious nor illegal; *Dow et al* v. *Drew*, 3 New Hampshire, 40; and the better opinion is, that at law, such an agreement made either at or after the time of the original contract, will be enforced; *Ex'rs of Pawling* v. *Adm'rs of Pawling*, 4 Yeates, 220; see *Camp* v. *Bates*, 11 Connecticut, 488, 496, &c.; *Gibbs* v. *Chisolm*, 2 Nott & M'Cord, 38. In several cases, where the payment of the principal, or of part of it, had been postponed to a more distant day than the interest, which by agreement was to be paid at certain specified times, as, annually, or at the end of every year, before the principal is due, it has been held that interest is chargeable on each instalment of interest; *Kennon* v. *Dickens*, 1 Taylor, 231; S. C., Cameron & Norwood, 357; *Gibbs* v. *Chisolm*, 2 Nott & M'Cord, 38; *O'Neall* v. *Sims*, 1 Strobhart, 115, 116; *Watkinson* v. *Root*, 4 Hammond, 373; *Talliaferro's Ex'rs* v. *King's Adm'r*, 9 Dana, 331; see *Mowry* v. *Bishop*, 5 Paige, 98, 101; and some cases have held generally that, where there is an express stipulation that interest shall be paid at certain fixed times, as, annually, or at the end of each year, even if the principal be due at or before the first instalment of interest is due, interest is to be charged upon the interest from the time that it is payable; *Singleton* v. *Lewis*, 2 Hill's So. Car. 408; *Doig* v. *Barkley*, 3 Richardson, 125; *Peirce et al. Ex'rs* v. *Rowe*, 1 New Hampshire, 179; and see *Stone* v. *Bennett*, 8 Missouri, 41, 45; and see *De Bruhl* v. *Neuffer*, 1 Strobhart, 426. But in other states it is established as a general principle, without reference to the distinction respecting the postponement of the payment of the principal, that though there be an express agreement in a note or bond to pay interest at a specified time, as annually, or semi-annually from the date, yet interest upon the interest from the time when it fell due, will not be allowed, but it will be considered that the holder by neglecting to call for his interest when it fell due, waived his right to have it converted into capital; *Hastings* v. *Wiswall*, 8 Massachusetts, 455, apparently overruling *Greenleaf* v. *Kellogg*, 2 Id. 568; *Henry* v. *Flagg*, 13 Metcalf, 65; *Ferry* v. *Ferry*, 2 Cushing, 92; *Doe* v. *Warren*, 7 Greenleaf, 48; *Pindall's Ex'x, &c.*, v. *Bank of Marietta*, 10 Leigh, 481, 484; and see *Howe* v. *Bradley*, 19 Maine, 31, 36, 40; and see 1 Aikens, 410; *Sparks* v. *Garrigues*, 1 Binney, 152, 165, and *Attwood* v. *Taylor*, 1 Manning & Granger, 279, 332: yet it is agreed that the claim to interest on such interest is an equitable one, and a note or other security given for it will be sustained and enforced as on a good and sufficient consideration; *Wilcox* v. *Howland*, 23 Pickering, 167; *Camp* v. *Bates*, 11 Connecticut, 488; *Rose* v. *The City of Bridgeport*, 17 Connecticut, 244, 247; *Mowry* v. *Bishop*, 5 Paige, 98, 102; *Fobes & Adams* v. *Cantfield*, 3 Hammond, 17; and see *Pindall's Ex'x, &c.*, v. *Bank of Marietta*, 10 Leigh, 481, 484: and in like manner if accounts have been settled on the basis of an allowance of compound interest, and there has been a promise to pay the balance, the promise is valid and binding; *Kellogg* v. *Hickok*, 1 Wendell, 521.

In chancery, however, agreements for compound interest are discountenanced, not because they are usurious, but on grounds of public policy, because they are oppressive and tend

to usury, and encourage negligence on the part of creditors in collecting their interest, which in the end it is more beneficial for the debtor should be collected without delay; *Quackenbush* v. *Leonard*, 9 Paige, 334, 345. The rule in equity is, that an agreement made at the time of the original loan, to allow interest on interest, though it is not so illegal as to vitiate the contract, is not valid and will not be enforced: and interest on interest will be allowed, only where there is a special agreement for it made after interest has become due, and to operate prospectively and not retrospectively, or, where there is a settlement of an account between the parties after the interest has become due, or where the master's report, computing the sum due for principal and interest, is confirmed, for it is then in the nature of a judgment; *Connecticut* v. *Jackson*, 1 Johnson's Chancery, 13, 14, 16; *Van Benschooten* v. *Lawson*, 6 Id. 313; and see *Childers* v. *Deane, &c.*, 4 Randolph, 406, 408, and *Niles* v. *The Board of Com'rs. of the Sinking Fund*, 8 Blackford, 158. But the case of *Mowry* v. *Bishop*, 5 Paige, 98, 102, recognises another distinction, that if the payment of the principal sum is postponed to a more distant period than the times fixed for the payment of interest, on the faith of an agreement to pay interest at those times, a subsequent agreement to pay interest on the arrears of interest due, will be supported in equity: and it appears that in such a case, even where there is no express promise to pay interest on interest, equity will not restrain the collection of it by execution at law; *Kennon* v. *Dickens*. In *Fitzhugh et al.* v. *McPherson, adm'r. of Neth*, 3 Gill, 409, 428, the general principle was adopted, that when interest has once accrued, it becomes a debt, and there is no longer any objection to an agreement between the parties that it shall be considered principal, and therefore carry interest. It appears to be settled that where accounts are stated or settled between the parties, interest becomes principal and carries interest; *Bainbridge & Co.* v. *Wilcocks*, Baldwin, 536; see *Bullock* v. *Boyd et al.*, 1 Hoffman, 294, 299, and *Von Hemert* v. *Porter*, 11 Metcalf, 211, 218. As to the charging of interest on rents and profits received by a mortgagee, see *Gibson* v. *Crehore*, 5 Pickering, 146, 160. If a person purchase a mortgage and take an assignment of it, at the request, or with the concurrence of the mortgagor, and if interest be then due and be paid for by him, he is entitled to interest on all the money paid by him, as well the interest as the principal originally lent; but if the interest be not actually paid by him, or the payment be not with the privity of the mortgagor, interest on the interest will not be allowed; *Jackson* v. *Campbell*, 5 Wendell, 572, 578; *Mallory* v. *Aspinwall*, 2 Day, 280, 292. Where one is prevented from receiving interest due, by an injunction out of chancery, which is not sustained, interest on the interest will be granted to him by the court of equity, which always relieves against injustice occasioned by its own acts and oversights; *Hosack* v. *Rogers*, 9 Paige, 462, 465.

Of the appointment and powers of agents. Of the several kinds of agencies. Agencies special and general, or express and implied.

BATTY AGAINST CARSWELL AND CARSWELL.

In the Supreme Court of New York.

NOVEMBER TERM, 1806.

[REPORTED, 2 JOHNSON, 48–50.]

Where A. authorized B. to sign his name to a note for $250, *payable in* six months, *and B. put A.'s name to a note for that sum payable in* 60 days, *it was held that A. was not liable. A special authority must be strictly pursued.*

THIS was an action of assumpsit on a promissory note, alleged to have been made by the defendants. The note was dated the 23d of October, 1801, for the payment of $250, in 60 days. Plea non assumpsit. The cause was tried at the Washington circuit, on the 18th of June, 1806, before Mr. Chief Justice KENT.

On the trial, the subscribing witness to the note swore, that two or three weeks previous to the date of the note, David Carswell, one of the defendants, applied to Abner Carswell the other defendant, to be his surety to the plaintiff, on a note for $250, payable in *six months*, which he consented to do, and directed the witness to sign his name to such a note. A few days afterwards, and before the note was made, David Carswell told the witness, that he had informed Albert Carswell, that he should not want the money of the plaintiff as he could do without it. The witness, with the assent of David Carswell, for whom he acted as clerk and agent, but without the privity of Abner Carswell, signed the note on which the present action is brought, and for which David Carswell received the amount.

It appeared, that Abner Carswell had admitted, in conversation, that he had authorized the other defendant to use his name to a note for $250, for the purpose of procuring that sum of the plaintiff, but that he was told by David Carswell, that he should not want the money, and did not know that the note had been so given, until some time afterwards. The note was then offered to be read in evidence, but

objected to by the defendants' counsel, because it had not been proved to have been signed by the defendants; but the objection was overruled. The defendants' counsel then moved for a nonsuit, which was refused. The judge charged the jury, that if they believed the note was made before David Carswell had told the other defendant, that he should not want the money, the plaintiff would be entitled to recover, otherwise, they ought to find for the defendants; but that those were facts on which they were to decide. The jury found a verdict for the plaintiff.

A motion was now made for a new trial, unless the court should think proper to grant a nonsuit.

Foot, for the defendants, urged the same objections as were made at the trial.

Crary and *Russell* contra, contended, that when an agent acts within the general scope of his authority, the principal would be bound though the agent should exceed his authority. (Fenn v. Harrison, 3 Term, 760.) There was an authority to sign a note for $250, for 60 days, which was not revoked. The information given by David Carswell, did not amount to a revocation of the authority by Abner Carswell. Long acquiescence, after knowing the note to have been made, is strong presumptive evidence of authority. There is an implied assent; and subsequent assent is sufficient evidence of authority. (Kyd. 273. Cumberback, 450.)

LIVINGSTON, J. delivered the opinion of the court. This was a special power, and ought to have been strictly pursued. (3 Term, 762.) But the note, to which Abner Carswell authorized the witness to put his name, was to be payable in six months, whereas the one he signed had only *sixty days* to run. The note, then, as far as it concerned Abner, admitting there was no revocation, was made without his authority. His confession, after the suit was commenced, does not alter the state of the case. It was merely that he had allowed David to put his name to *a* note. This must have been the one of which the first witness speaks, which was to be payable in six months. There must be a new trial, with costs to abide the event of the suit.

New trial granted.

PECK AND ANOTHER AGAINST HARRIOTT AND ANOTHER.

In the Supreme Court of Pennsylvania.

SEPTEMBER, 1820.

[REPORTED, 6 SERGEANT AND RAWLE, 146–151.]

If any agent, empowered to contract for sale, sell and convey *land, enter into articles of agreement, by which it is stipulated, that the vendee shall clear, make improvements, pay the purchase-money by instalments, &c., and on the completion of the covenants to be performed by him, receive from the vendor, or his legal representative, a good and sufficient warranty deed, in fee, for the premises, the receipt of the agent for such parts of the purchase-money as may be paid before the execution of the deed, is binding on the principal.*

IN the Court of Common Pleas of Crawford county, to which this was a writ of error, a case was stated for the opinion of the Court, to be considered as a special verdict, of which the following is the substance.

Gad Peck and Jared Shattock, on the 17th October, 1815, executed a power of attorney, by which they authorized Seth Young, *to contract for sale, sell, and convey*, any parts or parcels of certain lands, of which they were seised, lying in the counties of Erie, Crawford, Warren, and Venango; confirming and ratifying all that their said attorney should do in the premises, by virtue of the said power of attorney.

In pursuance of this power, Young, on the 29th December, 1815, entered into articles of agreement with James Harriott and Daniel Le Fevre, for the sale of two parcels of land lying in the county of Crawford, for the sum of five hundred and seventy-eight dollars, twelve cents, payable in four equal annual instalments, with interest: the first payment to be made on the 29th December, 1816. The vendees were to erect on the premises, a dwelling-house, in which they were to reside at least five years; to clear and improve at least five acres for every hundred acres contracted for, and to pay all the taxes which might thereafter become due on the premises. It was further agreed, "that upon payment of the whole, or a satisfactory part of the money and interest, within the terms aforesaid (the improvements aforesaid being also com-

pleted), the party of the first part (the vendors), or their legal representatives, would execute to the party of the second part, their heirs, and assigns, a good and sufficient warrantee deed, in fee, for the said premises, free of any expense, provided such party should, on the giving of said deed, give bond and mortgage on the said premises for the consideration moneys aforesaid, or so much as may remain due thereof."

On the 22d March, 1817, the vendees paid the sum of thirty dollars, and on the 5th of the following April, the further sum of three hundred and forty-six dollars, fifty cents, to Young, by whom a receipt, in the name of his principals, was endorsed on the article.

This suit being brought for the whole of the purchase-money, the question was, upon the validity of the payments made to the agent. The Court below were of opinion, that they were valid, and the plaintiffs excepted to their opinion.

Selden and *Baldwin*, for the plaintiffs in error.

The agency of Young was for a special purpose, and where that is the case, the general rule is, that the power is to be construed strictly. It was limited *to contracting for sale, selling, and conveying*, and did not extend to the receipt of the purchase-money. A power to *receive*, is not incident to a power to *sue:* so a power to convey, is not incident to a power to sell; nor is a power to receive the purchase-money, incident to a power to convey; because it is not necessary to the execution of the principal power. In the present instance, no conveyance has been executed, and the agreement was, that the money should be paid to the *principal.*

Forward, for the defendants in error.

All powers necessary to carry the principal power into effect, are incident to it. 1 Livermore on Agency, 105. Young had power to make conveyances, which in the usual form, acknowledge the receipt of the purchase-money, and therefore he must have power to receive the purchase-money. Indeed, it is not denied that if the money had been paid down, and a conveyance executed, the agent's receipt would have been good. Why then should it not be so, for part of the purchase-money? The power was not fully executed by the articles of agreement; the money was paid by instalments, and the same rule which would authorize him to receive the whole, would authorize him to receive those instalments.

DUNCAN J., delivered the Court's opinion.

The plaintiffs in error, being the owners of certain lands in the counties of Erie, Crawford, Warren, and Venango, on the 17th October, 1815, constituted one Seth Young, their attorney, in their names to contract for sale, sell, and convey, any parts or parcels of the lands, ratifying and confirming all that their said attorney might lawfully do in the premises. On the 29th of December in the same year, Young contracted to sell to the defendants two parcels of the lands. The vendees covenanted to pay the purchase-money in four annual instalments, with interest, and make settlements and certain specified improvement on the land. The first instalment became due on the 29th December, 1816; and in March and April, 1817, the vendees paid Young three hundred and seventy-six dollars fifty cents. By this article, the vendors, by their attorney, covenanted, on payment of the whole, or a satisfactory part of the money and interest, within the specified time, the improvements being completed, that *they, or their representative, would execute a conveyance*, a good and sufficient warrantee deed in fee, provided such party should, on giving the said deed, give bond and mortgage on the said premises for the consideration money, or so much thereof as should be due.

This action was brought for the whole consideration money, and the question submitted to the Court below, was on the validity of the payments. The Court adjudged they were valid, and on this opinion we are called on to decide.

Every general grant implies the grant of all things necessary to the enjoyment of the thing granted, without which it could not be enjoyed. Every general power necessarily implies the grant of every matter necessary to its complete execution. An attorney who has power to convey, has so essentially the power to receive the purchase-money, that a voluntary conveyance, without receiving the stipulated price or security for it, would be fraudulent, and either the whole contract might be rescinded by the principal, or the vendee liable for the purchase-money. The principal authority includes all mediate powers which are necessary to carry it into effect. The payment of the purchase-money was an intermediate act between the articles and the conveyance. The receipt of the purchase-money is within the general scope of an authority to sell and convey, as a mediate power, as an act without which the conveyance would be fraudulent. No words could confer a more ample authority than is conferred by this instrument. He has power to contract for sale, and having so contracted, to convey. All the acts he performs, necessary in the premises, are ratified and confirmed.

I cannot yield to the argument, that, having contracted for sale, his power ended, because the language of the power is very explicit, that he has not only power to enter into executory contracts, but, that hav-

ing entered into them, he has power to execute them by conveyances, and we must not stop at the words *contract for sale*, and say, that is a distinct power, but must go on with the whole sentence, *sell and convey*. Articles are the first step usual in the sale of lands; the conveyance the last act which the attorney is authorized to perform. If he had conveyed on the receipt of the whole purchase-money, it is admitted that this would have bound the principal. If he had power to receive the whole, he had power to receive any part, and it surely lies not in the mouth of the principal to say, that because he has not conveyed he has no right to receive the money; for the same objections would arise, had he received the whole money, and refused to convey. The validity of the payment does not rest on the actual conveyance, but the power to convey; the payment is to precede the conveyance. There is nothing in the nature of the thing to justify such a construction, nor in the words of the instrument, and it is a proposition which never can be maintained, that he had only power to receive the money when he had conveyed, and that it is the conveyance which renders the payment valid; whereas, the conveyance could only be good, if the money were paid, if he had power to receive money, and convey. If he has received the money and not conveyed, the payment must, in all reason and justice, be binding on the principal.

That the attorney here did not exceed his authority in making the contract, is admitted by this action calling for its execution. If he did not exceed his authority in making the contract, he had power to carry it into execution by conveyance. In order to enable him to do this, payment of the money, or security, was so necessary an incident, that without it the act would be fraudulent. He had power to convey; to convey without payment would have been a fraud on the principal; to receive the purchase money could not be a fraud.

It is not pretended that the power was revoked; much less that notice of the revocation before payment was given. It is not made any part of the case, that there was any fraud on the part of the defendants.

The power of attorney is unrestrained as to time, credit, or condition. All the authority that the principals could confer they did. They substituted Young, with all their powers, to part with their title; to convey the estate in fee; to bind *them* with covenants of general warranty. He could sell on credit, having the power to sell on credit; he could receive the money from the vendee, unless there was something in the instrument restrictive of this. It would be rather an unusual mode of conducting business to empower an attorney to sell and convey, and restrain him from receiving the purchase-money. Here, he is not so restricted, and the implication would be a constrained one; it would be

dangerous for the Court to look for a hidden meaning, where the terms are neither obscure, nor equivocal, or to imply a restriction of a power granted in general terms. The power is not required to be executed *uno flatu;* there are several acts to be done at several times; the last act, the *conveyance*, not to be immediately executed, not to be executed until all the conditions were complied with by the vendees. The several payments were to come round, and until paid, or a satisfactory part, and mortgage given for the balance, under the general power to contract for sale, and to convey, unrestrained as to the extent of authority, unlimited in its duration, remaining in full force at the time of payment, the Court of Common Pleas decided rightly, in determining these payments to be valid, and the judgment is affirmed.

Judgment affirmed.

H. C. ROSSITER *v.* W. S. ROSSITER.

In the Supreme Court of New York.

JANUARY TERM, 1832.

[REPORTED, 8 WENDELL, 494–499.]

A power of attorney *to collect debts; to execute deeds of lands; to accomplish a complete adjustment of all concerns of the constituent, in a particular place, and to do all other acts which the constituent could do in person, does not authorize the giving of a note by the attorney in the name of the principal.*

It seems, *that the larger powers conferred by the general words, must be construed with reference to the matters specially mentioned; and in this case* it was held *that authority to accomplish a complete adjustment, &c., did not authorize the giving of a note on the purchase of property.*

The acts of a special agent *do not bind the principal unless strictly within the authority conferred.*

Where the drawer of a note affixes his signature as the agent of another, if in an action against him personally, *he claims to have had authority to sign as he did, he is bound to show such authority existing* at

the time *of the making of the note, and is not permitted to show a* subsequent *ratification by his principal.*

THIS was an action of assumpsit, tried at the Monroe circuit, in September, 1830, before the HON. ADDISON GARDNER, one of the circuit judges.

In the spring or summer of 1826, a mercantile firm transacting business at Watertown, in the county of Jefferson, under the name of Fry & Murdock, failed, and assigned the property of the firm to Henry R. Pynchon, of New Haven, in Connecticut, who stood bound as their endorser, in the sum of $15,000. William S. Rossiter came to Watertown with a power of attorney from Pynchon, took charge of the property assigned, and was employed as the agent of Pynchon during the summer of 1826, in arranging and settling the concerns of the firm of Fry & Murdock, the latter of whom is the brother-in-law of Pynchon, having married his sister. Murdock was in possession of *household furniture* worth $1000, which he had assigned to Henry C. Rossiter, the plaintiff in this cause, to secure the payment of $612 19, due to him. To release the furniture from such assignment, William S. Rossiter, the agent of Pynchon, on the 28th of July, 1826, gave a note to Henry C. Rossiter, for the above sum of $612 19, payable in three years, with interest, and signed the same "Henry R. Pynchon, by his attorney, W. S. Rossiter," and took an assignment of the furniture to Pynchon, and let the same to Murdock, who ever since has paid rent for the same to W. S. Rossiter, as the agent of Pynchon, which agency still continues. When the note became due, payment was demanded of Pynchon, who refused to pay the note, declaring that he was not liable for the payment thereof, and denied the authority of W. S. Rossiter to give his note as his agent. The defendant produced in evidence a *power of attorney* from Pynchon to him, bearing date the 16th February, 1826, whereby Pynchon appointed him his attorney, to secure, demand, and sue for all sums of money then due, or thereafter to become due to Pynchon, in the state of New York or in the British provinces of North America, and to discharge and compound the same; to execute deeds of lands then or thereafter to be owned by Pynchon in the state of New York, *and to accomplish at his discretion, a complete adjustment of all the concerns of Pynchon in the state of New York, and to do any and every act in his name which he could do in person.* The defendant then offered to prove that *after* the making of the note, Pynchon assented to the same. The plaintiff objected to this testimony, insisting that if the defendant had no authority, as the agent of Pynchon, to make the note at the time of the making thereof, the plaintiff had a right to hold the defendant personally for the payment thereof, and

that the subsequent assent of Pynchon could not divest such right. The judge overruled the objection, deciding that evidence of Pynchon's assent, after the making of the note and previous to its falling due, was admissible. The defendant then proved that during the summer of 1826, a constant correspondence was maintained between the defendant and Pynchon, and that Pynchon had expressed his unqualified approbation of the manner in which the defendant had transacted his business at Watertown. The defendant also attempted to prove an express approval by Pynchon as to the giving of the note in question, but succeeded only in showing that the giving of the note had been spoken of in the hearing of Pynchon, and that he did not intimate his disapprobation. The judge charged the jury that the power of attorney did not confer authority upon the defendant to make the note as the agent of Pynchon, but instructed them that if they were satisfied that Pynchon had distinctly and unequivocally recognised the act of the defendant in giving the note, either by his acts or declarations, Pynchon was liable for the payment thereof, and they must find for the defendant. The jury found for the plaintiff, and the defendant now moved to set aside the verdict.

J. A. Spencer, for defendant. The power of attorney authorized the giving of the note: the authority it confers is very broad and general; it substituted the defendant in the place of Pynchon, and if the defendant did no more than Pynchon himself would have done had he been present, the acts of the attorney will be justified; what was done was advantageous to the principal and within the scope of the authority conferred. But if there be doubt whether the giving of the note was strictly within the power conferred, the subsequent ratification by the principal legalizes the act. Pynchon was informed of what had been done, and did not express his dissent; his silence is tantamount to an express ratification. The judge, therefore, erred in instructing the jury that they must find for the plaintiff unless they were satisfied that Pynchon had *distinctly* and *unequivocally* recognised the act of the defendant; he should have told them that if Pynchon knew what his agent had done, and had not within a reasonable time thereafter expressed his *dissent*, they might presume his *assent*. 12 Johns. R. 300. 15 Id. 44. 3 Mass. R. 70. 6 Id. 193. 2 Caines, 310. The defendant having proved enough to charge Pynchon as the maker of the note, was himself exonerated. 13 Johns. R. 307.

W. W. Frothingham, for plaintiff. A power of attorney must be strictly construed. An attorney acting under a special authority has no powers but such as are granted—none are to be implied. His

authority must appear by his commission and not to be derived from implication. 5 Johns. R. 58. 7 Id. 393. 1 Esp. N. P. R. 112. 14 Common L. R. 42. The power given to accomplish a complete adjustment of all the concerns of the principal, did not authorize the purchase of property and the giving of notes in the name of the principal. If the attorney had no right to give a note by the power specially conferred, the general terms used gave no such authority. 1 Taunton, 347. The note being made by the defendant as the agent of another, and having no authority to make it, a right of action accrued against him and a *subsequent* ratification by the principal could not deprive the plaintiff of his right to hold the defendant for the payment of the money. A subsequent ratification is sufficient to charge the principal, but not to deprive the plaintiff of his remedy against the agent.

By the Court, SAVAGE, Ch. J. The distinction between a *general* and *special* agent is well settled; the acts of the former bind the principal, whether in accordance to his instructions or not; those of the latter do not, unless strictly within his authority. In this case, the defendant was the special agent of Pynchon; his letter of attorney specifies what business he is to transact: 1. He was to collect all demands due Pynchon, and to discharge and compound the same; 2. He had authority to dispose of the real estate of Pynchon; and 3. To accomplish at discretion a complete adjustment of all the concerns of Pynchon. Does this latter clause confer any authority not relating to the business previously mentioned? The case of Hay v. Goldsmidt, cited by Lawrence, Justice, in Hogg v. Smith, 1 Taunt. 356, was as follows: The plaintiff's testator had given a letter of attorney to J. & R. Duff to ask, demand, and receive of the East India Company all money that might become due to him on any account whatsoever, and *to transact all business*, and upon non-payment, to use all such lawful ways and means as he might do if personally present. Under this power the attorneys received an India bill which they endorsed to the defendants, who discounted the bill; the defendants received the money on the bill, to recover which this action was brought. The court was of opinion that the power to transact all business did not authorize the attorneys to endorse the bill; they said the most large powers must be construed with reference to the subject-matter; the words *all business* must be confined to all business neccessary for the receipt of the money. In Fenn v. Harrison, 3 Taunt. 757, a special agent endorsed a bill contrary to the instructions he had received from his principals, and the court held that they were not liable. In The East India Co. v. Hensley, 1 Esp. 111, the distinction was taken between a general and special agent; and where a broker was authorized to purchase the best Bengal raw silk, but purchased that

which was not so, Lord Kenyon held the principal was not holden, because the contract was made without his authority. In Batty v. Carswell, 2 Johns. R. 48, an attorney was authorized to sign a note for the defendant for $250, payable in six months, and he drew one payable in sixty days. Livingston, Justice, says, "this was a special power and ought to have been strictly pursued;" and the note was made without authority. In Nixon v. Hyserott, 5 Johns. R. 58, a power was given to execute, seal and deliver such conveyances and assurances as might be necessary, but no special authority was given to bind the principal by covenants; the attorney executed a deed with the covenants of seisin, &c., and the court said a conveyance or assurance is good and perfect without warranty or personal covenants, but no authority was given to bind the principal by covenants. In Gibson v. Colt, 7 Johns. R. 390, the owners of a vessel authorized the master to sell a ship in the same manner as they themselves might and could make sale, &c. The master sold the vessel and represented that she was a registered vessel, whereas she had only a coasting license. The court held the owners were not bound. The master was a special agent, and if he exceeded his authority when he made the representation, his principals were not bound, and therefore the remedy was against the agent alone. The same doctrine will be found in White v. Skinner, 13 Johns. R. 307, and Munn v. Commission Co. 15 Id. 44, and many other cases.

It was contended on the part of the defendant that Pynchon had recognised the acts of the defendant subsequently, and thereby his liability on the note was established, even if the authority by the letter of attorney were doubtful; but I apprehend the true question is, whether the defendant had at the time authority to sign the note, and thereby obligate Pynchon to its payment. The note when executed was either the note of one or the other; if it was the note of Pynchon, then the defendant is not liable; if it was not the note of Pynchon, it was the defendant's note. The cases cited show that the authority of a special agent must be strictly pursued. The letter of attorney specifies two subjects upon which authority is given, and it is added, *to accomplish a complete adjustment of all my concerns in said state.* According to the case in Taunton, this only extends to the collection of money, and the disposition of the real estate. It seems to me it is going too far to say that the power given authorized the giving the note for $600, or any other sum. Making an adjustment of his concerns, if it relates to any subject not previously mentioned in the letter of attorney, is no authority for signing a note. If the judge erred in his charge, it was an error in favour of the defendant.

New trial denied.

GEORGE ODIORNE AND OTHERS versus VIRGIL MAXCY AND OTHERS.

In the Supreme Judicial Court of Massachusetts.

MARCH TERM, 1816.

[REPORTED, 13 MASSACHUSETTS, 178–182.]

Of the authority of factors and agents to bind their principals.

The opinion of the Court was delivered by

PUTNAM, J.(a) The plaintiffs undertake to show that the defendants authorized Levi Maxcy to make the contract declared upon, in their behalf.—This authority may be either express or implied. The former is not suggested: but the plaintiffs argue that the latter is to be inferred from the general agency, which the defendants entrusted to Mr. Maxcy. We do not, however, think ourselves warranted to say, that the law will necessarily imply a promise, on the part of the defendants, from the facts reported.—If the sale of the iron was made by the plaintiffs to P. Rice in his own name, and for his own use, and not for the use of the defendants, we are clearly of opinion that they are not liable, merely because their general agent has pledged their credit as sureties or endorsers for Rice.

The authority of a general agent is not unlimited: it must necessarily be restrained to the transactions and concerns appurtenant to the business of the principal. Thus, one who was authorized to buy the raw materials, and to sell the manufactures of a manufacturing company, could not by implication have authority to buy ships or real estate, or any other thing having no relation to the establishment. So, if one was authorized generally to sign promissory notes for the debts of the principal, it could not be reasonably intended, that he might by implication, have authority to give notes binding his principal to pay the debts of strangers; or to pledge the credit of his principal as a surety, for goods which were not bought for him, and which never came to his use.

(a) This was an action of assumpsit upon promissory notes given by one P. Rice, to the Neponset Cotton Factory Company, and endorsed to the plaintiffs by Levi Maxcy, the Company's general agent, describing himself in the endorsement as agent for that Company. The reporter's statement is omitted.

Analogous to this principle, it has been well settled, that a factor has no authority to pawn the goods of his principal: for the plain reason that such an authority could not reasonably be implied from the power of selling, to render an account.

In the case at bar, we are apprehensive that the jury have not distinctly considered the question, whether the iron was bought for the defendants, as an article supposed to be necessary in the management of their affairs. If such was the fact, we should hold the defendants liable in this action; even if the agent afterwards should have unfaithfully appropriated it to his own use. And if the goods came to the use of the defendants, we should think that was a fact, which was proper for the consideration of the jury, connected with the other circumstances of the case; as tending to prove that the contract was originally made on their account; or that they assented to the act of their agent: a subsequent assent being equivalent to a previous command. And the assent of any one of the partners would be good evidence, affecting the rest: unless by the articles or constitution of the company, the whole concern and management should have been entrusted to a committee or board of managers; in which case the assent should be proved to have been given by them or some of them, pursuant to the authority delegated to them by the company.

Upon these views of the case, we are of opinion that a new trial should be granted.

New trial granted.

DAVID C. M'CLURE *v.* EDWARD RICHARDSON.

In the Court of Appeals of South Carolina.

FEBRUARY TERM, 1839.

[REPORTED, RICE'S REPORTS, 215–218.]

Defendant was the owner of a boat, in which he was accustomed to carry his own cotton to Charleston; and occasionally, when he had not a load of his own, to take for his neighbours, they paying freight for the same. One Howzer *was the master or* patroon *of the boat, and the* general *habit was for those who wished to send their cotton by the defendant's boat, to apply to the defendant* himself. *On this occasion, the patroon had been told to take Col. G.'s and Mr. D.'s cotton, which*

he had done, when the plaintiff applied to Howzer, in the absence of the defendant, to take on board ten bales of his cotton, asking him if it was necessary to apply to the defendant himself, to which Howzer *replied, he thought not, and received the cotton:* HELD, *that under the circumstances, the defendant was bound by the act of* Howzer, *as being within the general scope of the authority conferred upon him by placing him in the situation of master of the boat, and that the defendant was, consequently, chargeable as a common carrier, for any loss of, or damage to the plaintiff's cotton.*

Before BUTLER, J., at Charleston, January Term, 1839.

THE report of his Honour, the presiding Judge, is as follows:—"This was a special action on the case, to make the defendant liable for cotton lost on board his boat by fire. The testimony is in writing and can be referred to. One Howzer was the patroon of the boat, and took the cotton on board under the following circumstances. He was employed by defendant to take charge of his boat as patroon, and in the early part of the season of 1835, perhaps in October, he made one trip on the Santee to Charleston, with defendant's own cotton: the habit of the defendant being to use his own boat to carry his own cotton, and occasionally, when he had not a load of his own, to take his neighbours'. On the trip when this cotton was lost, the patroon had been told to take Colonel Goodwin's and Mr. Dallas's cotton; he took in Goodwin's at defendant's own landing, and Dallas's at Dallas's landing, some distance below, in all 110 bales. At this place the plaintiff, M'Clure, applied to the patroon to take on board 10 bales of his cotton—asking the witness if it was necessary to apply to Colonel Richardson himself; the witness replied he supposed it was unnecessary—that Colonel Richardson was at his summer place and could not be applied to in time for the boat to go off. The cotton, 10 bales, were taken on board after the boat had passed through the rocky part of the river. At night when the boat stopped, fire was communicated to the cotton by one of the hands striking up a fire on board, contrary to orders; four bales were entirely consumed, two very much injured, and four delivered in Charleston. The cotton of the two that were injured, was put on board of another boat, or perhaps on the same boat, and some time afterwards was entirely lost in a gale. The grounds of defence were, that defendant was not liable for the loss, because the patroon was not his agent to take freight, and had no authority to take the cotton without the express orders of his employer. This question depended somewhat on the course of dealing and habits of defendant. Several witnesses were examined, who said that they had often shipped their cotton on defen-

dant's boat, and had paid the usual rates of freight. One witness said, he had put cotton on board the defendant's boat in his absence, by making arrangements with his overseer, or patroon of the boat. The general habit was to apply to Colonel Richardson himself. Howzer, the patroon on this boat, said he never had before taken cotton without Richardson's consent, but that he thought he was at liberty to do so under the circumstances. In my charge to the jury, I said that masters of marine vessels were regarded as the agents of the owners, to take freight, and that the patroons of boats on our inland rivers were generally in the habit of signing bills of lading. This being the general understanding, I thought the patroon should be regarded as a competent agent, unless the owner had given some public instructions to the contrary, or there were some collusive contract with the patroon by the shipper, contrary to the known habits of the owner. That if Howzer were a competent agent to take on board of the boat the cotton in question, which, under the circumstances I thought he was, then the defendant was clearly liable for the loss of the four bales of cotton which were entirely destroyed, he not having brought himself within any of the exceptions that would exempt a common carrier from liability, it having been proved that the plaintiff was to pay for the freight of his cotton. With regard to the two bales that were injured, and lost in a gale, I thought he should be held liable for them too, as the injury that they received in the first instance, resulted from carelessness, unless it could be shown that the ultimate accident, the act of God, would have destroyed the cotton, in spite of the delay occasioned by the fire. In other words, the defendant should be held liable for the free and natural consequences of his carelessness. It is probable, but for the fire, the cotton would have gone in safety to Charleston."

[The jury having found for the plaintiff to the amount of his claim, the defendant appealed.]

CURIA, per BUTLER, J. Whether the defendant, Richardson, would have consented that the plaintiff should put his cotton on board of his boat if he had been present, is a matter of conjecture. It is certain his agent, believing in his authority to do so, did take the cotton. The patroon who was in charge of the boat, represented himself as competent to take in freight, and had not the plaintiff every reason to believe that the agent was acting within the scope of his authority? The boat had on board Goodwin and Dallas's cotton, for which the owner charged them freight. The plaintiff might well have concluded that his cotton would be carried on the same terms, particularly as defendant had never made any discrimination among his neighbours, but indifferently took

their cotton when he wanted freight for his boat. So far as the community were concerned, the patroon (Howzer) occupied the position of any other master of a boat, and might be regarded as the agent of the defendant to take in and sign bills of lading for freight. If the defendant had previously employed his boat for his own purposes exclusively, it could not have been fairly inferred that the agent could do what his employer never had done—but his employer had used his boat in some measure for the community in which he lived, and from his course of dealing with it, had held himself out as a common carrier. He had not in fact imposed any restrictions on the patroon's authority to take in freight, and was clearly entitled to charge for all that was taken. If he had chosen to make himself liable alone for such contracts as he himself should make, he should have given some public notice—otherwise how natural was it that others might be deceived — more particularly as his agents before this, according to the testimony of Foyle, were in the habit of taking in freight for him in his absence. His liability arising from the general implication of law, was, that he would be answerable for the acts of his agent, acting within the ordinary scope of such agent's usual authority, unless it were specifically limited and restricted. The authority of an agent results from the position in which he is voluntarily placed by his employer; one should not put an agent in any public employment if he is not willing to be liable for his acts, bona fide done in such employment; the right of a master to take in freight arises from his custody of a boat, which is in the habit of carrying for the community.

The verdict in this case must stand. Motion refused.

GANTT, RICHARDSON, O'NEALL, and EVANS, Justices, concurred, EARLE, J., dubitante.

Frost, for the motion.
Magrath, contra.

S. & I. JAQUES *vs.* TODD.

In the Supreme Court of New York.

AUGUST, 1829.

[REPORTED, 3 WENDELL, 83–94.]

Where the course of business between a merchant in the country and a merchant in town is such, that the country merchant transmits to his correspondent in town his produce and such other articles as he has to sell, *and the merchant in town, in return, supplies him with such articles of merchandise as he deals in, and fills up his orders by procuring from other merchants on credit such articles as he does not deal in, and charges them to the merchant in the country, the latter is not liable to the seller for any articles thus procured, although he directs the purchase of an article which he knows the merchant in town does not deal in, and the seller is informed for whom the purchase is made, if the merchant in the country has funds in the hands of the merchant in the city, and has never authorized him to pledge his credit on the purchase of any articles thus ordered, or recognised such act. The* agency *in such case is special, without authority to pledge the credit of the principal.*

(*a*) *By the Court*, MARCY, J. This case turns on the nature and extent of the authority of Bailey and Voorhees, as agents of the defendant. If they were his *general* agents; if they were *special* agents, and the act done by them was within the scope of their powers; if in any instance they had in fact pledged his credit, and he had recognised their right to do so; or if he had, subsequent to the purchase, in any way, however slight, indicated his assent to the pledge of his credit, in this particular case he is liable to the plaintiffs on the demand for which this action is brought.

The nature of this agency is to be gathered from the connexion existing between the defendant and Bailey and Voorhees. It appears the defendant was in the practice of consigning to them whatever produce he had for the New York market. They sold it and gave him

(*a*) Assumpsit for goods sold, ordered by the defendant from Bailey and Voorhees in New York, and delivered to him at Waterford. The facts are sufficiently stated in the opinion of the court.

credit therefor. He purchased of them the goods which he required for his store at Waterford. He often sent to them for articles which he knew they did not usually keep, and was aware that they had to purchase them to supply his order; but these purchases were uniformly made in the name and on the responsibility of Bailey and Voorhees. Although Mr. Bailey states his house were the general agents of the defendant in New York, and were known to be such, this part of his testimony is to be taken in connexion with what he had before said in relation to the agency. He had previously declared that the article in question was purchased on his own responsibility for the defendant; that he had never used, or had authority to use the credit of the defendant, in any instance whatever. Do these facts make out a general or a special agency? The distinction between a general and a special agent is not always obvious; indeed, to trace the line that separates them is sometimes a matter of great nicety; and I apprehend that the principal difficulty in this case relates to this distinction. "By a general agent is understood, not merely a person substituted in the place of another for transacting all manner of business (since there are few instances in common use of an agency of that description), but a person whom a man puts in his place to transact all his business of a particular kind; as to buy and sell certain kinds of wares, to negotiate certain contracts, and the like." (Paley on Agency, ch. 3, sec. 5.) A person employed by another for a particular purpose, and acting under limited and circumscribed powers, is a special agent, and cannot bind his principal by any act exceeding the precise limits of his authority. (2 Saunders on Pl. and Ev. 732.) A factor, employed to sell goods, cannot pledge them. (Id. 735.) A person employed to sell articles at auction, at not less than a stated price, cannot, it is said, sell them at a private sale, even for a price beyond that fixed for the sale at auction. (Ambl. 498.) A principal who agrees to accept, and authorizes his agent to draw bills for advances on merchandise purchased for and consigned to him by such agent, is not liable for bills drawn on him by the agent, on account of his own property consigned to the principal. (1 Peters, 264.) A distinction is to be taken also between a special agent and a general agent, with instructions private or unknown to the person dealing with him, limiting and controlling, in particular instances, the exercise of his general powers. If Bailey and Voorhees had been constituted the agents of the defendant, with power to buy and sell for him, but were directed not to buy on credit when they had funds belonging to him, they would have been general agents; and if they had disregarded the instructions of their principal, and actually pledged his credit while they held his funds, he would have been bound by their acts, and it would have availed him nothing to

show that they had transgressed the limits prescribed to them. In such a case, the power to purchase on credit would have existed in the agent; but its exercise would be controlled by instructions, and dependent on circumstances not presumed to be generally known. But if the defendant, in constituting them agents, had withheld from them, under all circumstances, the authority to buy on his responsibility, or even to buy at all for him unless they were furnished with funds for immediate payment, they would, in my opinion, be only special agents. The evidence of Bailey is explicit, that his house never had the power to purchase on credit for the defendant.

Their mode of doing business is one that is very common. The merchant in the country sends what articles and produce he has on hand to a merchant in New York to sell, and transmits to him his orders for such goods as he may require. He is probably aware that there are articles on his order which the merchant to whom it is directed does not usually keep; but he expects, as the correspondent has his funds, that he will make out the assortment by purchasing on his own account, and perhaps on credit, such articles as his own establishment cannot supply. No country merchant, under such circumstances, supposes that he is committing his fortune to his correspondent, by giving him an unlimited power to use his credit in purchasing goods. From the testimony in this case, taking it altogether, Bailey and Voorhees appear to me to have been special agents, without the power to pledge the credit of the defendant.

If a special character can be given to their agency, consistently with well-established principles of law on this subject, it appears to me that it should be done. Prudence on the part of principals requires that they should often make restrictions limiting their responsibility; and when made in good faith, they should be recognised and upheld with all necessary safeguards for their support, and cautionary regulations to preserve them from perversion or abuse.

If the fact was clearly made out, that the salt was purchased by Bailey and Voorhees on the credit of the defendant, restricted as the agency was, I should consider it an act beyond the scope of their authority, for which the defendant would not be liable. I arrive at this conclusion from a view of the general character of the agency as detailed in Bailey's testimony.

It is proper to examine more minutely and critically the facts and circumstances relative to the sale of the salt, to see if there is anything to vary the character of the transaction. The plaintiffs were informed that the salt was purchased for the defendant, and the defendant actually received it. Whether the credit was given to the defendant or to Bailey and Voorhees, is a matter left in some doubt. It would seem, from the

entries in the books of the plaintiffs, that the credit was given to the defendant; another quantity sold at the same time, at the instance of Bailey and Voorhees, to Stewart, under somewhat similar circumstances, was charged to him, and not to B. & V. Bailey, however, says he gave no direction to have the salt in question charged to the defendant. He intended to buy it, and supposed he had bought it, on his own credit; he had often bought the same article of the plaintiffs for the defendant; and the previous purchases had always been on the responsibility of his house. From a conversation of the plaintiffs with one of the witnesses, after the failure of B. & V. it is quite evident they doubted the liability of the defendant. It is not so material to know to whom the plaintiffs charged the salt, as it is to ascertain to whom the facts warranted them to make the charge; for the rights of one party are not to be affected by the misapprehension of the other. If the facts relative to the sale are all before us, and there is no reason to suspect they are not, it would seem that in making the charge, on the supposition it was made against the defendant, the plaintiffs looked more to his ability to pay than to these facts. The circumstance that the salt was purchased with a design to be sent to the defendant, and that this was made known to the plaintiffs, does not, in my opinion, change the features of this case. There is some ambiguity in the witness's expression that *he purchased the salt for the defendant.* He undoubtedly meant to be understood that he purchased it for the use of, or to be sent to the defendant, but not on his account; for he followed this expression immediately by the declaration that he purchased it on his own responsibility.

But the defendant had the property, and it is therefore urged that he is liable to pay the plaintiff for it. The answer to this is twofold. It appears, in the first place, that the plaintiffs did not sell the property to the defendant, but to Bailey & Voorhees; if, however, upon the question of fact, there was any doubt, the other answer is conclusive—Bailey and Voorhees had funds furnished by the defendant, and his order to them was to procure it with these funds. So they understood it, and nothing was then or had been previously done to authorize the plaintiffs to understand it otherwise. If the facts will at all warrant the position that the defendant sent his agents to the plaintiffs to buy the salt, it was with money to pay for it. He can therefore avail himself of the principle, that where money is given to the agent or servant to purchase goods for his principal or master, and he retains the money, and purchases on the credit of his employer, the latter is not liable, unless it can be shown that sometimes the agent or servant has been permitted to buy on credit. (1 Show. 95. 5 Esp. N. P. Rep. 76. Peake's N. P. 47. Paley on Agency, 140.)

I see no reason to question the correctness of the judge's charge to the jury, or his refusal to charge as the plaintiffs requested. The motion for a new trial must therefore be denied.

The most practical distinction in agencies is between *express* and *implied*. The distinction between *special* and *general*, when properly understood, amounts nearly to the same thing; but there are ambiguities in the use of these words, which have produced confusion. *Special*, instead of being understood as applying to the appointment, has been supposed to refer to the limited nature of the acts authorized to be done; and *general*, instead of being considered as indicating the way in which the agency is created or inferred, has been defined as embracing an indeterminate power. The definitions, commonly given, that a general agent is one put in the place of the principal to transact all his business, or all of a particular kind, and that a special agent is one employed to do specific acts, are vitious. A general agent is one who has been generally, or usually, employed to do certain things, though of the most limited range; and a special agent is one who has been specifically authorized to act, though it may be in the most extensive and discretionary way. But by whatever names these different agencies may be called, the important distinction in the law, is between those express and special, or intentional, authorizations, under which the agent has no powers but such as the principal meant should be exercised by him, and those implied, or unintentional, agencies, in which the agent becomes vested with power in law, to bind the principal beyond the limit to which he meant to be bound, or altogether against his intention,—a power derived from the acts of the principal in relation to the agent and the public. It is to one class of the latter kind, that the term *general* agency, is applied, in the common law.

1. *Express or special agencies.*—If there be an express or special authority, the agent cannot by virtue of that authority, bind the principal beyond its express terms, or beyond those implied powers which are legally to be considered as accompanying, and being involved in, the appointment of an agent for the purpose in question. The rule of the common law, is, that no man can be bound by the act of another, without or beyond his consent; and where an agent acts under a special or express authority, whether written or verbal, the party dealing with him is bound to know, at his peril, what the power of the agent is, and to understand its legal effect; and if the agent exceed the boundary of his legal power, the act, as concerns the principal, is void. See *Delafield* v. *The State of Illinois*, 26 Wendell, 193, 222; *North River Bank* v. *Aymar*, 3 Hill's N. Y. 263, 266; *Beals* v. *Allen*, 18 Johnson, 363, 366; *Hampton et al.* v. *Matthews & Shaw*, 2 Harris, 105, 108; *Johnson* v. *Wingate*, 29 Maine, 404, 407; *Thompson* v. *Stewart*, 3 Connecticut, 172, 183; *Fisher & Johnson* v. *Campbell*, 9 Porter, 211, 216; *Banorgee* v. *Hovey et al.*, 5 Massachusetts, 11, 37; *Dresser Manuf. Co.* v. *Waterston and others*, 3 Metcalf, 9, 18; *Murdock and others* v. *Mills and others*, 11 Id. 5, 15; *Baring* v. *Peirce*, 5 Watts & Sergeant, 548; *Allen* v. *Ogden*, 1 Washington, C. C. 174; *Fox* v. *Fisk*, 6 Howard's Mississippi, 328, 345; *Curtis et al.* v. *Innerarity*, 6 Howard's S. Ct., 146, 162: &c. Even if the act

done beyond the scope of the agent's authority, be more for the benefit of the principal, than that which was authorized, yet if it were unauthorized, it is void; *Cox & Cox* v. *Robinson*, 2 Stewart & Porter, 91, 101. In fact, the power of the agent, and the rights of the person dealing with him as against the principal, depend upon a legal construction of the instrument, or language, of authorization, and that, of course, proceeds upon the intention, as legally signified, of the principal. The power must be pursued with legal strictness; and the agent can neither go beyond it nor beside it. The act done must be legally identical with that authorized to be done, or the principal is not bound.

The case of *Batty* v. *Carswells* illustrates the principle here stated; and there are numerous decisions to a similar effect. A written authority to draw for a certain sum at four months, will not render the principal liable on a bill drawn in formal accordance with the power, but antedated so as to be payable in less than four months, even when the bill was taken on the faith of the written authority; *Tate & Hopkins* v. *Evans*, 7 Missouri, 419. A special authority to receive payment of a note payable at a certain time in commodities, or to accept commodities delivered at a certain time in discharge of a debt, does not authorize such acceptance after the specified time; *Stewart* v. *Donnelly*, 4 Yerger, 177; *Longworth* v. *Connell*, 2 Blackford, 469, 472; *Brown* v. *Berry*, 14 New Hampshire, 459, 463; a power of attorney to receive a legacy and release the claim, will not authorize a release of a devise of lands; *Shepley* v. *Lytle*, 6 Watts, 500: a power to ask, demand, sue for, &c., all sums of money, debts, &c., which are or shall be due, &c., will not authorize a release of debts that are not due; *Heffernan* v. *Adams*, 7 Id. 116, 120: an authority to receive payment of a debt in money or a note payable to order, gives no power to dispose of the note after it is taken: *Hays & Wick* v. *Lynn*, Id. 524: an agency to bargain and sell lands will not enable the agent to give authority to the purchaser, before conveyance, to enter and cut timber; *Hubbard* v. *Elmer*, 7 Wendell, 446. An agent to whom a horse is given to sell, for the principal, cannot deliver him in payment of his own debt, and the principal may recover the horse from a purchaser from such deliveree; *Parsons* v. *Webb*, 8 Greenleaf, 38; and an attorney authorized to receive a debt, due to his principal, cannot commute that debt by exchanging it for one due from himself to the debtor; *Kingston* v. *Kincaid et al.* 1 Washington, C. C. 454, 456. An authority to an agent to sell a horse or exchange him for another horse suitable for staging, would not render the principal liable upon a warranty given by the agent in exchanging the horse for ponies not suitable for staging; *Scott* v. *McGrath*, 7 Barbour's S. Ct., 53. Where the principal directed the agent to sell with the condition that the property should not pass till payment, and the agent sold and delivered possession under an agreement that the vendor should have a lien for the purchase-money, the sale was held to be void; *Cowan* v. *Adams et als.*, 1 Fairfield, 374, 380. Where an agent was sent with current bank-notes to pay a bill, with directions to see the amount endorsed on the note, or receipted for, as paid, or else to bring the notes back, and the agent paid the notes, and took a conditional receipt, it was held that the acceptance of such a receipt by him was beyond his authority and void; and that the acceptance of the notes by the other party, made them payment; *Snow* v. *Perry*, 9 Pickering, 539. In like manner, it has been held, that an authority to sign and endorse notes in the principal's name at a particular bank, gave authority to sign and endorse notes payable at and due to that bank, but not notes due or payable elsewhere: *Morrison's Ex'or*

v. *H. Taylor*, 6 Monroe, 82; and that an authority to subscribe the principal's name as maker or endorser of a note to be discounted in a certain bank for the accommodation of the agent, would not authorize the signing of the principal's name to a note given for purchases made at shops by the agent; *Hortons & Hutton* v. *Townes*, 6 Leigh, 47. So, an authority by several principals to an attorney to endorse their names jointly on certain bills, is not satisfied by making successive endorsements of the names on a note payable to one of them, for the liabilities are different; *Bank of United States* v. *Beirne*, 1 Grattan, 234; S. C. 539. For other illustrations of the general principle, see *Lance* v. *Barrett*, 1 Hill's So. Car. 204; *Lagow* v. *Patterson*, 1 Blackford, 252; *Swett et al.* v. *Brown and Tr.*, 5 Pickering, 178; *Hopkins* v. *Blanc*, 1 Call, 361; *Thorndike* v. *Godfrey*, 3 Greenleaf, 429; *Gordon* v. *Buchanan*, 5 Yerger, 75, 79; *Dehart, &c.* v. *Wilson, &c.* 6 Monroe, 577, 581; *Mitchell's & Davis's Adm'rs* v. *Sproul*, 5 J. J. Marshall, 264, 267. An authority to endorse is not an authority to receive notice of dishonour; *Valk* v. *Gaillard*, 4 Strobhart, 99. An agency to carry timber and deliver it to a certain person, will not authorize a sale of it; *Powell* v. *Buck*, 4 Strobhart, 427. A mere special authority or direction to sell, does not authorize a sale on credit, unless commercial custom has given rise to such an understanding in some particular business: a power to sell stock does not authorize a sale on credit, and the owner is not bound by a sale so made; *Delafield* v. *The State of Illinois*, 26 Wendell, 193, 223. So a written power to sell for a certain sum, was decided to mean for so much ready money, and not for notes, unless there were something in the power itself, or in the usage of trade, to manifest a different intention; *Ives* v. *Davenport*, 3 Hill's N. Y. 374, 377. On the other hand, a factor has authority to sell on credit; see *infra*. And whether in case of a specific authority, a discretion to sell on credit is given, must depend on the construction of the authority in the particular case. In *May* v. *Mitchell*, 5 Humphreys, 365, a principal delivered to an agent three mules to be taken to the southern market and sold for the best price that he could get, and the proceeds to be returned; the defendant took them to the south, and sold them on credit, and the purchaser proved insolvent; it was held that the agent was vested with a discretionary power to sell upon the best terms that could be procured according to the course of trade in that part of the country to which the animals were carried; and as this was proved to be upon credit, since property could not otherwise be sold at anything like a fair price, the agent was decided not to be liable to the principal. See *Leland* v. *Douglass*, 1 Wendell, 490, 492.

But in all cases, an authority is to be construed, and the intention of the principal to be ascertained, in reference to the *purpose* of the appointment: and a consideration of the object which the agent is directed to accomplish, will either expand the powers specified as means of executing it, or limit the exercise of the most general powers conferred. Accordingly, it is a general maxim, applicable to special and limited agencies, as well as to those which are more comprehensive and discretionary, that in the absence of special instructions to the contrary, and in the absence of such prescription of the manner of doing the act, as implies an exclusion of any other manner, an authority or direction to do an act, or accomplish a particular end, implies and carries with it, authority to use the necessary means and inducements, and to execute the usual, legal, and appropriate measures, proper to perform it; or, as it has been expressed, "the principal authority includes all mediate powers which are necessary to carry it into effect;" *Peck & another* v. *Harriott & another*.

The amount of this rule is, that a direction or authority to do a thing, is a reasonable implication of the powers necessary to accomplish it, unless there is a special restriction, or unless an intention to the contrary is to be inferred from other parts of the authority. See *Bayley* v. *Wilkins*, 7 C. B. 886. Upon this principle, it has been decided that a special agency to sell chattels, or to procure subscribers to a joint-stock company relating to lands, implies (unless forbidden,) an authority to bind the principal by a warranty, or representations, respecting the quality or condition of the subject of the contract; such being usual means of accomplishing the proposed end; *Sandford* v. *Handy*, 23 Wendell, 260; *Nelson* v. *Cowing*, 6 Hill, 337; overruling *Gibson* v. *Colt & others*, 7 Johnson, 390; *Woodford* v. *McClenahan*, 4 Gilman, 85, 91; and that an authority to sell a slave, includes and implies a power to warrant that he is sound; *Skinner* v. *Gunn*, 9 Porter, 305; *Gaines* v. *McKinley*, 1 Judges' Alabama, 446; *Cocke* v. *Campbell & Smith*, 13 Id. 286, 289. An authority to discount bills or notes implies an authority to endorse them; *The Merchants' Bank of Macon* v. *The Central Bank of Georgia*, 1 Kelly, 418, 431. In like manner, an authority by deed to sell real estate, will authorize the attorney to make conveyances by deeds, except where such a power is expressly reserved; *Valentine* v. *Piper*, 22 Pickering, 85: and an authority to sell and convey lands, will authorize the execution of deeds with general warranty binding the principal, if there be no restriction in the power; *Peters* v. *Farnsworth*, 15 Vermont, 155; *Taggart* v. *Stanbery*, 2 McLean, 543, 549; *Vanada's Heirs* v. *Hopkins's Adm'r, &c.*, 1 J. J. Marshall, 285, 289; or with covenant of seisin; *Le Roy* v. *Beard*, 8 Howard's S. Ct., 451, 467; and these cases, with those above cited, warrant the conclusion that *Nixon* v. *Hyserott*, 5 Johnson, 58, in which it was decided that an attorney authorized to sell lands could not execute a deed containing a covenant of seisiu, is not law. See also as to the general principle, *Wilson* v. *Troup*, 2 Cowen, 197. A power of attorney to contract for sale, sell and convey, lands, authorizes the attorney to receive the purchase-money before execution of the deed; *Peck & another* v. *Harriott & another*. An authority to an agent to sell lands by auction will empower the agent to exact a reasonable and usual sum to be paid down as earnest; *Goodale* v. *Wheeler*, 11 New Hampshire, 424, 429. So an authority to settle accounts is said to imply an authority to allow credits; and a general power to contract for the purchase of any commodity implies a power to rescind or discharge the contract, if it becomes expedient to do so: *Anderson* v. *Coonley*, 21 Wendell, 279, 280; and see *Scott* v. *Wells*, 6 Watts & Sergeant, 357, 368. The rule that a grant of power to accomplish any particular enterprise carries with it authority to do all that is necessary for the work, is said to apply especially to works of a public nature; *Babcock* v. *Western Rail-Road Corporation*, 9 Metcalf, 553, 555. It is an application, also, of the same principle, that when a public office is instituted by the legislature, an implied authority is conferred on the officer, to bring all suits, as incident to his office, which the proper and faithful discharge of the duties of his office requires; *Overseers of Pittstown* v. *Overseers of Plattsburgh*, 18 Johnson, 407, 418.

It is to be understood, however, that in case of all agencies, whether public or private, this rule proceeds upon a reasonable presumption of the intention of the principal, as manifested and fixed by his acts, and that there can be no implication of mediate powers where they have been expressly withheld. Upon this distinction, the case of *Fenn* v. *Harrison*, 3 Term, 757; S. C., 4 Id. 177, turned: an agent had been directed to procure a bill to

be discounted, and upon one trial, it appeared that the principals had expressly refused to endorse it, and it was then held by a majority of the court, that the agent could not authorize it to be endorsed so as to create any liability in the principals; but upon another trial, where the same evidence was given, with this difference, that when the principals desired the agent to get the bill discounted, they did not say that they would not endorse it, the court were unanimously of opinion, that as the principals had authorized the agent to get the bill discounted without restraining his authority as to the mode of doing it, they were bound by his acts. In like manner, if a principal direct an agent to buy for cash, and give him the money, he cannot pledge the credit of his principal, where it does not appear that the principal had, on prior occasions, authorized the agent to deal on credit, or assented to his doing so; *Boston Iron Company* v. *Hale*, 8 New Hampshire, 363; but if an agent be ordered to buy, and be not furnished with funds, he may buy on credit; *Sprague & another* v. *Gillett & another*, 9 Metcalf, 91; see *Chomgua* v. *Mason et al.*, 1 Gallison, 342, 347.

But the powers of an agent are strictly circumscribed within the object and purpose for which he is empowered; *Angel* v. *Pownal*, 3 Vermont, 461; *Administrators of Shattuck* v. *Wilder*, 6 Id. 334, 338. It has been decided, that a general authority to collect debts, or to pay and receive money, or to make purchases for the principal, does not confer authority to bind the principal by negotiable bills or notes; and that such an authority cannot exist unless expressly conferred, or reasonably to be implied from the nature of the business; *Rossiter* v. *Rossiter; Webber* v. *Williams College*, 23 Pickering, 302, 304; *Taber* v. *Cannon & others*, 8 Metcalf, 456, 458; *Smith* v. *Gibson*, 6 Blackford, 370; *Scarborough* v. *Reynolds*, 12 Alabama, 252, 259; *Davidson* v. *Stanley*, 2 M. & Gr. 721: see *Martin* v. *Walton & Co.*, 1 M'Cord, 16; *Emerson et al.* v. *The Providence Hat Manufacturing Company*, 12 Massachusetts, 237, 242, and *Tappan* v. *Bailey & others*, 4 Metcalf, 529; *Denison* v. *Tyson*, 17 Vermont, 550, 555. See, however, *Laget et al.* v. *Gano*, 17 Ohio, 466. "The power of binding by promissory negotiable notes," said the court in *Paige* v. *Stone & another*, 10 Metcalf, 161, 168, "can be conferred only by the direct authority of the party to be bound, with the exception where, by necessary implication, the duties to be performed cannot be discharged without the exercise of such power. To facilitate the business of note-making, and thus affect the interest and estates of third persons to an indefinite amount, is not within the object and intent of the law regulating the common duties of principal and agent; neither is the power to be implied because occasionally an instance occurs, in which a note so made, should, in equity, be paid." In *Savage* v. *Rix et a.*, 9 New Hampshire, 263, 266, the rule is stated to be, that the authority of a special agent appointed to do a particular act, must be limited to that act, and to such acts as are necessary to the performance of it; and it was therefore held that a committee appointed by a town to repair a highway, for which an appropriation was made, had authority to pledge the credit of the town for payment, but not to bind it by negotiable notes. And it is a settled principle that the most general powers expressly conferred upon an agent, are to be limited in their exercise to the business or purpose for which the agency is created. This is illustrated by the case of *Rossiter* v. *Rossiter*, in which an agent or attorney appointed to settle an estate, was authorized, *inter alia*, to do any and every act in the principal's name, which the principal could do in person, which was held not to enlarge the powers of the agent beyond what were necessary for the settlement; and *Wood* v. *Mc-*

Cain, 7 Alabama, 801; *Scarborough* v. *Reynolds*, 12 Id. 252; and *Dearing* v. *Lightfoot*, 16 Id. 28; are to a similar effect. See, also, *Rogers and wife* v. *Cruger & others*, 7 Johnson, 557, 583. In like manner, if one be appointed, by express grant of authority, general agent of a manufacturing company, his powers, though general, must be limited by the duties to be performed and the business to be transacted; *Odiorne et al.* v. *Maxcy et al.*; and he will have power, therefore, to give negotiable notes of the company in payment of work done or articles furnished for the benefit of the company; *Frost* v. *Wood*, 2 Connecticut, 23; *Bates* v. *Keith Iron Company*, 7 Metcalf, 225; but not to transfer by deed, the real estate of the company; *Storr* v. *Wyse*, 7 Connecticut, 214, 219; nor to pledge or mortgage the machinery to raise money for the company; *Despatch Line of Packets* v. *Bellamy Man. Co.*, 12 New Hampshire, 206, 229. And where a person, engaged in grocery business, announced by public advertisement, that another was his "duly authorized agent, in the purchase of goods and everything appertaining to his business in the mercantile line," it was held, that the agent had authority to bind his principal by any contracts necessary or customary in the conduct of the trade, and thereby to make bills and notes in the principal's name, in payment of engagements in the course of business; but that this authority was restricted to such bills and notes as derived consideration from liabilities in the course of trade, or were used for the convenience or necessities of the business; and, therefore, that the agent was not empowered to make bills or notes for the accommodation of third persons; *Bank* v. *Johnson*, 3 Richardson, 42. And, on this account, it is a universal principle in the law of agency, that the powers of the agent are to be exercised for the benefit of the principal only, and not of the agent or of third parties. A power to do all acts that the principal could do, or all acts of a certain description, for and in the name of the principal, is limited to the doing of them for the use and benefit of the principal only, as much as if it were so expressed; *Stainer* v. *Tysen*, 3 Hill's N. Y. 279, 281; *North River Bank* v. *Aymar*, Id. 263, 266. A power, therefore, in the most general terms, to draw and endorse bills for and in the name of the principal, will not authorize a drawing or endorsing in his name for the accommodation of third persons; *Nichols* v. *State Bank*, 3 Yerger, 107; *Wallace* v. *Branch Bank at Mobile*, 1 Judges' Alabama, 565; *St. John* v. *Redmond*, 9 Porter, 428; *The Planters' Bank* v. *Cameron et al.*, 3 Smedes & Marshall, 609, 613; or for the benefit of the agent; *Suckley* v. *Tunno & Cox*, 1 Brevard, 257; S. C., 2 Bay, 505: and this principle is illustrated in the case of partnership: see supra, p. 499. A power in the most general terms to do all and everything that the agent may think proper in any business the principal may be concerned or interested in, will not authorize the agent to pledge the property of the principal for his own debt; *Hewes* v. *Doddridge, &c.*, 1 Robinson's Virginia, 143. See, also, *Jones* v. *Farley*, 6 Greenleaf, 226, &c. The most guiding principle in the construction of powers, is to be derived from a consideration of the *purpose* which the agent, or other depositary of power, is appointed to accomplish.

It will be seen, from some of the foregoing cases, that there may be an agency of the most general nature, created by the express and special appointment of the principal; that is, an authority to transact all the business of the principal, or to do all acts of a particular kind at the discretion of the agent. But in the legal principles applicable to them, there is no difference between such agencies, and express agencies of the most limited kind. In all of them alike, the power of the agent depends upon a legal construction of the language of authorization,

regard being had to the purpose of the appointment, and other legal circumstances; and no power can be exercised by him but such as it was intended by the principal, according to the expression of that intention in the authorization, should be exercised by him. Or, as it has been expressed by a respectable court, "An attorney in fact cannot bind his principal beyond the power delegated to him; and whether an authority of this description be considered general, as contemplating the execution of a variety of acts, in contradistinction to a special power to do a particular act, the construction must be the same. In either case, the principal is not bound unless the act done be within the scope of the power:" *St. John* v. *Redmond*, 9 Porter, 428, 431. Every *express* agency is *special*, according to the legal signification of that word: and the only reasonable distinction is between express and implied.

(2) *Implied agency.* The other range of cases is, where, the principal is bound by the act of the agent beyond what he intended to be, and beyond or against the express instructions which he had given to the agent. And of this kind, there are two classes which may be noted. 1. The case of what is properly called a general agency, that is, an authority implied from a number of acts, previously authorized or ratified, which will enable the agent to exceed or violate particular directions, and to bind the principal to the extent of the acts which have been usually allowed, or are usually incident to the relation in which the person is placed. 2. The case of a power expressly vested in an agent, with private instructions as to the purpose for which, or the extent to which, or the manner in which, it is to be exercised; where, upon the distinction between a power vested, and instructions as to its exercise, an act may be a fraudulent execution of the power as between the agent and principal, and a valid transaction as between the principal and the third party. All these are cases of *implied* agency, created by the conduct or acts of the principal: and they proceed upon the ground, that if one holds another out to the world and accredits him, as his agent, he is bound by that person's acts done within the scope of the credit thus given to him. In cases of this kind, the question is not what power was intended to be given to the agent, but what power, a third person dealing with him, had a right to infer from the conduct of the principal, that the agent possessed; *Johnson* v. *Jones*, 4 Barbour's Supreme Court, 369, 373.

1. If a man has usually, or frequently, employed another to do certain acts for him, or has usually ratified such acts when done for him by that person, the person becomes, by such employments or ratifications, his implied, or general, agent to do such acts. The true nature of a general agency, in this sense of the term, is stated by Lord Ellenborough in *Whitehead* v. *Tuckett*, 15 East, 400, 408; "Much of the argument in this case," he observed, "has turned upon the question whether Sill & Co. were invested with a general authority to sell the sugars: when that question is discussed, it may be material to consider the distinction between a particular and a general authority; the latter of which does not import an unqualified authority, but that which is derived from a multitude of instances; whereas the former is confined to an individual instance." A general agency, therefore, in this, which is the most proper, sense of the term in our law, is an implied authority derived from a course of dealing, or from a number of acts of a particular kind, authorized or assented to. Such a general authority enables the agent to bind the principal, without orders, in dealing with those who have no notice of the want of lawful power in the agent, and who act without collusion. See *Williams et al.* v. *Mitchell*, 17 Massachusetts, 98; *Hooe et al.* v. *Oxley & Hancock*, 1 Washing-

ton, 19; *Wilkins* v. *The Commercial Bank of Natchez*, 6 Howard's Mississippi, 217, 221; *St. John* v. *Redmond*, 9 Porter, 428, 432; *Stothard* v. *Aull & Morehead*, 7 Missouri, 318; *Walsh et al.* v. *Pierce*, 12 Vermont, 130, 138; *Schimmelpennich et al.* v. *Bayard et al.*, 1 Peters, 264, 290. In *Munn* v. *Commission Co.*, 15 Johnson, 44, D., the agent of a company, was authorized by the by-laws to make advances of money, on goods consigned or deposited, but in the present case he accepted a bill for accommodation, on a promise to consign rum: but "it was proved that D. had accepted a number of bills, in the same manner as the one in question, which were regularly paid by the company," (p. 47): and the Court said (p. 54), that, "the by-laws of the corporation have been produced, and they certainly do not confer on the agent the power of accepting bills, on an expected delivery of goods. But it was proved that D. was the general agent of the defendants, and that he was in the habit of accepting bills, which the company, afterwards, paid, under the like circumstances:" and accordingly, upon the distinction between a general and special agency, they held the acceptance to be binding on the company. So in *Tradesmen's Bank* v. *Astor*, 11 Wendell, 87, 90, where several persons, jointly interested in a concern, agreed, by articles among themselves, that no one should be bound by the acts or contracts of another, it was held, that where one acted as the general agent of the company, all were bound by his acts. In like manner, in *Johnson* v. *Jones*, 4 Barbour's Supreme Court, 369, 372, where an agent had been permitted to purchase goods upon credit, and to give the defendant's notes for them, and some of these notes were paid by the defendant without objection, and the principal, before the purchase in question, had instructed the agent not to sign his name to any paper, but if he wanted goods to send to him, the defendant, for them, yet without affirming that the agent had exceeded his authority in making the purchases and giving notes in the principal's name, it was held that these instructions must be considered as private restrictions upon a general agency, and as not affecting a person who dealt with the agent in ignorance of them, and that the principal was liable upon a note given in his name by the agent for goods purchased. In *M'Clure* v. *Richardson*, the defendant, a planter of cotton, owned a boat which he used for carrying cotton; "his habit being to use his boat to carry his own cotton, and occasionally, when he had not a load of his own to take his neighbours';" on the present occasion, the defendant had given the master orders to carry the cotton of two other persons, which he did; a third person, the plaintiff, while the boat was on the passage, delivered cotton of his to the master to carry; it was decided that the owner of the boat was liable for the loss of the cotton by the negligence of the hands: "If the defendant had previously employed his boat," said the court, "for his own purposes exclusively, it could not have been fairly inferred that the agent could do what his employer had never done: but his employer had used his boat in some measure for the community in which he lived, and from his course of dealing with it, had held himself out as a common carrier." In *Eagle Bank* v. *Smith*, 5 Connecticut, 71, 74, it was held that one who had been a clerk for several years in the store of the defendants, and in many instances had done business with the plaintiffs, was the general agent of his employer, within the scope of that business. A general agency may be created even by the frequent payment, with knowledge, of notes to which the payer's name has been forged; *Weed* v. *Carpenter*, 4 Wendell, 219.

The principle of general agency appears to be applicable to every species of business that can be done by agents.

See *Wilkins* v. *The Commercial Bank of Natchez*, 6 Howard's Mississippi, 217, 221. If one act generally as deputy of the sheriff, with the sheriff's knowledge and consent, the sheriff is liable for his official acts, even if he has given him no regular authority; *Bosley* v. *Farquar*, 2 Blackford, 62, 67. See, also, *Minor et al.* v. *The Mechanics' Bank of Alexandria*, 1 Peters, 47, 70. This general principle, that if one treat another as his agent, and thereby induce others to deal with him as such, that person becomes his agent *de facto*, and as such may bind him without any legal appointment, is strikingly illustrated in the recent case of *Despatch Line of Packets* v. *Bellamy Man. Co.*, 12 New Hampshire, 206, 223; it was there held, that a director of a private corporation, elected by a vote of the company, is an agent of the company for the management of its affairs or some of them; and that if a corporation elect a director, and permit him to act as such, though by the by-laws he be not legally eligible, they hold him out to the world as a director, or agent, having all the powers of an agent of that description, and to be trusted as such; and that those who deal with the corporation through him, have only to inquire what powers directors have, and what acts the corporation has authorized them to do. Another remarkable application of the principle will be found in *The Merchants' Bank of Macon* v. *The Central Bank of Georgia*, 1 Kelly, 418, 431.

There is a class of cases which proceed upon a similar principle, and recognise the general rule, that if one place a person in a certain official position in relation to himself, or employ a professional agent, and give him but a limited power, he may yet bind his principal, to the extent of the power usually incident to the relation in which he is placed. Thus if a man direct his servant to do some act, or empower a factor, broker, or auctioneer, to act for him, and limit his authority by particular instructions, such agent still has power to bind the principal to the full extent of his usual authority in dealing with those who have no notice of the limitation. See *Nickson* v. *Brohan*, 10 Modern, 109. "Where a person is engaged in a particular department of business, and is employed to do an act within his line, with special restrictions, there the general powers derivable from the nature of his ordinary employment, will control the limitation; he will be held to possess such in the *particular instance*, as his ordinary occupation fairly imports to the public. But in the absence of any such implication of general power, the limitation will control. Thus, in the case of a factor, or servant of a horse-dealer in the habit of making sales, if the factor or servant should be specially instructed in a given instance, the instructions would not be binding [in relation to third persons] if in conflict with the general authority derivable from their occupations. But if a person who had no such general character should be employed to do a particular act, such as sell a lot of goods, horse, &c., and in respect to which his power is specially limited, there if he exceed the limitations, his principal will not be bound:" per Nelson, C. J., in *Sanford* v. *Handy*, 23 Wendell, 260, 266: and see to the same effect, per Ashhurst, J., in *Fenn* v. *Harrison*, 3 Term, 757, 760; and per Bailey, J., in *Pickering* v. *Busk*, 15 East, 38, 45; and per Eldon, C., in *Bank of Scotland, App.* v. *Watson, Res.*, 1 Dow, 40, 44. See, also, *Andrews* v. *Kneeland*, 6 Cowen, 354; *Gibbs* v. *Boies & Linsley*, 13 Vermont, 208, 214; *Lobdell* v. *Baker*, 1 Metcalf, 193, 202; *Laussatt* v. *Lippincott and another*, 6 Sergeant & Rawle, 386, 393. In *Arnold* v. *Halenbake*, 5 Wendell, 33, it was held that a broker, factor, or commission-merchant has power to sell any goods consigned to him in the line of his business, though he may exceed his

instructions; because, as it is his business to sell all goods entrusted to him, there is in the act of sending them to him, an authority to sell; but that this does not apply to any man whose business or profession is not to sell all goods sent to him; and that a boatman or common carrier has therefore no implied authority to sell goods entrusted to him to carry, though it may be the usage for such carriers to sell when instructed. See *Rapp* v. *Palmer*, 3 Watts, 178; and see Lord Ellenborough's remarks in *Pickering* v. *Busk*, 15 East, 38, 43. This principle, however, ought to be applied with caution. There can be no doubt that if a man expressly empower, or by a course of dealing accredit another, as his auctioneer, broker, or factor, or other professional agent, and privately restrict his powers, the agent may bind him to the extent of his usual professional agency; and sending goods to such a person without directions of any kind, is a presumption of an authority to deal with them according to the course of the agent's usual business. But if the owner has not empowered the party at all as his agent to sell, either by a special authority, or by a previous general agency, and sends goods to a broker or auctioneer, for another purpose than sale, and with such directions as exclude an authority to sell, there is no case which says that the bailee may sell; and it is believed, that no such principle exists in the common law. See *Campbell* v. *Nichols*, 11 Robinson's Louisiana, 16.

With regard to the limits of the general agency which is created by a series of acts or a course of dealing, the language of Lord Eldon in *Davison* v. *Robertson and others*, 3 Dow, 219, 229, has generally been considered as defining the principle with accuracy. In that case, the position had been stated, that an endorsement per procuration required a special mandate; but Lord Eldon's "opinion was that no such thing was absolutely necessary: for if from *the general nature of the acts permitted to be done*, the law would infer an authority, the law would say that such an authority might exist without a special mandate, &c." This is illustrated in *Com. Bank of Lake Erie* v. *Norton*, 1 Hill's N. Y. 502; there, by the articles of copartnership, one H. N. was created agent of a firm, but his authority as thereby defined, did not extend to accommodation acceptances; it was proved, however, that he was the general agent of the firm, and with their knowledge and assent was in the habit of drawing bills, and making notes and endorsements for them; the specific act of acceptance was not mentioned in the evidence, as one that had been usually done; but the court decided that his general power, and the usage of putting the firm name to commercial paper in all other shapes, "was the same thing, and calculated to raise an inference in the public mind, that he had such a power as this." "It is not necessary," they said, "in order to constitute a general agent, that he should have done before, an act the same in specie with that in question. If he have usually done things of the same general character and effect, with the assent of his principals, that is enough."—But beyond the regular course of his business employment, and the general nature of the acts done, the implied power of a general agent will not extend: see *Jaques* v. *Todd*; *Jones* v. *Warner*, 11 Connecticut, 41; *Pourie and Dawson* v. *Fraser*, 2 Bay, 269; *Washington Bank* v. *Lewis*, 22 Pickering, 24, 30; *Wilkins* v. *The Commercial Bank of Natchez*, 6 Howard's Mississippi, 217, 221; *Odiorne* v. *Maxcy et al.*; *Johnson* v. *Wingate*, 29 Maine, 404, 407. "When the agency is to be inferred from the conduct of the principal," said the court in *Cox* v. *Hoffman*, 4 Devereux & Battle, 180, "that conduct furnishes the only evidence of its extent, as well as of its existence; and in solving all questions on this subject,

the general rule is, that the extent of the agent's authority is (as between his principal and third persons) to be measured by the extent of the usual employment of that person." So the powers of one who is invested with any kind of official or professional character, do not extend beyond the legal and customary limits of his duty. An overseer on a plantation, as such, has not authority to bind his employer for provisions for the slaves, where the employer has made arrangements to have them supplied from other quarters; and the fact that the provisions come to the use of the employer, by being appropriated to the support of his slaves, without his knowledge, will not render him liable to pay for them; *Fisher and Johnson* v. *Campbell*, 9 Porter, 211. Where the proprietor of a tailor's shop had gone out of the country, and had appointed an attorney to represent him in regard to contracts, it was decided that the person left in the shop as 'cutter and foreman,' had no authority to purchase cloths for the use of the shop, on credit, unless it were specially proved that by the usage and general understanding of the commuuity, his agency extended so far; and the fact that the cloths come to the use of the principal by being worked up in his business and for his benefit, would not, without evidence of assent, express or implied, amount to a ratification of the foreman's purchases; *Topham* v. *Roche*, 2 Hill's So. Car. 307. In *Kerns* v. *Piper*, 4 Watts, 222, it was held to be no part of the ordinary business of a clerk iu a store to borrow money or draw bills and notes in the name of his principals, and such acts did not bind them, when there was no evidence of authority, or sanction. See, also, *Hampton et al.* v. *Matthews & Shaw*, 2 Harris, 100, 108.

It has been said, in some cases, that where no legal authority exists, and a party dealing with a supposed agent, relies on a previous recognition of authority in the agent to bind the principal, he must show that he contracted with him on the faith of such previous recognition; *St. John* v. *Redmond*, 9 Porter, 428, 433. But *Williams et al.* v. *Mitchell*, 17 Massachusetts, 98, appears to be an authority to the contrary.

Another class of cases, in which the principal may be bound beyoud the extent to which he intended to be bound, proceeds upon the distinction between a power vested in the agent, and instructions given to him as to its exercise, the instructions not entering into and abridging the power, but designed to direct the agent in the use of it. In these cases, a power is actually and legally vested in the agent; he is not merely held out to the world as authorized to the extent of the entire power, but he is in fact and in law empowered to that extent, and the instructions are not in diminution of the power, but are persoual directions in guidance of its exercise. In instances of this kind, a person claiming under a regular execution of the power, is not to be affected by private advices from the principal to the agent, of which such third person had no notice. The application of this distinction is often extremely difficult. Where the authority of the agent is created by writing, it is clear that one dealing with the agent is bound to look only at his power of attoruey or letter of credit, and is not required to call for his letter of instructions, as that is a confidential matter between the principal and agent, and that acts done in accordance with and on the faith of the power will be good; *Withington* v. *Herring*, 5 Bingham, 442, 456, per Best, C. J. But the distinction exists also in verbal agencies. It is illustrated by the case put in *Jaques* v. *Todd;* that if one is constituted agent of another, with power to buy and sell for him, but it is directed not to buy on credit while he has funds, here a general power is vested, and if, in disregard of his instructions, the agent pledged the credit of his princi-

pal, while he had funds, the principal would still have been bound; for in such cases, the power to purchase on credit, would have existed in the agent, but its exercise would have been controlled by instructions, and dependent on circumstances not presumed to be generally known: but if the principal, in constituting the agent, had withheld from him under all circumstances, the authority to buy on the principal's responsibility, or even to buy at all for him, unless furnished with funds for immediate payment, this would have been a restriction and limitation of the agent's power. And in the recent case of *Hatch* v. *Taylor*, 10 New Hampshire, 538, 549, it was determined that in case of special and verbal agencies, the test (or one test) of the distinction is, whether either by express injunction or from the nature of the case, the advice was to be kept secret; and that where instructions are given to a special agent, respecting the mode of executing his agency, intended not to be communicated to those with whom he may deal, they are not to be regarded as limitations upon his authority; and notwithstanding he disregards them, his act, if otherwise within the scope of his agency, will be valid, and bind his employer. And it was there held, that if one person employs another to sell a horse, and instructs him to sell for a hundred dollars, if no more can be obtained, but to get the best price he can, and not to sell for less than that sum, or if one be employed to purchase at the best possible price, with instructions to give a certain sum but no more; here, the instructions being obviously intended to be kept secret, are not limitations on the power; but that if the principal direct his agent to offer his horse for sale at the sum of a hundred dollars, and to take no less, or to purchase ten bales of cotton, if to be had at a certain sum, and to give no more, the direction might well be regarded as part and parcel of, and a limitation on, the authority itself. See also *Bryant* v. *Moore*, 26 Maine, 84, 86. But this suggestion must undergo the test of frequent practical application, before its soundness can be ascertained.

Upon a similar principle, if the title or apparent title of property, is put into the name of another, for a special purpose, we may dispose of the property to *bona fide* purchasers. The case is the same, where power to create a valid title in others, is put into the hands of a party: thus if one in trust to another, endorsed notes or acceptances, to be used in a certain way and for the benefit of the principal, and he transfer them to a bona fide holder for his own private advantage, the principal is bound, for the possession of negotiable paper of that kind, is in law a power to create in any *bonâ fide* holder of it, a title upon the instrument; *Putnam et al.* v. *Sullivan et al.*, 4 Massachusetts, 45; *Clement* v. *Leverett*, 12 New Hampshire, 317. So a note signed in blank, and delivered, is an authority in law to fill it up to any amount; it is an unlimited letter of credit; and the intention of the principal as to the amount to be inserted, could not control the act of the agent in dealing *bonâ fide* with third parties; *Bank of Limestone* v. *Penick*, 5 Monroe, 25, 29; *Bank Com'th* v. *Curry*, 2 Dana, 142; *Hall et al.* v. *Com'ths Bank*, 5 Id. 258; *Decatur Bank* v. *Spence*, 9 Alabama, 800; *Goodwin* v. *McCoy*, 13 Id. 271, 276; *Hoyt* v. *Seeley*, 18 Connecticut, 353, 358; *Aiken* v. *Cathcart*, 3 Richardson, 133; *Ferguson* v. *Childress*, 9 Humphreys, 382: if, however, the note be taken with a knowledge that it has been filled in violation of the limitation imposed by the principal, the holder will be in no better situation than the agent; *Johnson, use &c.* v. *Blasdale & Grubbs*, 1 Smedes & Marshall, 17, 20; *Hemphill* v. *The Bank of Alabama*, 6 Id. 44, 49; *Goad* v. *Hart's Adm'rs*, 8 Id. 787. So, possession of a note by a commercial agent is an authority to receive payment of it according to

its terms; *Stewart* v. *Donnelly*, 4 Yerger, 177. But, of other property than negotiable instruments, possession is not a power of disposition.

Another case, somewhat similar in principle is, where a general power is vested in an agent, where as the power is in all cases to be executed for the benefit of the principal, the legality of its exercise may in some instances depend on circumstances not known to the person dealing with the agent. If the execution of the power was lawful up to the time of the transaction with the third party, the latter will not be affected by a subsequent misappropriation by the agent, as where the agent, having authority, discounted a note of his principal, and embezzled the proceeds; *Newland* v. *Oakley*, 6 Yerger, 489: but if the transaction is, from the beginning, not in accordance with the power given, as if notes are drawn and negotiated for the benefit of third persons, the principal is not bound: See *North River Bank* v. *Aymar*, 3 Hill's N. Y. 263, in which the law is correctly stated in the opinion of Nelson, C. J. And this is especially so, where the third party has notice, express or implied, from want of due diligence in making inquiry; *Stainer* v. *Tysen*, Id. 279; *Longworth* v. *Conwell*, 2 Blackford, 469.

Of the termination of the powers of an Agent.

HUNT *v.* ROUSMANIER'S ADMINISTRATORS.

In the Supreme Court of the United States.

FEBRUARY TERM, 1823.

[REPORTED, 8 WHEATON, 174–271.]

A letter of attorney may, in general, be revoked by the party making it, and is revoked by his death.

Where it forms a part of a contract, and is a security for the performance of any act, it is usually made irrevocable in terms, or if not so made, is deemed irrevocable in law.

But a power of attorney, though irrevocable during the life of the party, becomes (at law) extinct by his death.

But if the power be coupled with an interest, *it survives the person giving it, and may be executed after his death.*

To constitute a power coupled with an interest, *there must be an interest* in the thing itself, *and not merely in* the execution of the power.

How far a court of equity will compel the specific execution of a contract, intended to be secured by an irrevocable power of attorney, which was revoked by operation of law on the death of the party.

APPEAL from the Circuit Court of Rhode Island.(*a*)

The original bill, filed by the appellant, Hunt, stated, that Lewis Rousmanier, the intestate of the defendants, applied to the plaintiff, in January, 1820, for the loan of 1450 dollars, offering to give, in addition to his notes, a bill of sale, or a mortgage of his interest in the brig Nereus, then at sea, as collateral security for the repayment of the money. The sum requested was lent; and, on the 11th of January, the said Rousmanier executed two notes for the amount; and, on the 15th of the same month, he executed a power of attorney, authorizing the plaintiff to make and execute a bill of sale of three-fourths of the said vessel to himself, or to any other person; and, in the event of the said vessel, or her freight, being lost, to collect the money which should become due on a policy by which the vessel and freight were insured. This instrument contained, also, a proviso, reciting, that the power was given for collateral security for the payment of the notes already mentioned, and was to be void on their payment; on the failure to do which, the plaintiff was to pay the amount thereof, and all expenses, out of the proceeds of the said property, and to return the residue to the said Rousmanier.

The bill farther stated, that on the 21st of March, 1820, the plaintiff lent to the said Rousmanier the additional sum of 700 dollars, taking his note for payment, and a similar power to dispose of his interest in the schooner Industry, then also at sea. The bill then charged, that on the 6th of May, 1820, the said Rousmanier died insolvent, having paid only 200 dollars on the said notes. The plaintiff gave notice of his claim: and, on the return of the Nereus and Industry, took possession of them, and offered the intestate's interest in them for sale. The defendants forbad the sale; and this bill was brought to compel them to join in it.

The defendants demurred generally, and the Court sustained the demurrer; but gave the plaintiff leave to amend his bill.

The amended bill stated, that it was expressly agreed between the parties, that Rousmanier was to give specific security on the Nereus and Industry; and that he offered to execute a mortgage on them. The counsel was consulted on the subject, who advised, that a power of attorney, such as was actually executed, should be taken in preference to a mortgage, because it was equally valid and effectual as a security, and would prevent the necessity of changing the papers of the vessels, or of taking possession of them on their arrival in port. The powers were, accordingly, executed, with the full belief that they would, and with the intention that they should, give the plaintiff as full and perfect

(*a*) See this case, 2 Mason, 342, and 1 Peters, 2.

security as would be given by a deed of mortgage. The bill prayed, that the defendants might be decreed to join in a sale of the interest of their intestate in the Nereus and Industry, or to sell the same themselves, and pay out of the proceeds the debt due to the plaintiff. To this amended bill, also, the defendants demurred, and on argument the demurrer was sustained, and the bill dismissed. From this decree, the plaintiff appealed to this Court.(*a*)

Mr. Chief Justice MARSHALL delivered the opinion of the Court. The counsel for the appellant objects to the decree of the Circuit Court on two grounds. He contends,

1. That this power of attorney does, by its own operation, entitle the plaintiff, for the satisfaction of his debt, to the interest of Rousmanier in the Nereus and the Industry.

2. Or, if this be not so, that a Court of Chancery will, the conveyance being defective, lend its aid to carry the contract into execution, according to the intention of the parties.

We will consider 1. The effect of the power of attorney.

This instrument contains no words of conveyance or of assignment, but is a simple power to sell and convey. As the power of one man to act for another depends on the will and license of that other, the power ceases when the will, or this permission, is withdrawn. The general rule, therefore, is, that a letter of attorney may, at any time, be revoked by the party who makes it; and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or if not so, is deemed irrevocable in law. (2 Esp. N. P. Rep. 565.) Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will, yet, if he binds himself for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousmanier, therefore, could not, during his life, by any act of his own, have revoked this letter of attorney. But does it retain its efficacy after his death? We think it does not. We think it well settled, that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death.

This principle is asserted in Littleton (sec. 66), by Lord Coke in his commentary on that section (52 b.), and in Willes's Reports (105, note, and 565). The legal reason of the rule is a plain one. It seems

(*a*) The arguments of the counsel have been omitted.

founded on the presumption, that the substitute acts by virtue of the authority of his principal existing at the time the act is performed; and on the manner in which he must execute his authority, as stated in Coombe's case (9 Co. 766). In that case it was resolved, that "when any has authority as attorney to do any act, he ought to do it in his name who gave the authority." The reason of this resolution is obvious. The title can, regularly, pass out of the person in whom it is vested, only by a conveyance in his own name: and this cannot be executed by another for him, when it could not, in law, be executed by himself. A conveyance in the name of a person who was dead at the time, would be a manifest absurdity.

This general doctrine, that a power must be executed in the name of a person who gives it, a doctrine founded on the nature of the transaction, is most usually engrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do *in the name of his principal.* He is put in the place and stead of his principal, and is to act in his name. This accustomed form is observed in the instrument under consideration. Hunt is constituted the attorney, and is authorized to make and execute a regular bill of sale in the name of Rousmanier. Now, as an authority must be pursued, in order to make the act of the substitute the act of the principal, it is necessary that this bill of sale should be in the name of Rousmanier; and it would be a gross absurdity, that a deed should purport to be executed by him, even by attorney, after his death; for the attorney is in the place of the principal, capable of doing that alone which the principal might do.

This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an "interest," it survives the person giving it, and may be executed after his death.

As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression, "a power coupled with an interest?" Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing.

The words themselves would seem to import this meaning. "A power coupled with an interest," is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word "interest" an interest in that which is to be produced by the exercise of the power,

then they are never united. The power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate law language, be said to be "coupled" with it.

But the substantial basis of the opinion of the Court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest, or estate, passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected without violating any legal principle.

This idea may be in some degree illustrated by examples of cases in which the law is clear, and which are incompatible with any other exposition of the term "power coupled with an interest." If the word "interest" thus used, indicated a title to the proceeds of the sale, and not a title to the thing to be sold, then a power to A. to sell for his own benefit, would be a power coupled with an interest; but a power to A. to sell for the benefit of B., would be a naked power, which could be executed only in the life of the person who gave it. Yet, for this distinction, no legal reason can be assigned. Nor is there any reason for it in justice; for, a power to A., to sell for the benefit of B., may be as much a part of the contract on which B. advances his money, as if the power had been made to himself. If this were the true exposition of the term, then a power to A. to sell for the use of B., inserted in a conveyance to A., of the thing to be sold, would not be a power coupled with an interest, and, consequently, could not be exercised after the death of the person making it; while a power to A. to sell and pay a debt to himself, though not accompanied with any conveyance which might vest the title in him, would enable him to make the conveyance, and to pass a title not in him, even after the vivifying principles of the power had become extinct. But every day's experience teaches us,

that the law is not as the first case put would suppose. We know, that a power to A. to sell for the benefit of B., engrafted on an estate conveyed to A., may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given has no interest in its exercise. His power is coupled with an interest in the thing which enables him to execute it in his own name, and is, therefore, not dependent on the life of the person who created it.

The general rule, that a power of attorney, though irrevocable by the party during his life, is extinguished by his death, is not affected by the circumstance, that testamentary powers are executed after the death of the testator. The law, in allowing a testamentary disposition of property, not only permits a will to be considered as a conveyance, but gives it an operation which is not allowed to deeds which have their effect during the life of the person who executes them. An estate given by will may take effect at a future time or on a future contingency, and, in the mean time, descends to the heir. The power is, necessarily, to be executed after the death of the person who makes it, and cannot exist during his life. It is the intention, that it shall be executed after his death. The conveyance made by the person to whom it is given, takes effect by virtue of the will, and the purchaser holds his title under it. Every case of a power given in a will, is considered in a Court of Chancery as a trust for the benefit of the person for whose use the power is made, and as a devise or bequest to that person.

It is, then, deemed perfectly clear, that the power given in this case, is a naked power, not coupled with an interest, which, though irrevocable by Rousmanier himself, expired on his death.

It remains to inquire, whether the appellant is entitled to the aid of this Court, to give effect to the intention of the parties, to subject the interest of Rousmanier in the Nereus and Industry to the payment of the money advanced by the plaintiff on the credit of those vessels, the instrument taken for that purpose having totally failed to effect its object.

This is the point on which the plaintiff most relies, and is that on which the Court has felt most doubt. That the parties intended, the one to give, and the other to receive, an effective security on the two vessels mentioned in the bill, is admitted; and the question is, whether the law of this Court will enable it to carry this intent into execution when the instrument relied on by both parties has failed to accomplish its object.

The respondents insist, that there is no defect in the instrument itself; that it contains precisely what it was intended to contain, and is

the instrument which was chosen by the parties deliberately, on the advice of counsel, and intended to be the consummation of their agreement. That in such a case the written agreement cannot be varied by parol testimony.

The counsel for the appellant contends, with great force, that the cases in which parol testimony has been rejected, are cases in which the agreement itself has been committed to writing; and one of the parties has sought to contradict, explain, or vary it, by parol evidence. That in this case the agreement is not reduced to writing. The power of attorney does not profess to be the agreement, but is a collateral instrument to enable the party to have the benefit of it, leaving the agreement still in full force in its original form. That this parol agreement not being within the statute of frauds, would be enforced by this Court if the power of attorney had not been executed; and not being merged in the power, ought now to be executed. That the power being incompetent to its object, the Court will enforce the agreement against general creditors.

This argument is entitled to, and has received, very deliberate consideration.

The first inquiry respects the fact. Does this power of attorney purport to be the agreement? Is it an instrument collateral to the agreement? Or is it an execution of the agreement itself in the form intended by both the parties?

The bill states an offer on the part of Rousmanier to give a mortgage on the vessels, either in the usual form, or in the form of an absolute bill of sale, the vendor taking a defeasance; but does not state any agreement for that particular security. The agreement stated in the bill is generally, that the plaintiff, in addition to the notes of Rousmanier, should have specific security on the vessels; and it alleges, that the parties applied to counsel for advice respecting the most desirable mode of taking this security. On a comparison of the advantages and disadvantages of a mortgage, and an irrevocable power of attorney, counsel advised the latter instrument, and assigned reasons for his advice, the validity of which being admitted by the parties, the power of attorney was prepared and executed, and was received by the plaintiff as full security for his loans.

This is the case made by the amended bill; and it appears to the Court to be a case in which the notes and power of attorney are admitted to be a complete consummation of the agreement. The thing stipulated was a collateral security on the Nereus and Industry. On advice of counsel, this power of attorney was selected, and given as that security. We think it a complete execution of that part of the

agreement; as complete, though not as safe an execution of it, as a mortgage would have been.

It is contended, that the letter of attorney does not contain all the terms of the agreement.

Neither would a bill of sale, nor a deed of mortgage, contain them. Neither instrument constitutes the agreement itself, but is that for which the agreement stipulated. The agreement consisted of a loan of money on the part of Hunt, and of notes for its repayment, and of a collateral security on the Nereus and Industry, on the part of Rousmanier. The money was advanced, the notes were given, and this letter of attorney was, on advice of counsel, executed and received as the collateral security which Hunt required. The letter of attorney is as much an execution of that part of the agreement which stipulated a collateral security, as the notes are an execution of that part which stipulated that notes should be given.

But this power, although a complete security during the life of Rousmanier, has been rendered inoperative by his death. The legal character of the security was misunderstood by the parties. They did not suppose, that the power would, in law, expire with Rousmanier.

The question for the consideration of the Court is this: If money be advanced on a general stipulation to give security for its repayment on a specific article; and the parties deliberately, on advice of counsel, agree on a particular instrument, which is executed, but, from a legal quality inherent in its nature, that was unknown to the parties, becomes extinct by the death of one of them; can a Court of equity direct a new security of a different character to be given? or direct that to be done which the parties supposed would have been effected by the instrument agreed on between them?

This question has been very elaborately argued, and every case has been cited which could be supposed to bear upon it. No one of these cases decides the very question now before the Court. It must depend on the principles to be collected from them.

It is a general rule, that an agreement in writing, or an instrument carrying an agreement into execution, shall not be varied by parol testimony, stating conversations or circumstances anterior to the written instrument.

This rule is recognised in Courts of equity as well as in Courts of law; but Courts of equity grant relief in cases of fraud and mistake, which cannot be obtained in Courts of law. In such cases, a Court of equity may carry the intention of the parties into execution, where the written agreement fails to express that intention.

In this case, there is no ingredient of fraud. Mistake is the sole ground on which the plaintiff comes into Court; and that mistake is in

the law. The fact is, in all respects, what it was supposed to be. The instrument taken is the instrument intended to be taken. But it is, contrary to the expectation of the parties, extinguished by an event not foreseen nor adverted to, and is, therefore, incapable of effecting the object for which it was given. Does a Court of equity, in such a case, substitute a different instrument for that which has failed to effect its object?

In general, the mistakes against which a Court of equity relieves, are mistakes in fact. The decisions on this subject, though not always very distinctly stated, appear to be founded on some misconception of fact. Yet some of them bear a considerable analogy to that under consideration. Among these is that class of cases in which a joint obligation has been set up in equity against the representatives of a deceased obligor, who were discharged at law. If the principle of these decisions be, that the bond was joint from a mere mistake of the law, and that the Court will relieve against this mistake on the ground of the pre-existing equity arising from the advance of the money, it must be admitted, that they have a strong bearing on the case at bar. But the Judges in the Courts of equity seem to have placed them on mistake in fact, arising from the ignorance of the draftsman. In Simpson v. Vaughan, 2 Atk. 33, the bond was drawn by the obligor himself, and under circumstances which induced the Court to be of opinion, that it was intended to be joint and several. In Underhill v. Howard, 10 Ves. 209, 227, Lord Eldon, speaking of cases in which a joint bond has been set up against the representatives of a deceased obligor, says, "the Court has inferred, from the nature of the condition, and the transaction, that it was made joint by mistake. That is, the instrument is not what the parties intended in fact. They intended a joint and several obligation; the scrivener has, by mistake, prepared a joint obligation."

All the cases in which the Court has sustained a joint bond against the representatives of the deceased obligor, have turned upon a supposed mistake in drawing the bond. It was not until the case of Sumner v. Powell, 2 Meriv. 36, that anything was said by the Judge who determined the cause, from which it might be inferred, that relief in these cases would be afforded on any other principle than mistake in fact. In that case, the Court refused its aid, because there was no equity antecedent to the obligation. In delivering his judgment, the Master of the Rolls (Sir W. Grant) indicated very clearly an opinion, that a prior equitable consideration, received by the deceased, was indispensable to the setting up of a joint obligation against his representatives; and added, "so, where a joint bond has, in equity, been considered as several, there has been a credit previously given to the different persons who have entered into the obligation."

Had this case gone so far as to decide, that "the credit previously given" was the sole ground on which a Court of equity would consider a joint bond as several, it would have gone far to show, that the equitable obligation remained, and might be enforced, after the legal obligation of the instrument had expired. But the case does not go so far. It does not change the principle on which the Court had uniformly proceeded, nor discard the idea, that relief is to be granted because the obligation was made joint by a mistake in point of fact. The case only decides, that this mistake, in point of fact, will nót be presumed by the Court in a case where no equity existed antecedent to the obligation, where no advantage was received by, and no credit given to, the person against whose estate the instrument is to be set up.

Yet, the course of the Court seems to be uniform, to presume a mistake in point of fact in every case where a joint obligation has been given, and a benefit has been received by the deceased obligor. No proof of actual mistake is required. The existence of an antecedent equity is sufficient. In cases attended by precisely the same circumstances, so far as respects mistake, relief will be given against the representatives of a deceased obligor, who had received the benefit of the obligation, and refused against the representatives of him who had not received it. Yet the legal obligation is as completely extinguished in the one case as in the other; and the facts stated, in some of the cases in which these decisions have been made, would rather conduce to the opinion, that the bond was made joint from ignorance of the legal consequences of a joint obligation, than from any mistake in fact.

The case of Landsdowne v. Landsdowne, (reported in Moseley,) if it be law, has no inconsiderable bearing on this cause. The right of the heir at law was contested by a younger member of the family, and the arbitrator to whom the subject was referred decided against him. He executed a deed in compliance with this award, and was afterwards relieved against it, on the principle that he was ignorant of his title.

The case does not suppose this fact, that he was the eldest son, to have been unknown to him; and if he was ignorant of anything, it was of the law, which gave him, as eldest son, the estate he had conveyed to a younger brother. Yet he was relieved in Chancery against this conveyance. There are certainly strong objections to this decision in other respects; but, as a case in which relief has been granted on a mistake in law, it cannot be entirely disregarded.

Although we do not find the naked principle, that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided, that a plain and acknowledged mistake in law, is beyond the reach of equity. In the case of Lord Irnham v. Child, 1 Bro. Ch. Cas. 91, application was made to the

Chancellor to establish a clause, which had been, it was said, agreed upon, but which had been considered by the parties, and excluded from the written instrument by consent. It is true, they excluded the clause, from a mistaken opinion that it would make the contract usurious, but they did not believe that the legal effect of the contract was precisely the same as if the clause had been inserted. They weighed the consequences of inserting and omitting the clause, and preferred the latter. That, too, was a case to which the statute applied. Most of the cases which have been cited were within the statute of frauds, and it is not easy to say how much has been the influence of that statute on them.

The case cited by the respondent's counsel from Precedents in Chancery is not of this description; but it does not appear from that case, that the power of attorney was intended, or believed, to be a lien.

In this case, the fact of mistake is placed beyond any controversy. It is averred in the bill, and admitted by the demurrer, that, "the powers of attorney were given by the said Rousmanier, and received by the said Hunt, under the belief that they were, and with the intention that they should create, a specific lien and security on the said vessels."

We find no case which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say, that a Court of equity is incapable of affording relief.

The decree of the Circuit Court is reversed; but as this is a case in which creditors are concerned, the Court, instead of giving a final decree on the demurrer in favour of the plaintiff, directs the cause to be remanded, that the Circuit Court may permit the defendants to withdraw their demurrer, and to answer the bill.

DECREE. This case came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Rhode Island, and was argued by counsel. On consideration whereof, this Court is of opinion, that the said Circuit Court erred in sustaining the demurrer of the defendants, and dismissing the bill of the complainant. It is, therefore, DECREED and ORDERED, that the decree of the said Circuit Court in this case, be, and the same is hereby reversed and annulled. And it is further ordered, that the said cause be remanded to the said Circuit Court, with directions to permit the defendants to withdraw their demurrer, and to answer the bill of the complainants.

An agency may be determined by the full execution of the purpose for which it was appointed; thus, an agency to sell a particular article, is terminated by the delivery of it to the purchaser, and of the proceeds to the principal; and after that, the agent cannot rescind the contract; *Smith* v. *Rice*, 1 Bailey, 648; *Bradford* v. *Bush*, 10 Alabama, 386, 389. Or, it may be expressly revoked; but a revocation by the act of the principal, does not take effect till notice is given to the agent; nor, as against purchasers for a valuable consideration on the faith of a written authority left in the agent's hands, or of a known agency previously existing, till notice to them; *Morgan* v. *Stell*, 5 Binney, 305; *Hancock* v. *Byrne*, 5 Dana, 513, 515; *Beard* v. *Kirk*, 11 New Hampshire, 398, 403; *Bowerbank* v. *Morris*, Wallace's C. C. 119. An agency, created by instrument under seal, may be revoked by parol; *Brookshire* v. *Brookshire*, 8 Iredell, 74, 77. The death of the principal, also, though not affecting a power coupled with an interest in property on which the power is to be exercised; *Knapp* v. *Alvord*, 10 Paige, 205; is an immediate determination of an authority not coupled with an interest; and acts done by the agent after the principal's death, though in ignorance of it, and in good faith, are void; *Hunt* v. *Rousmanier; Galt and others* v. *Galloway and others*, 4 Peters, 333, 344; *Jenkins* v. *Atkins*, 1 Humphreys, 294, 299; *Rigs et als.* v. *Cage*, 2 Id. 350; *Stirnermaun* v. *Cowing*, 7 Johnson's Chancery, 275, 285; *Houghtaling* v. *Marvin*, 7 Barbour's S. Ct., 412; *Gale* v. *Tappan*, 12 New Hampshire, 146, 148; *Surviving partners of Auley M'Naughton & Co.* v. *Moore*, 1 Haywood, 189; and the death of a client is an entire revocation of the power of an attorney at law; *Palmer* v. *Reiffenstein*, 1 Manning & Granger, 94; *Clark's Ex'rs* v. *Parish's Executors*, 1 Bibb, 547; *Campbell's Repr's.* v. *Kincaid*, 3 Monroe, 68, 71; *Gleason* v. *Dodd*, *Administrator*, 4 Metcalf, 333, 341; *Huston's Adm'r* v. *Cantril et al.*, 11 Leigh, 137. The reason of the distinction is, that "in the case of a *revocation*, the power continues good *against the constituent*, till notice is given to the attorney; but the instant the constituent dies, the estate belongs to his heirs, or devisees, or creditors; and their rights cannot be devested or impaired by any act performed by the attorney after the death has happened; the attorney *then* being a stranger to them, and having no control over their property:" per Mellen, C. J., in *Harper et al.* v. *Little*, 2 Greenleaf, 14, 18. In opposition, however, to all the authorities, it was held in *Cassiday* v. *M'Kenzie*, 4 Watts & Sergeant, 282, that acts done by an agent, after his principal's death, bona fide, in ignorance of the fact, are valid and binding: see also, act of Pennsylvania of 1705, ch. 23, sec. 4, as to agencies for the sale of lands. In South Carolina, by statute, acts done by an agent after his principal's death are valid, if without knowledge in the third party, and if done within nine months of the death; st. of 1828; Stats. at large, vol. 6, p. 359. In the case of a subagent, as his power emanates from the principal, the death of the agent who appointed him, is no revocation of his powers; *Smith et al.* v. *White*, 5 Dana, 376, 383. It has been held, also, that the insanity of the principal, or his incapacity to exercise any volition upon the subject, by reason of an entire loss of mental power, operates as a revocation, or suspension for the time being, of the powers of an agent acting under a revocable power; a suspension, merely, if after recovery he does not manifest his will to terminate the agency entirely; but that such suspension or revocation would not operate to the injury of third persons, trusting to an apparent authority, in ignorance of the principal's incapacity; *Davis* v. *Lane*, 10 New Hampshire, 156, 159. As to the effect of the principal's bankruptcy, see *Ogden*, *Fer-*

guson & Co. v. *Gillingham, Mitchell & Co.*, Baldwin, 38, 46. The death of the agent, also, is an immediate termination of all powers granted to him; and his administrators have no authority whatever to act in the business of the principal; *Gage* v. *Allison & Clark*, 1 Brevard, 495; *City Council* v. *Duncan*, 3 Id. 386; *Merrick's Estate*, 8 Watts & Sergeant, 402.

It is a maxim, that delegatus non potest delegare. An agent or attorney, who has a mere authority, must execute it himself, and cannot delegate his authority to a sub-ageut, so as to authorize him to bind his principal, unless by consent of the principal, expressly given, or to be implied from usage or a known necessity; and this is especially applicable to matters requiring any degree of judgment or discretion however small; *Brewster* v. *Hobart*, 15 Pickering, 303, 307; *Entz* v. *Mills & Beach*, 1 McMullan, 453; *Cathcart et al.* v. *Keirnayhan*, 5 Strobhart, 129; *Wilson* v. *York and Maryland Line Railroad Co.*, 11 Gill & Johnson, 58, 74; *Lyon* v. *Jerome*, 26 Wendell, 485; *Shankland* v. *The Corporation of Washington*, 5 Peters, 390, 395; *Mason* v. *Wait et al.*, 4 Scammon, 127, 133; *Despatch Line, &c.* v. *Bellamy Man. Co.*, 12 New Hampshire, 206, 228; *Warner et al.* v. *Martin*, 11 Howard's S. Ct., 209, 223; *Dorchester & Milton Bank* v. *N. E. Bank*, 1 Cushing, 178. In *Ex parte Henry Winsor*, 3 Story, 411, 425, it was held, that this principle was applicable where a corporation was the agent, and that powers of a discretionary nature confided to a corporation, cannot be delegated to the directors, but ought, in the absence of all other provisions, to be solely exercised by the corporation at its legal meetings held for that purpose.

It has been held, in some cases, that the duty of a notary public, in making presentment of a foreign bill of exchange, cannot be performed by his clerk; *The Onondaga County Bank* v. *Bates*, 3 Hill's N. Y. 54; *Chenowith & Co.* v. *Chamberlin*, 6 B. Monroe, 60; *Bank of Kentucky* v. *Garcy, &c.*, Id. 626, 629.

A merely ministerial or mechanical act may, however, be done by a subdelegate; *Com. Bank of Lake Eric* v. *Norton*, 1 Hill's N. Y. 502, 505.

Of the ratification of acts done for another, without authority.

JOHN CULVER *v.* THOMAS ASHLEY.

In the Supreme Judicial Court of Massachusetts.

SEPTEMBER TERM, 1837.

[REPORTED, 19 PICKERING, 300–304.]

If arbitrators exceed their authority in making an award, and one of the parties performs the award and the other accepts his acts, the latter thereby ratifies the award, and is bound by it in the same manner as if he had originally authorized it.

MORTON, J.(*a*) When this case was before the Court at a former term, the award was determined to be invalid, because the arbitrators had exceeded their authority. 17 Pick. 98. That was the only question then submitted to our decision. But the case has again been tried, and the plaintiff's claim placed on different grounds. It is now contended, that although the arbitrators exceeded their authority and the award in itself had no binding force, yet that the parties, by their subsequent conduct adopted and ratified it.

There can be no doubt that arbitrators mutually agreed upon are so far the agents of the parties, that their acts are the proper subjects of ratification. Perkins v. Wing, 10 Johns. R. 143. Indeed no such relation is necessary. If a perfect stranger assumes to act for a party, the latter may adopt his agency, and has an election either to ratify or to reject the acts thus done by him. A subsequent ratification is equivalent to a previous authority. Paley on Agency, 143; Ward v. Evans, 6 Mod. 37; S. C., 2 Ld. Raym. 930; Thorold v. Smith, 11 Mod. 88; Wilson v. Poulter, 2 Str. 859; Clarke v. Ryall, 1 W. Bl. 642; Herring v. Polley, 8 Mass. R. 120; Lent v. Padelford, 10 Mass. R. 236; Clement v. Jones, 12 Mass. R. 60; Erick v. Johnson, 6 Mass. R. 193; Barnaby v. Barnaby, 1 Pick. 221; Copeland v. Mercantile Ins. Co., 6 Pick. 198. Has the defendant adopted and ratified the unauthorized

(*a*) This was an action of debt on an award. The Reporter's statement has been omitted.

acts of the arbitrators? They awarded several things to be done by each of the parties.

The plaintiff, whose lease of the firm had not expired, was required to leave it, in the condition prescribed, within one week, and to transfer to the defendant the personal property on the farm. All this was punctually and faithfully performed by the plaintiff.

The defendant, on his part, in consideration of these things to be done by the plaintiff, was to pay him $34.72 and the expense of the reference, taxed at $19.57; in the whole, $54.29. He accepted the personal property awarded to him, received possession of the real estate, and paid a part of the sum awarded to the plaintiff. We can entertain no doubt that the person who took charge of the property on the farm was the defendant's agent, and that the note which he gave was intended to be in part satisfaction of the award.

Now the defendant, having received all the benefits of the award, cannot avoid the charges and duties imposed upon him by it. Indeed it cannot for a moment be doubted, that these acts are amply sufficient to show a ratification.

But it is contended that these acts were done by the defendant in ignorance or misapprehension of his rights. It is undoubtedly true, that a ratification to be valid, must be made understandingly. Acts done in pursuance of the decision of the arbitrators, and in a belief of its validity, are evidence of submission to a binding judgment, rather than of the adoption of an unauthorized award. If the defendant assented to the award and recognised its validity, in ignorance of the circumstances, he was bound, as soon as he discovered the facts, to notify the other party of his determination to rescind his ratification. And the omission to give notice of rejection has been deemed sufficient evidence of ratification. Frothingham v. Haley, 3 Mass. R. 70; Cairnes v. Bleeker, 12 Johns. R. 300. But the defendant could not repudiate his ratification without restoring the plaintiff to as good a situation as he was in when the award was made. It would be most unjust for him to refuse to perform his part of the award, while he retains the fruits of it. And if the plaintiff cannot be placed *in statu quo*, it would be more reasonable and equitable to hold the defendant to an agreement which he may have incautiously or ignorantly made, than that the plaintiff, who has been guilty of no negligence or mistake, should he subjected to loss or injury. Let him who has committed the error bear the consequence of his own rashness or ignorance. But we have no need to rely on this reasoning, for we are well satisfied that the defendant acted under a full knowledge of all the circumstances. He knew the terms of the arbitration agreement which he had executed; he was conusant of all the proceedings of the arbitrators; he knew that

in exceeding their authority they acted by the request of both parties; he knew the terms of the award, that they required a transfer to him of more property than was needed to pay the balance due to him, and that he was required to pay for the excess and to pay the cost of the arbitration. With this knowledge, he accepted from the plaintiff, possession of the farm, all the personal property, and whatever else he was required to do, and on his own part paid a part of the debt and a part of the cost awarded against him. A stronger case of a free, full and understanding ratification, cannot well be imagined.

If the defendant acted under any mistake of his legal rights, it must have arisen from his own misapprehension of the law. If he supposed that the award was obligatory upon him, he mistook his legal duties and liabilities. Every one is presumed to know the law. And whether this presumption be well founded or not, it is the only one upon which legal justice can be administered. All the facts now known to us, were then known to him; and if he drew illegal inferences from them, the injury, if any has been sustained, should rest upon him and not on a party who has made no mistake and been guilty of no neglect.

The award, having no validity in itself, derives all its force from the acceptance of the parties. It presented to them proposals for their adoption or rejection. It proposed to one party, to transfer certain property, and perform certain other things; and to the other party, to pay certain sums of money and do certain other things. These terms were mutual and dependent, each forming the consideration of the other. The parties manifested their acceptance of the proposals by the part performance of them. The award thus adopted possesses all the ingredients of a contract. It was fairly made, under circumstances which preclude a rescission of it by either party without the consent of the other. It must be enforced.

The view which we have taken supersedes the necessity of examining the other questions which were discussed. The award was clearly unauthorized, without referring to the vexed question of awarding costs. The evidence of the mistake of the arbitrators, which doubtless should be excluded (Perkins v. Wing, 10 Johns. R. 143), could not, if received, impair an award which before had no validity. The parol evidence of the extension of the power of the arbitrators is immaterial because the award is expressly and wholly founded upon the written agreement. And the compatibility of the different counts, and the right to recover upon the latter ones, are rendered mere moot subjects; inasmuch as we have founded our judgment on the count upon the award.

Defendant defaulted, and judgment according to the auditor's report.

It is a general maxim that a subsequent assent to an assumed agency is equivalent to a previous authority: the rule being, *omnis ratihabitio retrotrahitur, et mandato equiparatur.* See *Clark's Ex'rs* v. *Van Riemsdyk*, 9 Cranch, 153, 161; *Delafield* v. *The State of Illinois*, 26 Wendell, 193, 226, &c.; *Reynolds* v. *Dothard et al.*, 11 Alabama, 531, 534; *Dearing* v. *Lightfoot*, 16 Id. 28, 33. There are some acts, indeed, which to be validly done at all, must be done by one having a legal and absolute authority at the time: as, generally, in the case of official acts; *Skinner* v. *White*, 9 New Hampshire, 205, 214; *Clark* v. *Peabody*, 22 Maine, 500; see also *Grove* v. *Harvey & another*, 12 Robinson's Louisiana, 221; *Smith* v. *McMickin*, Id. 654, 659; *Kellogg & Kenneth* v. *Miller and Rogers*, 1 English, 469, 473; or of acts to whose efficacy it is essential that they should be certain and irrevocable, and where the quality of being affirmable or voidable is repugnant to their legal nature. In a late case in the Exchequer, Parke, B., said, "A well-known maxim of the law between private individuals is, '*omnis ratihabitio retrotrahitur et mandato equiparatur.*' If, for instance, a bailiff distrains goods, he may justify the act either by a previous or subsequent authority from the landlord; for, if an act be done by a person *as agent*, it is, in general, immaterial whether the authority be given prior or subsequent to the act. If the bailiff so authorized be a trespasser, the person whose goods are seized, has his remedy against the principal. Therefore, generally speaking, between subject and subject, a subsequent ratification of an act done *as agent*, is equal to a prior authority. That, however, is *not* universally true. In the case of a tenant from year to year, who has, by law, a right to a half-year's notice to quit, if such notice be given by an agent without the authority of the landlord, the tenant is not bound by it." *Buron* v. *Denman*, 2 Exchequer, 167, 188. But with few exceptions, the rule laid down by Tindal, C. J., in *Wilson* v. *Tumman*, 6 Manning & Granger, 236, 242, is of general application, that "An act done, *for another*, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the prineipal, if subsequently ratified by him. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his *previous* authority." See *Clealand* v. *Walker*, 11 Alabama, 1059, 1063. Even a forged note may be ratified by the acts of the party whose name has been signed; *Fitzpatrick* v. *School Commissioners*, 7 Humphreys, 224, 228. An authority conferred by law may be adopted by the person for whose benefit it was done; and if an officer executes process in favour of a creditor, his authority is conferred by law, but he acts for account of the creditor, so far that his act, though done without direction, is capable of ratification; *The Farmers' Loan & Trust Co.* v. *Walworth*, 1 Comstock, 434, 444. A ratification, however, cannot operate retrospectively to overreach and defeat rights acquired *bonâ fide* by third persons, after the act is done and before it has been ratified; *Wood* v. *McCain*, 7 Alabama, 801, 806; *Bayley* v. *Bryant*, 24 Pickering, 198, 202. And though to be capable of ratification, an act must have been done for, or on behalf of, the principal, yet it is not necessary that any relation of agency should previously have existed; for if a perfect stranger assumes to act for a party, the latter may adopt his agency with an effect equivalent to a previous authority; *Culver* v. *Ashley; Finney and others* v. *Fairhaven Insurance Company*, 5 Metcalf, 192. A ratification of an assumed agency may be express; *Booker et al.* v. *Tally*, 2

Humphreys, 308; or inferred from the acts of the person to be affected; *Lawrence* v. *Taylor*, 5 Hill, 108, 113; *Hatch* v. *Taylor*, 10 New Hampshire, 538, 553; see *Delafield* v. *The State of Illinois*, 26 Wendell, 193, 226; and these in some cases operate as an estoppel against denying the agency, and in other cases as evidence of an assent to it. If a contract be made, or an act done, for one, without authority, and the consideration of the contract or act, or a benefit under it, be accepted and retained, or legally demanded, as by bringing suit, by the principal, with full knowledge, it is a confirmation of the contract or act; *Despatch Line of Packets* v. *Bellamy Manufacturing Co.*, 12 New Hampshire, 206, 237; *Payne* v. *Smith*, Id. 34, 39; *Campbell* v. *Wallace*, Id. 362, 367; *Moss* v. *The Rossie Lead Mining Company*, 5 Hill, 137; *Johnson* v. *Jones*, 4 Barbour's Supreme Court, 369, 374; *Finney and others* v. *Fairhaven Insurance Company*, 5 Metcalf, 192; *Richards et ux.* v. *Folsom*, 2 Fairfield, 70; *Bryant* v. *Sheely*, 5 Dana, 530, 532; *Patton* v. *Brittain*, 10 Iredell, 8; and in general the ratification of a part of a transaction, by claiming a benefit under it, is a ratification of the whole, because it affirms the agency; *Moss* v. *The Rossie Lead Mining Company; The Farmers' Loan & Trust Co.* v. *Walworth*, 1 Comstock, 434, 445; *Beckwith et a.* v. *Baxter et a.*, 3 New Hampshire, 67, 68; *Newell* v. *Hurlburt et al.*, 2 Vermont, 351; and these principles of ratification by acts, are as applicable to corporations, as to private persons; *Church* v. *Sterling*, 16 Connecticut, 389, 399; *The Planters' Bank* v. *Sharp et al.*, 4 Smedes & Marshall, 75, 83; *Montgomery R. R. Co., use &c.*, v. *Hurst*, 9 Alabama, 513, 516; *Blair and Johnson* v. *The Pathkiller*, 2 Yerger, 407; and see *Whitwell et al.* v. *Warner et al.*, 20 Vermont, 426. If one assuming to act as the agent of a corporation, though without authority, make a contract, and the corporation receive the benefit of it and retain the property acquired by it, the corporation will be held to have ratified the contract, and will be liable upon it; *The Merchants' Bank of Macon* v. *The Central Bank of Georgia*, 1 Kelly, 418, 428. Assent may also be presumed from acquiescence after notice; See *Delafield* v. *The State of Illinois*, 26 Wendell, 227: and it is frequently said that the principal must disavow the act of an authorized agent beyond his authority, promptly after notice, or he will be bound by it; see *Bredin* v. *Dubarry*, 14 Sergeant & Rawle, 27, 30; and *Lee's Administrators* v. *Fontaine & Freeman, &c.*, 10 Alabama, 756, 771; and this is probably so, wherever a loss may accrue from a delay on the part of the principal to disavow the agency, or where the transaction may turn out a profit or loss, according to circumstances: but if the act attempted to be done is merely the imposition of a liability on the principal, and can prove only injurious to him, and the delay can do no injury to the other parties concerned, a neglect to communicate his dissent will not necessarily render the principal liable, and at most is only evidence to the jury of acquiescence which they are not obliged to yield to: see per Tucker, P., in *Hortons and Hutton* v. *Townes*, 6 Leigh, 47, 60, 61: and in the case of a mere stranger assuming to act for another, there are certainly many instances in which the silence of the party to be affected, after notice, ought to be construed as a non-acceptance of the proffered act, or contract, and not as an acceptance of it: and in all cases, probably, it is a question for the jury whether silence is a reasonable presumption of ratification; which will depend chiefly upon the question whether the other parties had reason, from the course of previous dealing, or from the circumstances of the case, to suppose that the principal party would inform them, if he intended not to ratify the act, and whether his delay and silence are, or are not, a fraud

upon the other parties. In the recent case of *Bryant* v. *Moore*, 26 Maine, 84, 87, it was said, "that if one person knows that another has acted as his agent without authority, or has exceeded his authority as agent, and with such knowledge accepts money, property, or security, or avails himself of advantages, derived from the act, he will be regarded as having ratified it: but that this will not be the case, when the knowledge that the person has exceeded his authority is not received by the employer so early as to enable him, before a material change of circumstances, to repudiate the whole transaction without essential injury. If, for instance, a merchant should authorize a broker by a written memorandum to purchase certain goods at a price named, and the broker should exhibit it to the seller, and yet should exceed the price, and this should be made known to the merchant, when he received the goods; if he should retain or sell them, he would ratify the bargain made by the broker, and be obliged to pay the agreed price. But if he had received the goods without knowledge, that they had been purchased at an advanced price, he would not be obliged to restore them or pay such advauced price, if he could not, when informed of it, repudiate the bargain without suffering loss. In such case he would not be in fault. The seller would be, aud he should bear the loss." It is a prineiple quite universal, that there can be no binding ratification, without full knowledge; *Owings* v. *Hull*, 9 Peters, 609, 629; *Modisett* v. *Lindley*, 2 Blackford, 119; *Baker and Vardeman* v. *Byrne, Herman & Co.*, 2 Smedes & Marshall, 193, 199; *Copeland* v. *Mercantile Ins. Co.*, 6 Pickering, 198, 293; *Thorndike* v. *Godfrey*, 3 Greenleaf, 429, 432; *Skinner* v. *Gunn*, 9 Porter, 305; *The Penn., Del. & Md. Steam Navigation Co.* v. *Dandridge*, 8 Gill & Johnson, 250, 323; *Pourie and Dawson* v. *Fraser*, 2 Bay, 269.

It has been said to be a rule, on the ground that a ratification operates as equivalent to a previous authority, that where the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification except in the same manner; and thus, as an authority to execute deeds must be under seal, there cannot be a parol ratification of a deed, executed without authority under seal; and where the vote of a corporation is necessary to authorize an agent to convey by deed, a ratification of such a conveyance must be by vote; *Despatch Line of Packets* v. *Bellamy Man. Co.*, 12 New Hampshire, 206, 232; see *Parks* v. *S. & L. Turnpike Company*, 4 J. J. Marshall, 546; and see the case of deeds, *infra*. This is certainly applicable to express ratifications, and no doubt also to ratification by such acts of recoguition and acquiescence as operate merely as evidences of assent; but it ean hardly be questionable that an act which operates as an estoppel in pais, such as the receiving and retaining the benefit of a contract under seal, would confirm a contract under seal made by an agent without legal authority. If an agent, not authorized under seal, or by a corporate vote, in a case where such authority is legally requisite, entered into covenants under seal for the principal, and the principal, with full knowledge, received or exercised a benefit under the contract, he would surely be estopped to deny his liability upon the covenants.

An authority by adopting a transaction may as well be conferred when the question of agency arises under the Statute of Frauds, as at common law; *Davis* v. *Shields*, 24 Wendell, 322, 325; *Lawrence* v. *Taylor*, 5 Hill's N. Y. 108, 113.

Of the execution, by an agent or attorney, for a principal, of instruments under seal, and of instruments or written contracts not under seal.

JONATHAN ELWELL VERSUS JONES SHAW.

Supreme Judicial Court of Massachusetts.

1819.

[REPORTED, 16 MASSACHUSETTS, 42–47.]

A deed executed by an attorney, in order to transfer the interest of the principal, must be made in the principal's name, and must be executed as his deed.

[THIS case turned upon the validity of a conveyance of the land of one Jonathan Elwell by a deed executed by Joshua Elwell, an attorney duly appointed by deed. The attorney, in his deed of conveyance, after reciting the power, proceeded thus: "Now know ye that I, the said Joshua, by virtue of the power aforesaid, &c., do hereby bargain, grant, sell, and convey," &c.; and concluded, "In testimony whereof, I have hereunto set the name and seal of the said Jonathan, this," &c., signed *Joshua Elwell*, and a seal. The reporter's statement has been omitted.]

WILDE, J. We have examined the cases cited in the argument of this cause, with a strong wish to discover some ground, which would authorize a decision according to the apparent equity of the case. The objection made to the grant to the tenant is merely technical; and it is impossible that any one should doubt as to the intention of the parties. Nevertheless the objection is supported by all the adjudged cases relating to the point.

It does not appear that the authority of Coombe's case is at all shaken by more modern decisions. All concur in laying it down as an indispensable requisite, to give validity to a deed executed by an attorney, that it should be made in the name of the principal. This was admitted by all the court, in the case of Wilks & al. vs. Back, cited by

the counsel for the tenant. It is true there is a *dictum* of Lord Holt's in the case of Parker vs. Kett (1 Ld. Raym. 658. 12 Mod. 466, S. C. Salk. 95, S. C.), which seems to countenance a different doctrine. But his remark, although general, must be qualified by reference to the case then under discussion; which brought in question the validity of the appointment and acts of a sub-deputy or attorney, made by the deputy of the steward of a manor, for the purpose of taking the surrender of a copyhold estate. Such an attorney, says his lordship, may act in his own name, and without reciting his power, and the taking of the surrender will be good: and that which follows has reference to such a case, or to acts of attorneys in pais, and not, as I take it, to the execution of deeds.

The current of authorities being thus strong, we must remember that *stare decisis* is a rule of no inconsiderable importance, if we wish to preserve the stability of judicial decisions; and to relieve the law, as much as possible, from the reproach of uncertainty, which has so often been urged against it.

It is important that the forms, respecting the transfer of real estate, should be strictly observed: otherwise great looseness may be introduced, and titles may thus become involved in great uncertainty. A seal, although it may seem an unmeaning ceremony, and not at all necessary to explain the intention of the contracting parties, is nevertheless an essential part of a deed. The difficulty in the case at bar has arisen from employing as a scrivener to write the deed, one who was unacquainted with the forms of conveyancing. This difficulty frequently occurs, and is a great evil. It is only to be prevented by a steady adherence, on the part of courts, to the rules of law, whenever a question arises upon the operation of a deed, defective in any of the essential forms. These forms, in this country, are exceedingly simple: simple however as they are, it requires some knowledge of legal principles, to enable any one to apply them correctly.

New trial granted.(*a*)

(*a*) This case afterwards came before the Supreme Court of Maine, and the present decision was sustained: 1 Greenleaf, 339.

THE NEW ENGLAND MARINE INSURANCE COMPANY versus JAMES DE WOLF, Junior.

In the Supreme Judicial Court of Massachusetts.

MARCH TERM, 1829.

[REPORTED, 8 PICKERING, 56–63.]

The rule that an attorney or agent, in executing an instrument or written agreement for his principal, must sign his name, does not apply to instruments or agreements not under seal.

[This was an action of assumpsit against James De Wolf, Junior, as guarantor of two promissory notes, made by George De Wolf, and payable to the plaintiff, and given for the premium of insurances. The guaranty on the back of one note was as follows: "Boston, April 27, 1825. By authority from J. De Wolf, Junior, I hereby guaranty the payment of this note. Isaac Clap;" and on the other, "By authority from J. De Wolf, Junior, in a letter dated Sept. 24, 1824, I hereby guaranty his payment of the premium or policy No. 10079. Isaac Clap." The reporter's statement has been omitted.]

Parker, C. J., delivered the opinion of the Court.

With respect to the form of the guarantee, we are of opinion that the effect of it must be determined by the intention with which it was made. If Clap had authority to make the guarantee for the defendant, and the words are such as not clearly to bind himself alone, and it can be ascertained that he intended to act for De Wolf, the latter will be bound. The authorities cited to maintain the position, that the name of the principal must be signed by the agent, are of deeds only; instruments under seal; and it is not desirable that the rigid doctrine of the common law should be extended to mercantile transactions of this nature, which are usually managed with more attention to the substance than to the form of contracts.

Clap, in his guarantee, declares that he acts by authority of De Wolf, and it is evident, from all the circumstances of the case, that he professed to act only as his agent. The only question ought to be, therefore, whether he had such authority. Now it is perfectly clear from

the letters of the defendant to Clap and to George De Wolf, that he intended to guaranty the premium upon the policies which were assigned to him. He was informed distinctly that he could no otherwise obtain the consent of the underwriters to the assignment, and their promise to pay any loss to him. His repeated calls for all the policies, his express direction with respect to all but one, his frequent and pressing calls for that which was omitted from the list transmitted by Clap, knowing the only terms upon which he could obtain the policies in question with the promise of the office upon them, are clear and decisive evidence of an authority to Clap, and if that were doubtful, of a ratification with a full knowledge of the means by which they had been obtained.

In regard to the admissibility of the letters of Clap and George De Wolf, we think there is no question. The whole correspondence relates to a mercantile contract between the defendant and his agents touching the very subject in controversy, the guaranty of premium notes. It is the transaction itself, the *res gestæ*. It is admitted that the letters of the defendant are good evidence; then certainly those to which his are answers should have been received. Indeed the only use of the letters was to prove that the defendant knew the conditions on which alone the office would substitute him on the policies. There is no declaration of the agents to bind the principal, but the communication of facts which coming to his knowledge are to be used in construction of his subsequent acts.

In regard to the form in which the substitution was made on the policies, being by the secretary only, we think it clear that this was *prima facie* evidence of an obligation on the company. It is to be presumed that the secretary acted under the instructions of the president and directors, and the charter does not require the signature of the president to any instrument but the policy. If an action had been brought on this promise by the defendant, to recover a loss, the company could not have resisted payment, unless they could show an express prohibition upon the secretary to bind them in this way. Indeed, having received a consideration in the guarantee of the defendants, they have accepted the act of the secretary, and are bound by it.

We think, also, that the promise of the office to pay, in case of loss, to the defendant, is a sufficient consideration for the guarantee, notwithstanding in one of the policies they originally agreed to pay to the assured or their assigns; for the promise directed to him, on which an action could be maintained, is of itself a sufficient consideration.

Judgment according to verdict.

The foregoing cases illustrate the distinction as to the form of execution, between instruments under seal, and instruments not under seal, made by an agent on behalf of his principal.

1. As to *Deeds.*

The second resolution in *Combe's Case*, 9 Coke, 76 b, is in these words: "It was resolved, that when any has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name, and as the act of him who gives the authority." This rule relates to *acts done*, and as the execution of a deed is an act, it is an established principle, that a deed executed by an attorney for a principal, must be made and executed in the name of the principal, in order to operate as his deed. In the late case of *Evans* v. *Wells*, 22 Wendell, 325, 337, 340, it was declared in the Court of Errors, that there is no rule in the law better settled than this, and none that has so uniformly received the sanction and approbation of the various judicial tribunals of this country, and that this strictness as to the execution of deeds can only be relieved by legislative enactment. The *contract* or conveyance, set forth in the deed, must be made in the name of the principal, for otherwise it will not be his contract, or conveyance; but besides this, the *instrument* must be attested by his seal, or sealed and delivered in his name, because an instrument is not the deed of any man whose seal has not been affixed to it by himself or his agent.

If an attorney, though duly authorized, contract by deed in his own name only, and attest the instrument with his own hand and seal, without mentioning his principal either in the body of the deed, or in the attestation of it, the deed has no operation against the principal; and parol evidence of an intention to bind the principal is inadmissible; and a parol ratification of the attorney's deed by the principal, will not render it the deed of the principal: *Wells* v. *Evans*, 20 Wendell, 251; S. C. on error, 22 Id. 325; *Heffernan* v. *Addams*, 7 Watts, 116, 121.

In like manner, if the attorney convey or covenant in his own name as attorney or agent of the principal, and attests the deed either in his own name, or in his own name as agent or attorney, the instrument has no operation as the deed of the principal; *Elwell* v. *Shaw*; *Tippets* v. *Walker et al.*, 4 Massachusetts, 595; *Sheldon et al.* v. *Dunlap*, 1 Harrison, 245; *Strohecker* v. *The Farmers' Bank*, 8 Watts, 188; *Spencer* v. *Field*, 10 Wendell, 87; *Lessee of Barger* v. *Miller*, 4 Washington, 280, 283; *Locke* v. *Alexander*, 1 Hawks, 412; *Banks et al.* v. *Sharp, &c.*, 6 J. J. Marshall, 180; *Lessee of Anderson* v. *Brown and others*, 9 Ohio, 151; see *Walke and others* v. *The Bank of Circleville*, 15 Id. 288. Thus, where an attorney duly authorized, executed a sealed bill of sale of a ship at sea, beginning, "I, William Usher, Jr., attorney in fact of Patrick Usher, owner of the brig Junietta, &c., grant, bargain and sell, &c.," and sealed by "Wm. Usher, Jr., attorney for Patrick Usher," it was decided that the execution of the power was invalid, and that no title or interest in the ship passed; *Welsh* v. *Parish et al.*, 1 Hill's So. Car. 155. And in another case where R. G. Harper had been duly constituted the attorney of one J. R., to convey in his name, and in a deed executed under this authority, recited his letter of attorney, &c., and then proceeded, "Now this indenture made, &c., between the said R. G. Harper, for and as attorney of the said J. R., on the one part," &c., "witnesseth, that the said R. G. Harper, for and as attorney of the said J. R., and in pursuance of the above-mentioned power of attorney, hath granted," &c.; and concluded, "In witness whereof the said parties

have hereunto set their hands and seals," &c. "R. G. Harper (seal), attorney for J. R.," it was decided in the General Court of Appeals in Maryland, that the instrument was inoperative to pass the lands, "inasmuch as the authority had not been pursued, it being the deed of the attorney, and not of the principal, not being in his name in the granting part;" *Harper* v. *Hampton*, 1 Harris & Johnson, 622, 627, 629, 709. So, where a deed, by an attorney, in the granting part of it, ran "I the said C. L. C., attorney as aforesaid," &c., "do hereby," &c., and the attesting clause, was "In witness whereof, the said C. L. C., attorney as aforesaid, has hereunto subscribed his hand and seal this," &c., "C. L. C. (L. S.)," it was held to be an invalid execution. "The act," said the Court, "does not purport to be the act of the principals, but of the attorney. It is his deed, and his seal, and not theirs. This may savour of refinement, since it is apparent that the party intended to pass the interest and title of his principals. But the law looks not to the intent alone, but to the fact whether that intent has been executed in such a manner as to possess a legal validity;" *Lessee of Clarke et al.* v. *Courtney et al.*, 5 Peters, 320, 350. So a deed "between B. B. and E. M., attorneys in fact for J. M.," of the one part, and the party of the second part, witnessed that the said "B. B. and E. M., attorneys in fact for J. M.," granted, &c.; and that "the said B. B. and E. M. *for the said J. M.*" covenanted, &c.; and concluded "In witness whereof the said B. B. and E. M. have hereunto set *their* hands and seals;" and after their names and seals, was added, "attor. in fact for J. M.;" was decided (Bibb, C. J., dissenting) to be not the deed of the principal, and not to pass his interest; *Parmers* v. *Respass*, 5 Monroe, 562, 566: see also, *Tauls* v. *Winn, &c.*, 5 J. J. Marshall, 437, 442. There is one decision in Connecticut in opposition to this settled rule of law: in that case, an agent authorized by a vote of a company to convey with warranty, executed a conveyance in this form: "I, Arthur W. Magill, agent for the M. M. Company, being empowered, by a vote of said company, in pursuance of said power, and for the consideration of 1200 dollars, received to my full satisfaction, for and in behalf of said company, &c., do give, grant," &c., "and I do hereby covenant for and in behalf of said M. M. Company," &c., "and I do also bind said M. M. Company to warrant and defend," &c., concluding, "In witness whereof, I have hereto, for and in behalf of said M. M. Company, set my hand and seal," &c. "Arthur W. Magill (L. S.), agent for the M. M. Company;" and it was held that the instrument was well executed as the conveyance and covenant of the company; *Magill* v. *Hinsdale*, 6 Connecticut, 465. But this case is declared by the Chancellor, in *Townsend* v. *Hubbard*, 4 Hill's N. Y. 359, to be in conflict with the whole current of authority both in this country and in England: and as to this point, its authority seems to be disclaimed and overruled in *Savings Bank* v. *Davis and Center*, 8 Connecticut, 192, 206. The case of *Jones's Devisees* v. *Carter*, 4 Hening & Munford, 184, is by no means an authority to the same effect: there a deed containing an agreement for a partition of the lands of Robert and Charles Carter, recited that Charles Carter, and Bushrod Washington, appointed by Robert Harper, to divide, &c., on the part of the said Robert, have agreed, &c., and was sealed by Charles Carter and "Bushrod Washington, attorney for Robert Carter:" but the question did not stand upon the mere operation of such a deed at law, in passing an interest, or binding the principal as his deed, and this was expressly stated in argument by the counsel who supported the partition; but upon the binding effect in equity of such an agreement of division, where possession had followed,

and the deed was recognised and asserted as his deed by Robert in his answer.

And even where the deed is made, in the body of it, in the name of the principal, as the party to the deed, and as the party conveying or covenanting, yet is attested by the agent with his own seal, the instrument has no operation against the principal, though the agent were fully authorized to execute the deed for him. In *Bellas* v. *Hays*, 5 Sergeant & Rawle, 427, 438, an agreement and conveyance under seal, began thus: "This agreement between J. H. by his agent H. L. C., of the one part, and H. B. of the other part, witnesses, &c.," but was signed and sealed, "H. L. C." (seal) and "H. B." (seal); and it was held to be not a good execution of the authority given to H. L. C. by J. H.; *Combe's case* being, said Gibson, J., "express, that the act must be done in the name of the principal, and sealing being an essential part of the execution of a deed, the seal of the person giving the authority must be affixed." In like manner, in *Lessee of Jerusha Hatch* v. *Barr*, 1 Hammond, 390, the President of the Miami Exporting Company, duly authorized by a resolution of the Corporation, executed a deed of conveyance in which the President and Directors of the Company, were named as grantors, but which was attested thus, "In witness whereof, I, Oliver M. Spencer, President of the said Miami Exporting Company, have hereto set my hand and seal," &c. "Oliver M. Spencer, President of the Miami Exporting Company;" it appeared, moreover, that the Company had never formally adopted any seal, and that the seal impressed on the paper had been procured by the President, and used as the seal of the institution; but it was decided that the instrument was inoperative as a conveyance of the interest of the Corporation; the Court saying, that it purported to be a conveyance from the President and Directors of the Company as grantors, but was executed by O. M. Spencer, as president, in his own name and under his own seal, as president, and the grantors named in the deed did not execute it; that the person who executed it, had no interest in the subject conveyed, and was not named as grantor in the deed, and it was therefore no conveyance. The same principle is established in the recent cases of *Townsend* v. *Corning*, 23 Wendell, 436, and *Townsend* v. *Hubbard*, 4 Hill's N. Y. 351; there, an agreement under seal, had been entered into, expressed in the beginning to be between the plaintiffs "by H. Baldwin, their attorney," and the defendants, and the covenants ran in the name of the plaintiffs, but the instrument concluded, "In witness whereof, the said H. Baldwin, as attorney of the parties of the first part, and the said parties of the second part, have hereunto set their hands and seals;" and was signed and sealed, "H. Baldwin (L. S.)," and by the parties of the second part; and it was decided by the Supreme Court and the Court of Errors, that this was not the deed of the principals, nor binding on them: and Walworth, Chancellor, said, that to bind the principal by deed, no particular form of words is necessary, provided it appears upon the face of the instrument, that it was intended to be executed as the deed of the principal, and that the seal affixed to the instrument is his seal, and not the seal of the attorney or agent merely; but that where it distinctly appears from the deed, that the seal affixed thereto is the seal of the attorney and not of the principal, the latter cannot be made liable, in an action of debt or covenant, as on a specialty, and such deed will not pass any title or interest belonging to him which by law requires an instrument under seal to transfer or discharge it; and he added, that although this rule of requiring sealed instruments when executed by an attorney, to be executed in the name of the principal, and to purport to be

sealed with his seal, instead of the seal of the attorney, may be considered as merely technical, yet that it is one upon which the titles to many estates may depend, and which has been too long established to be now altered by the Courts. See also *Stanton* v. *Camp*, 4 Barbour's Supreme Court, 275, 277. There is one decision, however, in contravention of this clear principle; that of *Montgomery* v. *Dorion*, 7 New Hampshire, 475. In that case a conveyance of land was made in the names of the principals, but was attested thus: "In testimony of the foregoing, I. Winslow, Jr., being duly constituted attorney for the purpose by all the foregoing grantors, has hereunto set his hand and seal. Isaac Winslow, Jr. (seal):" the court said, as had been decided in *Colburn* v. *Ellenwood*, 4 New Hampshire, 99, 102, that when an attorney makes a deed of land, to make it pass the estate of the principal, it must be made in the name of the principal; but that in this case the deed was in the name of the principals, so that the only objection to it was, that it was not executed so as to make it the deed of the principals; but that for that, no particular form of words was necessary, and that, in this case, in testimony that the grantors who are named as such in the deed, make the conveyance, the agent puts his hand and seal to the instrument; this, the court said, seems to be tantamount to putting his hand and seal to the deed for them, which is sufficient. But this case is clearly erroneous, upon all the authorities. See *Hale* v. *Woods*, 10 Id. 470.

The rule that the seal of the principal must be affixed, to render it his deed, applies where a corporation is the principal: an agent of a corporation, executing a deed in its name, must affix the corporate seal in order to make it the deed of the corporation; *Savings Bank* v. *Davis & Center*, 8 Connecticut, 192; see *Despatch Line of Packets* v. *Bellamy Man. Co.*, 12 New Hampshire, 206, 230. If an instrument run in the name of the corporation, and be signed by the president, and the corporate seal be affixed, it is the deed of the corporation, and does not bind the president personally; *Pitman* v. *Kintner*, 5 Blackford, 251.

It is agreed that, in executing a deed for another, no particular form of words is necessary, provided the act be done in the name of the principal. The most regular way is to say, "A. B. (the principal) by C. D. (the attorney);" but if the preceding contract or obligation be in the name of the principal, it is a valid execution if the attorney sign and seal, "C. D. for A. B.;" *Wilks & another* v. *Back*, 2 East, 142; and though it is more regular to place the seal by the name of the principal, thus, "A. B. (L. S.) by his attorney C. D.," it is equally valid if it be placed by the name of the agent, "For A. B., C. D. (L. S.);" *Wilburn* v. *Larkin*, 3 Blackford, 55. But if the instrument in the granting part of it, be in the name of the agent only, it will not become the deed of the principal by being signed and sealed "C. D., attorney to A. B.;" *Copeland* v. *Mercantile Ins. Co.*, 6 Pickering, 198, 203; and where a deed of conveyance purported to be "between A. H., attorney in fact for C. H.," and the party of the second part, and witnessed "that the said attorney in fact A. H." conveys, and concluded "In testimony whereof, the said C. H. hath set his hand and seal," and was signed "A. H." and seal; it was decided not to be the deed of the principal and to pass no interest; *Martin* v. *Flowers*, 8 Leigh, 158; and see *Elwell* v. *Shaw*. In *Martin* v. *Dortch*, 1 Stewart, 479, a sealed note, "I promise to pay," &c., "witness my hand and seal," "D. H. (seal) for J. H., T. R., J. W.," was decided to be the engagement of the principals; but in *Skinner* v. *Gunns*, 9 Porter, 305, 307, it was held that a bill of sale stating that "I, J. H.," convey, and "I warrant," &c., and signed "J. H. (seal)

attorney for L. S.," though the execution was sufficient, was not the warranty of the principal, but of the agent personally: these cases proceed apparently upon the distinction, that the "I," in the first case, might be referred to each principal, but that "I, J. H." (the agent's name) could not; see *Stringfellow & Hobson* v. *Mariott*, 1 Alabama, 573, 576. In fact, where the execution is simply "C. D. for A. B.," or "C. D., attorney or agent for A. B.," without any express statement whose seal is affixed, the operation of the instrument as the deed of the principal must depend upon who is the party in the preceding contract; and that may be sometimes a question of nicety. In *Deming* v. *Bullitt*, 1 Blackford, 241, 242, it was said, that in determining who are the parties to a deed, as in ascertaining the nature and effect of it, recourse must be had to the whole of the instrument; and that a bond which sets forth on its face, that A. B. as agent of C. D., legally authorized for the purpose, binds the said C. D. to make a title, &c., and is executed "A. B. (seal), agent for C. D.," is the deed of C. D., provided the authority of the agent be sufficient; for C. D. is here alone bound, and the bond is executed for him by his agent: in such a case, the covenants explain the nature and effect of the signature and seal, and show the intention of the parties; they show that the words, *agent, &c.*, attached to the signature are not merely descriptive, but are intended to explain that A. B.'s execution of the deed was not for himself individually, but for and in the name of him whose covenants are contained in it; but that if instead of binding C. D., A. B. had obligated himself in the body of the deed, for the performance of the contract by C. D., it would have been the deed of A. B. and not of C. D., notwithstanding the words, *agent, &c.*, attached to the signature and seal. In like manner, in *Hunter's Adm'rs* v. *Miller's Ex'rs*, 6 B. Monroe, 612, 620, an instrument was described in the caption as "Articles of agreement, &c., between F. M. of the one part, and W. S. H., agent for T. T. and M. H.," and was sealed "W. S. H. (seal), for T. T. and M. H.," but in the body of the instrument stated that the principals were to convey, &c.; and it was decided not to bind the agent; and the Court laid down the following very reasonable rule, that "if it clearly appears on the face of the instrument, who is intended to be bound, and if the mode of execution be such as that he may be bound, the necessary consequence of the universal principle applicable to contracts is, that he is bound, and that if such appears to be the intention of the parties, he alone is bound." So in *Hale* v. *Woods*, 10 New Hampshire, 470, the court said that the deed of an attorney, to be valid, must be in the name, and purport to be the act and deed, of the principal; but whether such is the purport of an instrument, must be determined from its general tenor and not from any particular clause. In that case, the terms of the conveyance were "I, Daniel King, as well for myself as attorney for Zachariah King, doth for myself and the said Zachariah, remise, release, &c., all the estate, &c., of me, the said Daniel and said Zachariah, which we now have, &c., in said premises. And we, the said Daniel and Zachariah, for ourselves, our heirs, and executors, covenant, &c.:" "In witness whereof we, the said Daniel for himself, and as attorney aforesaid, have hereunto set our hands and seals, &c.," signed 'Daniel King' and 'Daniel King, attorney for Zachariah King, being duly authorized as appears of record,' with seals affixed to each signature. But the court held that the covenants were clearly the covenants of the principal; and they thought, from the terms used, that the grant purported to be the act of the principal; the grant is for said Daniel and Zachariah of all the interest *we* now have in the premises; and that if these terms, together with the covenants, purport a

conveyance of the interest of the principal, the execution of the deed would seem to be sufficient to effect the intent of the instrument. In like manner, in *Varnum, Fuller & Co.* v. *Evans*, 2 McMullan, 409, the principle was admitted, that a deed which purports to be the act of the agent, does not bind the principal; but it was decided that where the attorney recited the power of attorney, and said, "I, the said W., attorney and agent as aforesaid, &c., by virtue of the authority vested in me as aforesaid, &c., *in the name and in behalf of the said V., F. & Co.* (and others) do hereby accept the provisions in the said assignment, &c., and do further release and discharge, &c.;" executed "J. W. (L. S.) attorney for, &c.," and "J. W. (seal) agent for, &c.;" the execution was a compliance with the rule which requires a deed executed by one as attorney to be sealed and delivered in the name of the principal, as it purported to be by the authority, and in the name, and in the behalf of the principals. See, also, *Rantin* v. *Robertson*, 2 Strobhart, 366; and see *Shanks et als.* v. *Lancaster*, 5 Grattan, 112, 118.

As to the operation as against the principal, of a deed executed by an attorney not in the principal's name; if the act be of an executed nature, as the transfer of an interest, the deed is merely inoperative and void, and if a deed was necessary to the transfer, or if the agent was only authorized to convey by deed, in his principal's name, as in the case of an attorney appointed to convey land belonging to the principal, the transaction is a nullity; *Frontin* v. *Small*, 2 Ld. Raymond, 1418; *Lessee of Jerusha Hatch* v. *Barr*, 1 Hammond, 390; *Locke* v. *Alexander*, 1 Hawks, 412; *Martin* v. *Flowers*, 8 Leigh, 158; *Elwell* v. *Shaw;* but where it is not necessary to the execution of the agency, that the transfer should be by deed in the principal's name, and the act is done in such a way as would have been valid if the authority and its execution had not been under seal, there the execution by instrument under seal in the agent's name, may take effect as a transfer not under seal, if there be a parol ratification express or implied. Where an agent appointed to sell chattels, executed a bill of sale under seal in his own name, it has been held that though, not being the deed of the principal, it did not transfer the property by its own operation, yet parol evidence might be given of the transfer, and of the receipt of the money, by the agent of the principal; *Falls and Caldwell* v. *Gaither*, 9 Porter, 606, 617: and where an agent authorized by parol to sell a slave, executed a bill of sale with a warranty of soundness, under seal, and the principal received the purchase-money, it was decided that the warranty, as matter in parol, would bind the principal; "and we entertain no doubt," said the court, "but the bill of sale might be looked to by the jury, not as the deed of the plaintiff, and therefore binding on him, but as evidence, or the admissions of the agent at the time of the sale, to ascertain the terms of the contract;" *Cocke* v. *Campbell & Smith*, 13 Alabama, 286, 289. In *Evans* v. *Wells*, 22 Wendell, 325, 340, 343, Verplank, Senator, whose opinion was sanctioned by the Court of Errors, inclined to the opinion that, generally, where the transaction does not require for its validity a sealed instrument, the informally executed deed may take effect, as a simple contract of the principal, if the intent to bind him be apparent; but see *Cummins, &c.* v. *Cassily*, 5 B. Monroe, 74, 75. But it is believed that an irregular execution under seal, can take effect as a parol transaction, only, where there is a ratification express or implied, of the act as it has been done; and that an authority to act by deed in the principal's name cannot, of itself, give validity to any execution by parol, or in the agent's name; see *Hunter* v. *Parke*, 7 Meeson and Welsby, 322,

345. In case of a contract made for a corporation, by an authorized agent, and executed under his own hand, a series of cases decide that he is not liable personally on the sealed instrument, and the corporation is liable in assumpsit, because the agent's seal is not a seal in respect to the corporation; *Randall* v. *Van Vechten*, 19 Johnson, 60; *M'Donough* v. *Templeman*, 1 Harris & Johnson, 156; *The Bank of the Metropolis* v. *Guttschlick*, 14 Peters, 20, 29; *Dubois* v. *Delaware and Hudson Canal Company*, 4 Wendell, 285, 288; *Damon* v. *Granby*, 2 Pickering, 345, 353; and see *Bank of Columbia* v. *Patterson's Adm'r*, 7 Cranch, 299, 304, and *Brockway* v. *Allen*, 17 Wendell, 40: but some doubt is thrown on this in *Hopkins* v. *Mehaffy*, 11 Sergeant & Rawle, 126.

In equity, however, on the ground of aiding a defective execution of powers, relief is given in cases where deeds are, by mistake, sealed and delivered in the name of the attorney instead of the principal. An agreement under seal by an attorney for a principal, inoperative at law for want of a formal execution, in the name of the principal, is binding in equity, if the attorney had authority; *Vanada's Heirs* v. *Hopkins's Adm'rs, &c.*, 1 J. J. Marshall, 285, 296; *Banks et al.* v. *Sharp, &c.*, 6 Id. 180, 181; *Johnson, &c.* v. *Johnson's Heirs, &c.*, 1 Dana, 364, 368; and a conveyance, which by being executed in the name of the attorney, transfers no interest at law, will be sustained in equity as an agreement; and will be good against the principal, and subsequent lien creditors; *Welsh* v. *Usher and others*, 2 Hill's Chancery, 166; and subsequent purchasers with notice: *Martin* v. *Flowers*, 8 Leigh, 158, 162.

With regard to the inoperativeness of covenants by the other party to the deed, which are in consideration of an estate intended to be conveyed, or covenants intended to be entered into, by the principal, but not effective from want of legal execution, or from a want of authority in the agent, see Moor, 70, pl. 171; *Frontin* v. *Small*, 2 Lord Raymond, 1418; *Berkeley* v. *Hardy*, 5 Barnewall & Cresswell, 355; *Fowler* v. *Shearer*, 7 Massachusetts, 14, 19; *Bellas* v. *Hays*, 5 Sergeant & Rawle, 427, 438; *Stetson* v. *Patten et al.*, 2 Greenleaf, 358; *Townsend* v. *Hubbard*, 4 Hill's N. Y. 351; *Bogart* v. *De Bussy*, 6 Johnson, 94; and the questionable distinction taken in *Spencer* v. *Field*, 10 Wendell, 87; see also *Potts* v. *Rider*, 3 Ohio, 70; *Pryor* v. *Coulter*, 1 Bailey, 517.

With regard to the personal liability of the agent; if a deed contain covenants in the name of the principal, and not the agent, or be clearly intended to bind the principal only, but is executed in the agent's name, the agent is not liable upon the deed; for a deed cannot bind a person sealing it, unless it contain words legally expressive of an intention on his part to be bound; *Hopkins* v. *Mehaffy*, 11 Sergeant & Rawle, 126; *Catlin* v. *Ware*, 9 Massachusetts, 218, 220; *Townsend* v. *Corning*, 23 Wendell, 436, 440; *Stanton* v. *Camp*, 4 Barbour's Supreme Court, 275, 277; *Grubbs* v. *Wiley*, 9 Smedes & Marshall, 29; *Underhill et al.* v. *Gibson et al.*, 2 New Hampshire, 352, 354; and, in like manner, when a deed is made and executed in the principal's name by an attorney having no authority, it is not a deed binding the attorney; *Stetson* v. *Patten et al.*, 2 Greenleaf, 358; *Harper et al.* v. *Little*, Id. 14; *Delius et al.* v. *Cawthorn*, 2 Devereux, 90.— But if one covenants in his own name, though it be expressly *in auter droit*, and in a representative capacity, as executor, guardian, trustee, committee, agent, or otherwise, he is himself personally bound; *Appleton* v. *Binks*, 5 East, 148; *Sumner, Adm'r*, v. *Williams et al.*, 8 Massachusetts, 162, 209, 212; *Donahoe* v. *Emery and another*, 9 Metcalf, 63, 66; *Duvall* v. *Craig*, 2 Wheaton, 46, 56, and note; *Jordan* v. *Trice*, 6 Yer-

ger, 479; *Sterling* v. *Peet*, 14 Connecticut, 245, 252; *M'Clure* v. *Bennett*, 1 Blackford, 189; *Deming* v. *Bullett*, Id. 241, 242; *Meyer et al.* v. *Barker*, 6 Binney, 228, 234; *Taft* v. *Brewster*, 9 Johnson, 334; *White* v. *Skinner*, 13 Id. 307; *Rathbon* v. *Budlong*, 15 Id. 1, 3; *Spencer* v. *Field*, 10 Wendell, 87; *Stone* v. *Wood*, 7 Cowen, 453; *Lutz* v. *Linthicum*, 8 Peters, 166, 177; which of course overrule *Potts* v. *Lazarus*, 2 Carolina Law Repository, 83. So persons entering into a submission by bond to arbitration, on behalf of infant heirs, are themselves personally liable for its non-performance; *Smith* v. *Van Nostrand*, 5 Hill's N. Y. 419. In *Edings* v. *Brown*, 1 Richardson, 255, covenant was brought for a breach of a covenant of warranty of soundness, contained in a bill of sale, by the terms of which "Catharine Brown per R. E. Brown, Trustee," conveyed and covenanted, &c., the bill being executed, "Catherine Brown (L. S.), Per R. E. Brown, Trustee," the woman being a feme covert, and it was held that the trustee was liable, for where an irresponsible person covenants by another, the party by whom the covenant is made is liable. In *Thayer* v. *Wendell*, 1 Gallison, 37, however, a deed purported on its face, to be made by one as executor, and the covenants were "in my capacity as aforesaid, but not otherwise, I do covenant," and it was held by Story, J., to create no personal responsibility, as the intention not to be personally bound was clear: but this seems to be a mistake; for the person certainly covenants, and his stating the capacity in which he does the act, cannot undo the act: it is admitted that if he had said merely "in my capacity as executor, I covenant," the legal operation of these words would be to bind him personally; the addition of the words "not otherwise," therefore, makes the covenant, in legal operation, "not otherwise than personally."

To the rule, that an agent, covenanting in his own name and affixing his own seal, is personally liable, the case of a public officer, acting in the course of official employment, on behalf of the government, or public, is a recognised exception. "Where a public agent," says Marshall, C. J., in *Hodgson* v. *Dexter*, 1 Cranch, 345, 363, "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 enure 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 public agent, if he should be made personally responsible for contracts on the public account." The principle is that he is not liable upon official contracts; but still the question is open whether the engagement was official or personal. A public officer or agent, contracting in his official character, is not personally liable although he covenant and seal in his own name; and wherever a contract is made by such a person, on account of the public or government, within his official duty and power, it will be presumed that it is made in official capacity, and that the engagement of the public or government only is intended to be given, unless a contrary intention be very apparent; *Unwin* v. *Wolseley*, 1 Term, 674; *Hodgson* v. *Dexter*; *Dawes* v. *Jackson*, 9 Massachusetts, 490; *dictum* in *Sumner, Adm'r*, v. *Williams et al.*, 8 Id. 162, 212; and the rule is similar as to contracts not under seal; *Macbeath* v. *Haldimand*, 1 Term, 172; *Parks* v. *Ross*, 11 Howard's S. Ct. 362, 374; *Brown* v. *Austin*, 1 Massachusetts, 208; *Walker* v. *Swartwout*, 12 Johnson, 444; *Olney* v. *Wickes*, 18 Id. 122; *Fox* v. *Drake*, 8 Cowen, 191; *Osborne* v. *Kerr*, 12 Wendell, 179; *Adams* v. *Whittlesey*, 3 Connecticut, 560; *Perry*

v. *Hide*, 10 Id. 330; *Syme* v. *Butler, Ex'r*, 1 Call, 105; *Brown* v. *Hatton*, 9 Iredell, 319; *Tutt* v. *Lewis's Ex'rs*, 3 Id. 233; *Enloe* v. *Hall*, 1 Humphreys, 303; *Ghent* v. *Adams*, 2 Kelly, 214: but if the engagement of the agent was meant to be personal, and not official, and credit was given to him individually and not to the government, he will be liable, both where the contract is under seal and where it is not under seal; and whether the engagement is personal or official must depend on the intention as inferred from the terms and circumstances of the transaction; *Powell* v. *Finch*, 5 Yerger, 446; *Sheffield* v. *Watson*, 3 Caines, 69; *Gill* v. *Brown*, 12 Johnson, 385; *Swift* v. *Hopkins*, 13 Id. 313; *King* v. *Butler*, 15 Id. 281; *Rathbon* v. *Budlong*, Id. 1, 2.

With regard to the liability of an agent, in an action on the case, when he has executed a deed without authority, it is settled that to sustain such an action, there must be fraud in the agent: if an agent discloses his authority, and the parties are misled by a common misapprehension of the law as to the extent of that agency, or act in common ignorance of some fact by which the powers of the agent have been terminated, an action on the case will not lie; *Jenkins* v. *Atkins*, 1 Humphreys, 294, 299; but if an agent corruptly represents that he has authority, knowing that he has not, he will be guilty of fraud; *Delius et al.* v. *Cawthorn*, 2 Devereux, 90; and assuming to act as agent, without having authority, is *prima facie* fraudulent, and if the plaintiff show such assumption of agency, the *onus probandi* to rebut the presumption is on the defendant; *Clark* v. *Foster*, 8 Vermont, 98; see also *Roberts* v. *Button et al.*, 14 Id. 195, 202.

To render a deed regularly executed by an agent, the deed of his principal, the authority to execute must be under seal; *Evans* v. *Wells*, 22 Wendell, 325, 334; *Delius et al.* v. *Cawthorn; Gordon* v. *Bulkeley*, 14 Sergeant & Rawle, 331; *Maus* v. *Worthing*, 3 Scammon, 26; *M'Murtry & Peebles* v. *Frank*, 4 Monroe, 39, 41; *Mitchell's & Davis's Adm'rs* v. *Sproul*, 5 J. J. Marshall, 264, 267; *Rhode* v. *Louthian*, 8 Blackford, 413; *Cocke* v. *Campbell & Smith*, 13 Alabama, 286, 288; *The Heirs of Piatt and others* v. *The Heirs of McCullough*, 1 McLean, 69, 82; unless the execution by the agent be in the presence of the principal; *Kime* v. *Brooks*, 9 Iredell, 218: however, if executed without authority, it may be ratified as the deed of the principal, by instrument under seal; *Millikin et als.* v. *Coombs et als.*, 1 Greenleaf, 343; but as a previous parol authority would be insufficient, so a subsequent ratification of the deed by parol or by acts in pais, not amounting to redelivery, will not give it validity as the deed of the principal; *Hanford* v. *McNair*, 9 Wendell, 54; *Wells* v. *Evans*, 20 Id. 251, 258; *Stetson* v. *Patton et al.*; *Boyd* v. *Dodson*, 5 Humphreys, 37; *Smith et al.* v. *Dickinson*, 6 Id. 261: but a parol acknowledgment by the principal that the agent had a legal authority to execute the deed for him, would be admissible evidence of such authority, after notice to produce the original power of attorney; *Blood* v. *Goodrich*, 9 Wendell, 68, 77; S. C. 12 Id. 525: see *Curtis* v. *Ingham*, 2 Vermont, 287, 289; *Despatch Line of Packets* v. *Bellamy Man. Co.*, 12 New Hampshire, 206, 231. But when it is said that acts in pais will not ratify a deed executed without authority, it must be understood, perhaps, of such acts as amount only to evidence of an intention to affirm, and not to such as operate by estoppel (see supra). But where the act done by the agent would be good without seal, and there is a parol authority or ratification, the act will be valid. In *Cooper* v. *Rankin*, 5 Binney, 613, where an attorney, without authority, under seal, executed a release, it was held that though the instrument could not operate as a release, yet it might as a simple contract,

if it was on sufficient consideration, and the agent had authority to make such a contract: see also *Van Ostrand* v. *Reed*, 1 Wendell, 424, 431. And, in other cases, it has been held, that where a deed is executed by an agent without authority under seal, the agreement evidenced by the deed may operate as a simple contract, if ratified in a way to give validity to a simple contract, though such ratification could not set up the deed; *Despatch Line of Packets* v. *Bellamy Man. Co.*, 12 New Hampshire, 206, 234; *Hanford* v. *McNair*, 9 Wendell, 54. In *Hunter* v. *Parker*, 7 Meeson & Welsby, 322, an auctioneer exeeuted, without authority, a deed of transfer of a ship, in his own name, under his own seal, and this was afterwards ratified by the principal by parol. A statute of 3 & 4 Wm. 4, required the transfer to be by instrument in writing, and the instrument in this case was of such a kind as would have been sufficient if it had not been under seal; and the Court of Exchequer held that it was sufficient to pass the interest. "It is the deed of the auctioneer," said Park, B., in delivering the judgment of the court, "but it also may operate, by the consent of the principal, as a written transfer from him, as it certainly would have done if there had been no seal to it; and in order to prevent the instrument from failing in its effect, and ut res magis valeat quam pereat, we do not feel ourselves precluded from holding that it operates to transfer an interest. If the authority had been by deed to convey by deed, the instrument would have been clearly inoperative for that purpose; but the authority is by parol: and must be assumed to have been to convey in the form in which it was conveyed: and this we think may be supported."

2. As to instruments not under seal.

The case of *New England Marine Ins. Co.* v. *De Wolf*, illustrates the distinction between sealed and unsealed instruments, and shows that the rule requiring the instrument to be *executed*, or signed, in the name of the principal, does not apply to instruments not under seal: and the same distinetion is expressly stated in *Andrews* v. *Estes et als.*, 2 Fairfield, 267. The eases in all the states, in regard to instruments not under seal, agree, that if the name of the principal appear in the instrument, and the intention, on the whole, be apparently to bind him, he will be the party bound, if the agent had authority, although the instrument be signed in the agent's name only. See *Farmers' & Mechanics' Bank* v. *Troy City Bank*, 1 Douglass, 458, 467. "In an agreement not under seal," said the chancellor, in the late case of *Townsend* v. *Hubbard*, 4 Hill's N. Y. 351, 357, (and see *Townsend* v. *Corning*, 23 Wendell, 436, 440,) "executed by an agent or attorney on behalf of his prineipal, and where the agent or attorney is duly authorized to make the agreement, it is sufficient, as a general rule, if it appears in any part of the instrument, that the understanding of the parties was that the principal, and not the agent or attorney, was the person to be bound for the fulfilment of the contract." See also *Evans* v. *Wells*, 22 Wendell, 325, 335, 340. In South Carolina, in some earlier cases, this was not admitted, and it had been decided, that a note in the form, "I promise, &e.," signed "J. L. R. for I. I.," bound the agent personally, and did not bind the principal; *Fash* v. *Ross*, 2 Hill's So. Car. 294; *Taylor* v. *McLean*, 1 McMullan, 352; *Moore* v. *Cooper*, 1 Spears, 87: but all these are overruled in *Robertson* v. *Pope*, 1 Richardson, 501, and the distinction recognised between deeds and parol contracts, that in the former the sealing and delivery must be in the name of the principal, but in the latter it is enough if it appear, that the contract was intended to be made for the principal. In Kentucky, also, in the earlier cases, it had been decided, that notes beginning, "I promise to pay, &c.," and signed, "For A. B., C. D."

or "C. D. for A. B.," or "C. D., agent for A.," bind the agent and not the principal; *MacBean* v. *Morrison*, 1 Marshall, 545; *Patterson, &c.* v. *Henry*, 4 J. J. Marshall, 126; *Parks* v. *S. & L. Turnpike Company*, Id. 456; but these cases have been qualified to the extent of allowing parol evidence to show that the agent intended not to bind himself personally, but to execute the instrument or contract as the act of the principal; *Owings* v. *Grubbs' Administrator*, 6 J. J. Marshall, 31; *Webb* v. *Burke*, 5 B. Monroe, 51; and are now perhaps to be regarded as quite overruled by *Hunter's Ad'rs.* v. *Miller's Ex'rs.*, 6 Id. 612, 625, and *Wright, &c.* v. *Roberts*, cited Id. 625.

It will be seen, therefore, from the foregoing note, and from the one that follows, that a distinction exists in the forms of valid contracts, by an agent for a principal, when under seal, when in writing not under seal, and when verbal. A contract under seal, by an agent for a principal, is not binding on the principal, unless it profess to bind him, and be executed in his name, and as his deed: a written contract not under seal is binding on the principal, in whatever form made or executed, if the principal's name appear in it, and the intention to bind him be apparent, but not unless his name appear in it: a verbal contract is binding on the principal, if his name is disclosed, and the person making it contract as his agent, and on his behalf.

Of the liabilities and rights of action, upon parol contracts made by an agent for a principal.

S. & J. RATHBON AGAINST BUDLONG.

In the Supreme Court of New York.

JANUARY TERM, 1818.

[REPORTED, 15 JOHNSON, 1–3.]

An agent who makes a contract on behalf of his principal, whose name he discloses at the time, to the person with whom he contracts, is not personally liable.

There is no difference, in this respect, between an agent for government and for an individual.

THIS was an action of assumpsit on a promissory note, tried before the Chief Justice, at the last Albany circuit.

The note was in the following words: "Ninety days after date, I promise to pay S. & J. L. Rathbon, or order, three hundred and two $\frac{92}{100}$ dollars, value received, for the Susquehannah Cotton and

Woollen Manufacturing Company. Albany, June 24th, 1815. Samuel Budlong, agent."

The defendant gave in evidence a bill of parcels, headed as follows: "The Susquehannah Cotton and Woollen Manufacturing Company, bought of S. & J. L. Rathbon," &c., at the bottom of which was the following receipt. "Albany, June 24th, 1815. Received payment, by a note payable in ninety days, which, when paid, will be in full of the above." It was admitted that the purchase of the goods of the plaintiff, and giving the note, were simultaneous acts. The defendant produced in evidence a power of attorney from the Susquehannah Cotton and Woollen Manufacturing Company, under their corporate seal, authorizing him to purchase and sell goods, &c., and make bargains, &c., draw bills and promissory notes, for them and in their names, and generally to manage the business of the Company, as the defendant should think fit, &c., subject to the control and direction of the trustees of the Company, &c.

A verdict was found for the plaintiffs, for 347 dollars and 7 cents, subject to the opinion of the court, on a case, as above stated.

Foot, for the plaintiffs, contended, that the defendant had made the contract *personally*, and not in the name of his principals. The note was, "I promise to pay," &c. An agent or attorney cannot draw or sign bills or notes in the name of another, without a special authority for that purpose. Here the defendant had a special power; but he did not sign the names of his principals. (9 Co. 76. 1 Str. 705. Lord Raymond, 1418. 6 Term. Rep. 176. 2 East, 142. Appleton v. Binks, 5 East, 148. Buffum v. Chadwick, 8 Mass. Rep. 103.) There is no distinction, in this respect, between contracts under seal, and contracts not under seal.

Henry, contra, was stopped by the court.

SPENCER, J., delivered the opinion of the court. It is perfectly manifest that the note, on which the suit is brought, was given by the defendant, as agent for the Susquehannah Cotton and Woollen Manufacturing Company, and that the goods for which the note was given were sold on the credit of that Company. To charge the defendant with the payment of the note, would violate every principle of justice and equity; nor is the law so unjust. The general principle is, that an agent is not liable to be sued upon contracts made by him on behalf of his principal, if the name of his principal is disclosed and made known to the person contracted with, at the time of entering into the contract. This doctrine is fully supported by the case of Owen v. Gooch. (2 Esp.

Rep. 567.) In fact, there is no difference between the agent of an individual and of the government, as to their liabilities. The question, in all cases, is, to whom was the credit given?

There are cases of covenants where persons have made themselves personally liable, because they have covenanted and bound themselves under seal, in which cases the principals were either not disclosed, or were not bound, or the agent meant to bind himself personally. In the present case, the credit was not only given to the Company, but they were bound by the note of their agent; and there is not the least pretence to hold the agent responsible.

Judgment for the defendant.

PENTZ *v.* STANTON.

In the Supreme Court of New York.

MAY, 1833.

[REPORTED, 10 WENDELL, 271–278.]

Where the agent of a manufacturing establishment bought a quantity of dye-stuffs for the use of the factory, without disclosing the name of his principal, and the bill of goods was made out, "Mr. A. B., Agent, *bought of," &c., and he drew a bill of exchange on a third person, signing it* A. B., Agent, *and the bill was subsequently protested, and an action to recover the price of the goods was brought against the principal;* it was held, *that the principal could not be charged as* drawer *of the bill by his agent,* the name of the principal not appearing on it, *but that the plaintiff was entitled to recover under* a count for goods sold, *the jury being warranted under the facts of the case in saying that the goods were not sold on the exclusive credit of the agent.*

Whether in such case the goods are sold on the credit of the agent *or on the responsibility of the* principal, *whoever he may be, is a question for the jury; but where that question was not submitted, and a verdict was found for the plaintiff, and the court were satisfied of the ultimate liability of the principal to the agent, they refused to set aside the verdict.*

A person may draw, accept or endorse a bill by his agent, *and it will be as obligatory upon him as though it was done by his own hand;*

but the agent in such case must either sign the name *of the principal to the bill, or it must appear on* the face of the bill *itself, in some way or other, that it was in fact done for him, or the principal will not be bound; the particular form of the execution is not material, if it be substantially done in the name of the principal.*

THIS was an action of assumpsit, tried at the Madison circuit in September, 1830, before the Hon. NATHAN WILLIAMS, one of the circuit judges.

The first count in the declaration was on a bill of exchange for $158.36, bearing date 25th May, 1826, charged to have been drawn by one Henry F. West, by the name and description of H. F. West, *agent*, he, the said West, then and there being the agent and servant of the defendant in that behalf, according to the custom of merchants. The bill was drawn on one James Carey, payable four months after date, was accepted by Carey, and when due was protested for non-payment, and notice of non-payment was alleged to have been given *to the defendant.* There were also the common counts for goods sold and delivered *to the defendant* and for money lent, &c. The defendant pleaded the general issue, and especially that the bill of exchange counted upon was received and accepted by the plaintiff in satisfaction of the goods sold; as to which the plaintiff took issue. On the trial the bill was produced, and purported to be signed H. F. West, *agent.* A regular protest was shown, and notice of the same addressed to and received by West at Manchester in Oneida county, where West, at the date of the bill, and before and since as the agent of the defendant, superintended a woollen manufactory belonging to the defendant, who resided at Pompey in Onondaga county, and spent only a portion of his time at the factory. West testified that he was authorized by the defendant to make notes and draw bills of exchange in the name of the defendant, and as agent in his behalf; that the bill in question was given on the purchase by him of a quantity of dye-stuffs of the plaintiff for the defendant, taken to and used in the factory and in the business of the defendant; that when he called for the goods he proposed to the plaintiff to give him the bill in question, who agreed to accept, and did accept, the same, giving him, the witness, a bill of the goods, headed, "Mr. H. F. West, Agent, bought of W. A. F. Pentz," and receipting the draft at the bottom. He further testified, that he informed the defendant of the drawing of the bill of exchange, and delivered the notice of protest to him, he did not do so until several weeks after he had received it; that the letters relating to the factory business were generally sent to Manchester, sometimes addressed to the defendant and sometimes to the witness as agent; and that he always opened them, whether addressed

to his principal or himself. It further appeared that the acceptor failed before the bill fell due, and that on the day after the bill was protested the plaintiff addressed a letter to West, complaining that *he* had suffered the protest, as he had been apprised by the acceptor of his inability to meet it. On this evidence, the defendant's counsel insisted that the plaintiff was not entitled to recover; but the judge ruled that he was entitled to recover, and so instructed the jury, who accordingly found the amount of the bill, with interest. The defendant moves for a new trial.

P. Gridley, for the defendant. The plaintiff was not entitled to recover on the bill of exchange; the name of the defendant did not appear upon it, and therefore no action will lie against him. Chitty on Bills, 50, 22, 26, 27. 3 T. R. 761. 2 East, 144. 1 Id. 434. 6 T. R. 176. 1 Lev. 205. If the bill was good, the notice was not sufficient in not being directed to the *defendant* and to the place of his *residence*. Besides, the plaintiff was bound in the first instance to resort to the acceptor of the bill; 6 Wendell, 658. Nor can the plaintiff recover on the common counts; the credit was given to West, and not to the defendant. There is no pretence that West made known the name of the defendant; he represented himself as an agent, but not as the agent of the defendant. The bill of goods was charged to West, and even after the protest, to him the plaintiff looked for payment.

J. A. Spencer, for the plaintiff. The defendant is holden to pay the bill of exchange; it was drawn by his authorized agent, acting within the scope of his authority and for the benefit of the defendant. His signature as *agent* was enough to authorize the admission of proof of who was the principal. Can it be doubted that a bank would be charged on an acceptance by its cashier, although he should only sign A. B., Cash'r? The general rule laid down by Mr. Chitty, that no person can be considered as a party to a bill unless his name appear on some part of it, is not supported by the case of Fenn v. Harrison, 3 T. R. 760, which he cites, for that was not the case of a bill of exchange drawn by a *general agent*, as here, but the sale of a bill by a *special agent*. If, then, the defendant was bound by the act of his agent in drawing the bill, the notice in this case was sufficient, being sent to the place of business of the defendant; for whether addressed to the defendant or to his agent was a matter of indifference, notice to the agent being equivalent to notice to the principal. But if the defendant was not liable on the bill, he was on the common counts; the goods were brought for him and appropriated to his use. It cannot be pretended that they were sold on the credit of the agent, for the bill shows they were charged to West *as agent*, and he as agent drew the bill—

forbidding the conclusion that credit was given to him as *principal.* So the pretence that the bill was received in payment is equally unfounded; why should the plaintiff be required to sue an insolvent acceptor?

By the Court, SUTHERLAND, J. The plaintiff cannot recover upon the bill of exchange against the present defendant. His name no where appears upon it. It was drawn and subscribed by West in his own name, with the simple addition of "agent," but without any specification whatever of the name of the principal. Mr. Chitty, in his valuable Treatise on Bills, says, page 22, "It is a general rule that no person can be considered a party to a bill, unless his name, or the name of the firm of which he is partner, appear on some part of it;" and Mr. Justice Buller, in Fenn v. Harrison, 3 T. R. 761, observes, that in the case of bills of exchange, we know precisely what remedy the holder has, if the bill be not paid; his security appears wholly on the face of the bill itself; the acceptor, the drawers, and the endorsers are all liable in their turns, but they are only liable because they have written their names on the bill; but this is an attempt to make some other persons liable, whose names do not appear on the bill. In Siffkin v. Walker & Rowleston, 2 Camp. 308, an action was brought against the defendants upon a promissory note given and signed by Walker only. The declaration appears, from the argument of counsel, to have averred that Walker had authority to give the note for Rowleston, and that it was given for their joint debt; and it appeared that the defendants were jointly indebted to the plaintiff, on a charter party of affreightment, and that the note was given by Walker in satisfaction of that debt. Lord Ellenborough nonsuited the plaintiff, observing that his remedy was either jointly against both defendants on the charter party, or separately against Walker on the promissory note; and he asked, how can I say that a note, made and signed by one in his own name, is the note of him and another person neither mentioned nor referred to? And he observes further, that the import and legal effect of a written instrument must be gathered from the terms in which it is expressed, and this note must be considered as a separate security for a joint debt. In Emly and others v. Lye and another, 15 East, 6, the action was upon a bill of exchange drawn by one of the defendants (who were partners) in his own name, which was *discounted* by the plaintiffs, and the money went to the use of the firm; but it was held that the plaintiffs could not recover, either upon the bill or the money counts. Lord Ellenborough observed that the counts in the bill had been properly abandoned, for unquestionably, on a bill of exchange drawn by one only, it cannot be allowed to supply by intendment the names of others in order to charge them; and considering it a mere discount or sale of the bill, he also held

that there was no joint liability of the defendants for money had and received, and that it was the individual transaction of the partner who drew the bill; and all the other judges expressed similar opinions.

There is no doubt that a person may draw, accept or endorse a bill by his agent or attorney, and that it will be as obligatory upon him as though it were done by his own hand. But the agent in such case must either sign the name of the principal to the bill, or it must appear on the face of the bill itself, in some way or another, that it was in fact drawn for him, or the principal will not be bound. The particular form of the execution is not material, if it be substantially done in the name of the principal. 1 East, 434. 2 Id. 142. 3 Esp. 266. 2 Strange, 705. Comyn's Dig. Attorney, C. 14. 1 Campb. 485, 6, 384. 6 T. R. 176. This doctrine is very clearly stated in Stackpole v. Arnold, 11 Mass. R. 27, and in Arfridson v. Ladd, 12 Id. 173. In the first of those cases, the action was brought upon three promissory notes, executed by one Cook, for premiums upon policies of insurance, procured by him at the request and for the benefit of defendant. Cook acted merely as the factor of the defendant, and intended to bind him by the premium notes; but the notes did not, on the face of them, purport to be signed by Cook on the behalf of the defendant, and he was held not to be liable upon the notes. The parol testimony explaining and showing the real nature of the transaction, was decided to be inadmissible, on the ground that it contradicted or varied the written contract. Judge Parker, in delivering the opinion of the court, says that "No person, in making a contract, is considered to be the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument which he signs." This principle has been long settled and has been frequently recognised. "Nor do I know," he continues, "an instance in the books of an attempt to charge a person as the maker of a written contract appearing to be signed by another, unless the signer professed to act by procuration or authority, and stated the name of the principal on whose behalf he gave his signature." He also discusses at length the question of the admissibility of parol evidence in such cases to show the real character of the transaction, and holds it to be utterly incompetent, on the ground which has already been stated. Vide also Mayhew v. Prince, 16 Mass. R. 54, and Meyer v. Barker, 6 Binn. 228.

It is well settled, that if a private agent draw a bill or enter into any other contract in his own name, without stating that he acts as agent, so as to bind his principal, he will be personally liable. Chitty on Bills, 36, and cases there cited. 5 Taunt. 749. 2 Marsh. 454. 5 East, 148. 1 Bos. & Pul. 368. 1 T. R. 181. It is not sufficient, to charge the principal or protect the agent from personal responsibility, merely to describe himself as agent, if the language of the instrument

imports a personal contract on his part. 5 Mass. R. 299. 6 Id. 58. 8 Id. 103. 1 Gall. 630. Chitty, 52. 9 Cranch, 155. But where the name of the principal appears on the face of the instrument or contract, and it is evident that the agent did not intend to bind himself personally, but acted merely on behalf of the principal, if he acted by competent authority, the principal and not the agent will be bound. Rathbon v. Budlong, 15 Johns. R. 1. Owen v. Gooch, 2 Esp. R. 567. Mott v. Hicks, 1 Cowen, 513, and the cases there referred to in the opinions of the judges. Rossiter v. Rossiter, 8 Wendell, 494.

The next inquiry is whether the defendant is liable upon the counts, for goods sold and delivered. West was examined as a witness, and testified that he was the agent of the defendant in carrying on a woollen manufactory in Oneida county; that the goods for which he gave the bill were purchased for the defendant, and were used in his business of manufacturing; that he had authority to draw bills of exchange and notes in the name of the defendant: that when he called for the goods in this case, he proposed to let the plaintiff have the draft in question; that the plaintiff said he would inquire about the drawee, and did so, and afterwards received the draft from the witness, and gave the receipt at the bottom of the bill. It does not appear that West disclosed to the plaintiff the fact that the goods were purchased for the defendant. The bill of goods delivered to him, was headed W. H. F. West, *agent*, and the draft which he gave was also signed by him *as agent*. These are the only circumstances showing the mutual understanding of the parties that West was acting as agent and not as principal in the transaction. It was shown that payment of the bill had been regularly demanded of the drawee, and notice of its dishonour regularly given to West, the drawer. This would entitle the plaintiff to resort to the common count as against West, if he were the defendant and it had been a transaction unquestionably on his own account. Jones & Mann v. Savage, 6 Wendell, 659, 662. The question then upon this branch of the case is, whether the goods were sold to West exclusively upon his own individual credit and the credit of the bill which he drew, so as to prevent the plaintiff from all remedy against the defendant, for whom they were in fact purchased, and who has had the exclusive benefit of them. The only additional evidence upon this point, not already adverted to, is the letter written by the plaintiff to West on the 29th of September, 1826, advising him of the dishonour of the bill by the drawee, and requesting him to make provision for its payment. I do not think that this is a circumstance of much importance in the case. The communication would of course be made to West, and he would be called on for payment, admitting that he was known and considered by the plaintiff as a mere agent, as a matter of necessity; and it does not

appear that the plaintiff knew who the principal was. It was a question for the jury to decide whether the goods were sold exclusively upon the credit of West and of the bill, or not; Bentley v. Griffin, 5 Taunt. 356; 1 Com. L. R. 131; Legget v. Reed, 1 Car. & Payne, 16; 11 Com. L. R. 301, and cases stated in note; and it is to be regretted that it was not distinctly left to them by the judge. Upon the evidence, I think the jury would have been justified in finding for the plaintiff on this point. The plaintiff certainly knew that West was acting as *agent* for some third person. The bill of goods was made out to him as *agent*, and the draft which he received was signed by West as *agent*. It would not be an unreasonable conclusion from these facts that the plaintiff did not repose entirely upon the security and responsibility of West, but had regard to the eventual liability of the principal, whoever he might be, if it should become necessary to resort to him. If the plaintiff should fail in this action on the ground that the credit was given exclusively to West, then no doubt he could recover in an action against West, and it is equally clear that whatever money West may be compelled to pay on this account, would be money paid to the use of the defendant, and which he might recover from him. The defendant must eventually pay for these goods, and I see no legal objection to a recovery against him in this action upon the common counts.

Motion for new trial denied.

DUSENBURY AGAINST ELLIS.

In the Supreme Court of New York.

JANUARY, 1802.

[REPORTED, 3 JOHNSON'S CASES, 70–71.]

A person who signs a note in the name of another, as his attorney, without any authority for that purpose, is personally liable on the note, to the party who accepts the note, under such mistake or imposition.

IN error on certiorari, from a justice's court. Ellis sued Dusenbury, before the justice, on a promissory note, for 19 dollars and 77 cents, given by Dusenbury to Levi Fish or order, and by him endorsed, in blank. The note was signed by the defendant below, in this manner: "For Peter Sharpe, Gabriel Dusenbury, attorney." The note was,

otherwise, in the usual form, and began with the words "I promise," &c. It was contended that the defendant was not liable, having signed the note merely as attorney for Sharp, and he produced his letter of attorney, which, however, appeared to be nothing more than the usual power to collect debts, and contained no authority to give notes, or bind the principal, in that way. The justice gave judgment for the plaintiff below.

Van Antwerp, for the plaintiff in error.

Emott, contra.

PER CURIAM. There can be no question, but that Dusenbury signed the note, without having any authority for that purpose. The letter of attorney could not bind the principal beyond the plain import of it. An authority to collect debts cannot, by any possible construction, be an authority to give notes.

The only question, then, is, whether Dusenbury was not personally responsible, as for his own note. On this point we are of opinion, that if a person, under pretence of authority from another, executes a note in his name, he is bound; and the name of the person for whom he assumed to act will be rejected, as surplusage. The party who accepts of a note, under such mistake or imposition, ought to have the same remedy against the attorney, who imposes on him, as he would have had against the pretended principal, if he had been really bound.

Judgment of affirmance.

THE UNITED STATES *v.* JOHN PARMELE.

Circuit Court: U. S.: Connecticut.

APRIL TERM, 1810.

Before { Hon. BROCKHOLST LIVINGSTON, Associate Justice of the Supreme Court.
Hon. PIERPONT EDWARDS, District Judge.

[REPORTED, 1 PAINE, 252–255.]

LIVINGSTON, J. This cause coming up on a demurrer to the declaration, if that be insufficient there must be judgment for the defendant below.

This action is brought on a written contract of the defendant, by which he acknowledged to have received from one Stephen Rainy one hundred barrels of flour, and agreed to be holden therefor to Alexander Wolcott, Esquire, or order, when called for, he paying ten cents per barrel storage.

The objections to the declaration are, that no demand is stated to have been made of the defendant, nor any tender of the storage; and that no action will lie on this agreement in the name of the United States.

The last objection is the only one which will be examined, for if that be well taken, the plaintiffs cannot recover in this suit.

To obviate the force of this objection, which seems to be felt, it has been said, that the action is not founded on the written contract, but on the right which vested in the United States by the seizure and condemnation of this property; and that the agreement was only made use of as evidence. Whether such an action could have been brought, this Court is not bound to say; but the present suit is not of that description. It proceeds entirely on the defendant's contract, and the Court, if it cannot discover his liability there, has no right to look for it elsewhere.

It is also contended, that an interest in the United States is sufficient for the purpose of maintaining this suit. Such an interest, it is true, is disclosed in the declaration, so far as a seizure and confiscation could give it; but a science of these matters not being imputed to the defendant, it is not easy to perceive how he could suppose the public had any interest in the flour committed to his keeping. But if he knew everything, it will not, in the judgment of this Court make any difference.

The United States, in a case of this kind, have no privilege or rights beyond those of an individual. If they sue on a contract, they are as much held to prove it as a private citizen, and any variance will be as fatal in the one case as the other. If this flour had been private property, but not that of Rainy or Wolcott, and it had been known to be so to the defendant, yet on this contract no suit could have been maintained, but in the name of the parties to it. None of the cases cited show that the *cestuy que trust* can bring an action at law, on an agreement made with his trustee. There is a fitness in confining the remedy to the party to whom the promise is made; in which case the judgment can always be pleaded in bar to another action. If the United States recover in this action, who can say that Parmele may not be vexed by another suit in the name of Rainy or Wolcott? The Court, although it has an opinion, is not called upon to say who would have been the proper plaintiff in this case; but as no promise was made to

the United States, it is sufficient to say, that they have altogether failed in making out their cause of action. The Court cannot say, that an engagement to deliver this property to Rainy or Wolcott was one to deliver it to the United States, or to their Marshal of this district. Where there is no difficulty in suing in the name of the party to the contract, there can be no necessity of supporting the suit of a stranger to it; and without a precedent in point, the Court would feel great reluctance in making one.

This case has also been likened to those of principal and factor; and it has been said, and correctly, that the former can sue on a sale made by the latter, although he be not at the time known to the purchaser. Courts of Law, out of their great solicitude to protect the interest of a principal, have gone great lengths in identifying him with his agent or factor, and as a necessary consequence, have permitted a suit in his own name, although he be not, except by implication of law, a party to it. But the Court does not know that such suit was ever sustained on the contract itself, where one in writing took place between the factor and vendor, in which the name of the principal did not appear. What use might be made of such a paper, as matter of evidence, is one thing; but that a suit can be brought upon it in the name of any but a party to it, has not been shown; nor is it believed that such is the law. Without then disturbing any of the cases of this class which have been referred to, this Court cannot, when sitting as a Court of Law, say, that an express and written promise to do a thing to Rainy or Wolcott, is a contract to do the same thing to the United States. It looks in vain to the writing itself for such an engagement; and that is the only source from which it has any right to make its deductions. It is on that which the plaintiffs have relied, and if they do not succeed in showing an assumpsit there, they fail in their action altogether.

Upon the whole, as the United States have sued on a written contract, to which they are not parties, and in which they are not even named, but which appears to have been made with other persons, it is the opinion of this Court, that the judgment of the District Court was erroneous, and must be reversed.

TAINTOR *v.* PRENDERGAST.

In the Supreme Court of New York.

MAY TERM, 1842.

[REPORTED, 3 HILL'S N. Y. 72–74.]

ASSUMPSIT.

Of the liability, and right of action, of an undisclosed principal, upon parol contracts made by his agent.

BY the Court, COWEN, J. This suit was brought to recover a sum of money advanced to the defendant, a citizen of this state, in part payment for a quantity of wool which he agreed to deliver to the plaintiff's agent. The contract was made by the latter without disclosing the name of his principal, who was a merchant residing at Hartford, Connecticut. The agent was a resident of this state. The wool was not delivered as agreed, and the question is, whether an action can be maintained by the principal.

It may be admitted, as was urged in the argument, that whether the principal be considered a foreigner or not, his agent, omitting to disclose his name, would be personally liable to an action. Even in case of a foreign principal, however, I apprehend it would be too strong to say, that when discovered he would not be liable for the price of the commodity purchased by his agent. This may indeed be said, when a clear intent is shown to give an exclusive credit to the agent. I admit that such intent may be inferred from the custom of trade, where the purchaser is known to live in a foreign country. No custom was shown or pretended in the case at bar; and where the parties reside in different states under the same confederation, this has been held essential to exonerate the principal. (Thomson v. Davenport, 9 Barn. & Cress. 78.) It will be seen by this case and others referred to by it, that the usual and decisive indication of an exclusive credit is, where the creditor knows there is a foreign principal, but makes his charge in account against the agent. If the seller be kept in ignorance that he is selling to an agent or factor, I am not aware of a case which denies a concurrent remedy.

On the other hand, I am still in want of an authority that, where an

agent acquires rights in a course of dealing for his principal, whether the latter be foreign or domestic, and his name is kept secret, the principal may not sue to enforce those rights. I admit that the defendant is not by such form of action to be cut off from any equities he may have against the agent. So far the latter is considered as the exclusive principal; but no farther. As a general rule, the latter cannot maintain an action in his own name at all; and the exception will be found to arise from cases where he has rights of bailee or some other *rights;* not the mere powers of a naked agent. (Paley on Ag. by Loyd, ch. 4; Id. ch. 5; White v. Bennett, 1 Missouri Rep. 102, 104, 105.) The learned judge charged according to this principle; and he was clearly right. None of the quotations so lavishly made on the argument from Judge Story's treatise on agency, will be found to impugn it in the least.

New trial denied.(*a*)

We may consider, first, the LIABILITY of the principal and agent respectively, on parol contracts made by an agent; and afterwards the RIGHT OF ACTION on their part on contracts made to them.

1. In regard to LIABILITY, the general rule is, that *implied* contracts in law are raised from the party interested in the consideration: but as to *express* contracts, if a relation of agency exists and appears in any contract, the right of action is against the principal, unless credit was given expressly and exclusively to the agent: and an agent is not personally bound upon a contract made as agent, unless, first, credit was given to him exclusively, or, secondly, he has given no right of action against his principal upon the contract; in which cases he is bound.

(1) The case of EXPRESS CONTRACTS may be examined first: and as the rules of law and evidence create some difference between written and verbal contracts it may be expedient to consider them separately.

In respect to the liability of the PRINCIPAL on written contracts; if the name of the principal, and a relation of agency, be stated in the writing, and the agent really be authorized, the principal alone is bound, unless the language express a clear intention to bind the agent personally. See *Stanton* v. *Camp*, 4 Barbour's Supreme Court, 275, 277; *Dyer* v. *Burnham*, 25 Maine, 10, 13; *Downman* v. *Williams*, 7 Queen's Bench, 103, 111. But in order that the principal may be bound upon a written instrument or agreement, not under seal, it is necessary that his name should appear in some part of the instrument or agreement. The rule is, that in suing on a written instrument, such as a promissory note, the whole liability must be made out on the instrument itself, and

(*a*) See Pitts v. Mower (6 Shepl. Rep. 361); Estate of Merrick (2 Ashm. Rep. 485); Parker v. Donaldson (2 Watts & Serg. Rep. 9); Harp v. Osgood (2 Hill, 216).—*Note by Reporter.*

that parol evidence is not admissible to alter, or add to, a written agreement which is made the ground of the action; and therefore a principal cannot be made liable on a written instrument, or by mere force of a written agreement, where his name does not appear in the instrument or agreement, as a party to the contract; *Pentz* v. *Stanton*; *Stackpole* v. *Arnold*, 11 Massachusetts, 27; *Bedford Commercial Ins. Co.* v. *Covell*, 8 Metcalf, 442; *Taber* v. *Cannon and others*, Id. 456, 460; *Clealand* v. *Walker*, 11 Alabama, 1059, 1063; *Minard* v. *Mead*, 7 Wendell, 68; *The Bank of Rochester* v. *Monteath*, 1 Denio, 402, 404; *Thurston* v. *Mauro*, 1 Iowa, 231, 233. In *The Merchants' Bank of Macon* v. *The Central Bank of Georgia*, 1 Kelly, 418, 428, the point decided was that the principal, whose name was not on the bill, was, in consequence of receiving the consideration, "liable upon the common count, upon principles *ex æquo et bono*."

And not only must the name of the person for whom the engagement is entered into, appear in the instrument, but a relation of agency between himself and the person making the engagement must be disclosed on its face; that is, it must appear that the person acted as agent in making the contract; for unless this appear, he will be bound personally, and the other, on whose account he acts, will not be bound. Whether the party making the contract, acts as agent, and whether being an agent, he yet intends to pledge his own personal responsibility for his principal, must depend on the intention of the parties to the agreement; it is a question of construction, to be determined by the language of the agreement, with reference to its subject, and the circumstances; or as was said in *Campbell and another*, v. *Nicholson and another*, 12 Robinson's Louisiana, 428, 433, "by an examination of the contract itself, of the circumstances under which it was made, and the manner in which it was carried out by the parties, and appears to have been understood between them." "As the forms of words in which contracts may be made and executed," say the court in *Bradlee* v. *Boston Glass Co.*, 16 Pickering, 347, 350, "are almost infinitely various, the test question is, whether the person signing professes and intends to bind himself, and adds the name of another, to indicate the capacity or trust in which he acts, or the person for whose account his promise is made; or whether the words referring to a principal, are intended to indicate, that he does a mere ministerial act, in giving effect and authenticity to the act, promise and contract of another. Does the person signing apply the executing hand as the instrument of another, or the promising and engaging mind of a contracting party?" If the contract disclose an agency, and show that the person contracting acts as the representative of another, who is competent to contract, and whom he has authority to bind, it will be the contract of the principal and not the agent, unless the form of the language show a distinct intention to the contrary. Or, as the rule is expressed in *Key* v. *Parnham*, 6 Harris & Johnson, 418, 421, "wherever, upon the face of an agreement, a party contracting plainly appears to be acting as the agent of another, the stipulations of the contract are to be considered as operating solely to bind the principal; unless it manifestly appears by the terms of the instrument that the agent intended to superadd or substitute his own responsibility for that of his principal. In such case, and in such case only, if acting within the scope of his powers, is he personally answerable." In determining whether a party contracts personally or as agent, the presumption is in favour of the former; that is, a party will be bound personally unless his character of agent be clearly disclosed: but in determining whether an apparent agent intends to bind himself or his principal, the presumption is in

favour of the latter; that is, the agent will not be bound, unless there be a clear intention to that effect.

Accordingly, instruments in the following forms, where the transaction was really on account of the principal, and the agent had authority to bind him, have been decided to bind the principal, and not the agent:—"I promise to pay, &c.," "value received, for the S. C. and W. M. Company. S. B., Agent;" *Rathbon* v. *Budlong*; a note beginning, "I promise to pay, &c.," or "I warrant, &c.," and signed "A. B., agent for C. D.," or, "for C. D., A. B.," or, "A. B. for C. D.;" *Long* v. *Colburn*, 11 Massachusetts, 97; *Despatch Line of Packets* v. *Bellamy Man. Co.*, 12 New Hampshire, 206, 229; *Roberts* v. *Button et al.*, 14 Vermont, 195; *Hovey* v. *Magill*, 2 Connecticut, 680; *Frost* v. *Wood*, Id. 23; *Robertson* v. *Pope*, 1 Richardson, 501; *Campbell* v. *Baker*, 2 Watts 83; *Exparte Buckley in re Clarke*, 14 Meeson & Welsby, 469, overruling *Hall* v. *Smith*, 1 Barnewall & Cresswell, 407:—and a contract expressed to be made "on behalf of" another whose name is disclosed; *Key* v. *Parnham*, 6 Harris & Johnson, 418; *Tuttle* v. *Executors of Ayres*, Pennington, 682. In *Bradlee* v. *Boston Glass Co.*, 16 Pickering, 347, a note in this form, "For value received, we, the subscribers, jointly and severally, promise to pay Messrs. J. & T. B. or order, for the Boston Glass Manufactory, thirty-five hundred dollars, &c.," and signed "J. H., S. G., C. F. K.," was decided to be not the note of the company, but of the individuals signing; and among other things, the words "jointly, and severally" were said to be quite decisive of the question; and see also, *Savage* v. *Rix, et a.*, 9 New Hampshire, 263, 270, and *Trask* v. *Roberts et al.*, 1 B. Monroe, 201, 204, as to the presumption afforded by those words: but in *Rice* v. *Gove*, 22 Pickering, 158, a note in this form, "For value received, we jointly and severally promise to pay, &c.," "P. & J. for Ira Gove," was decided to be the note of Gove, the intention to bind him, manifested by the form of execution, being still stronger than the indication to the contrary furnished by the words "jointly and severally," which were to be rejected as surplusage. The last case shows that these words may be used where there is no intention to incur a personal liability, and seems substantially to overrule the former case, which as to that particular seems to have been erroneous. On a question of actual intention, in an informal instrument, such technical phrases ought to be considered as entitled to little attention: the parties either mean nothing by such words, or they may be considered as meaning to execute the agency jointly and severally.

But the cases are numerous in which a person professedly contracts on account of another, and as a representative of his interests, and yet the party for whose benefit the contract is made, is not bound, because the relation is not one of agency, or the title used by the acting party, is not distinctly expressive of an agency. Thus, if one makes a note promising as guardian of A. B. to pay a sum of money, and signs also as guardian, he is bound personally, because, as an administrator cannot by his promise bind the estate of his intestate, so neither can a guardian by his contract bind the person or estate of his ward; *Forster* v. *Fuller*, 6 Massachusetts, 58. So, in *Burrell* v. *Jones*, 3 Barnewall & Alderson, 47, a distress having been levied on the estate of a bankrupt, the solicitors of the assignees gave an engagement of this kind, on the faith of which, the distress was abandoned; "We, as solicitors of T. M. E. &c., assignees of J. L. J. &c., do hereby undertake to pay, &c., such rent as shall appear to be due, &c.," which was decided to constitute a personal liability; and this case, in *Roberts* v. *Button et al.*, 14 Vermont, 195, 204, is put upon the ground, first, of want

of authority in the solicitors, secondly, that the term 'solicitors,' *ex vi termini*, has no natural fitness to show an undertaking on the part of another, (unless it be in a matter of pleading in a court of chancery,) any more than *brother* or *friend*, or *adviser*, or *confessor*, or almost any other relative term applicable to persons.

In like manner, the word 'committee' is not of itself indicative of the relation of principal and agent, and when it is used, it must depend on the form of the engagement, and the language used, or on the circumstances of the transaction, whether the persons described as a committee, intend to bind themselves personally, or to bind the body which they represent, and to which party credit is given on the other side. Thus where a contract in writing, in the introductory part was described as an "agreement between H. H., E. S., and N. H., committee of the town of Wayland, on the one part," and "W. S., &c., on the other," and stated that the "said committee are to pay, &c.," it was decided to be the personal agreement of those individuals, and that 'committee' was a mere *descriptio personarum; Simonds* v. *Heard*, 23 Pickering, 120. So, in *Savage* v. *Rix et a.*, 9 New Hampshire, 263, a note was in this form, "We, jointly and severally, promise to pay S. S., in official capacity, &c.," dated, "Dalton," and signed, "E. R., E. C., O. P. B., Whitefield Road Committee;" and it was decided not to bind the town of Dalton, of which they were agents, but to bind them personally, even if it were considered that they meant to charge the town and had authority to do so, because the note did not purport to contain the promise of the town, but of the parties personally: however, the words, 'in official capacity,' are so strong, that perhaps the only ground on which the decision in that case can be sustained, is, the non-disclosure of the name of the principal in the instrument, as the party to the contract. In *Andrews* v. *Estes et als.*, 2 Fairfield, 267, an agreement in this form, "We, the undersigned, committee of the first school district, promise *in behalf of* said district to pay, &c.," signed "R. E., S. G. S., P. F.; Committee," was decided to bind the district, and not the signers personally, the school district being a quasi-corporation, and competent to contract for the purpose. And in *Stanton* v. *Camp*, 4 Barbour's Supreme Court, 275, a contract described as between the plaintiff of the first part, and "the S. H. P. Society, by their committee, of the second part," by which the plaintiff agreed with "the said party of the second part," for a consideration to be paid "by the said party of the second part," to build a church for the society, and signed by the committee individually, was decided not to bind them personally. And see *Campbell and another* v. *Nicholson and another*, 12 Robinson's Louisiana, 428; and *Miller* v. *Ford*, 4 Strobhart, 214.

In like manner, the word, "trustees," appended to the names of one of the parties contracting, does not of itself express a character of agency, but, on the contrary, is *primâ facie*, but *descriptio personarum*, and is not of itself sufficient to rebut the personal liability; *Hills* v. *Bannister*, 8 Cowen, 31; *Brockway* v. *Allen*, 17 Wendell, 40; *Fogg* v. *Virgin*, 19 Maine, 352; *Cleaveland* v. *Stewart and others*, 3 Kelly, 283; *Trask* v. *Roberts et al.*, 1 B. Monroe, 201; and see *Webb* v. *Burke*, 5 Id. 51, 53. It has been held, however, that, although a note made by persons styling themselves "trustees" is an individual promise, and the word "trustees" merely descriptive, yet a note made by persons "*as* trustees," is evidence of a contract or promise made, not in an individual, but in a fiduciary capacity; *Leach* v. *Blow*, 8 Smedes & Marshall, 221, 228.

So, also, where a contract is made by a person describing himself as the officer of an institution, for example President, it cannot in all cases be de-

termined from that descriptive title alone, whether the act is on personal or official account, and the question of liability must be decided upon the form of the contract, or extrinsic circumstances. Accordingly, it has been determined, that a note, in the form, "We promise to pay, &c., for work done on the building of the G. S. Comp., (signed) O. B. I. Pres. G. S. C.," bound the company and not the individual; *Robertson* v. *Pope*, 1 Richardson, 501: on the other hand, it has been held that where the President of a company makes a note beginning, "I, J. F., President of the M. F. I. Company, promise," &c., and signed "J. F.," or beginning, "I promise," &c., and signed "J. F., President of the M. F. I. Co.," it is not, on its face, the promise of the Company; *Barker* v. *Mechanic Ins. Co.*, 3 Wendell, 94, 98: but the judgment of the court appears to have been based upon the authorities relating to sealed instruments, and perhaps the decision is hardly to be sustained: see *Wyman* v. *Gray*, 7 Harris & Johnson, 409; *Lazarus, use, &c.* v. *Shearer*, 2 Alabama, 719; and *Lyman et al.* v. *Sherwood et al.*, 20 Vermont, 42, 49; and see *Passmore* v. *Mott*, 2 Binney, 201. In *Farmers and Mechanics' Bank* v. *Troy City Bank*, 1 Douglass, 458, a bill addressed to "J. A. W., Cashier Farmers and Mechanics' Bank of Michigan," and "accepted, J. A. W., Cashier," was held to be the acceptance of the bank, and not the cashier. And in *City of Detroit* v. *Jackson*, 1 Douglass, 107, 114, a submission declared in the body of it, to be on the part of "The Mayor, Recorder, Aldermen, and Freemen of the City of Detroit, by Z. P., Mayor of said city, and agent for that purpose duly appointed," and signed "Z. P., Mayor of Detroit," was decided to be the agreement of the city, and not of the mayor personally. In *Mechanics' Bank* v. *Bank of Columbia*, 5 Wheaton, 326, and *Bank of Utica* v. *Magher*, 18 Johnson, 341, 346, it was held, that where an instrument had on its face the appearance and form of a corporate transaction, but was signed by an officer of the corporation without the addition of his official title, it was either to be taken as an official act, supposing the marks of official character to predominate on the face of the instrument, or else parol evidence was to be received of the nature and circumstances of the transaction. See also, *The Merchants Bank of Macon* v. *The Central Bank of Georgia*, 1 Kelly, 418, 429; *Ghent* v. *Adams*, 2 Id. 214. In cases of this kind, where there is a doubt or ambiguity on the face of the instrument, as to whether the person means to bind himself, or only to give an evidence of debt against an institution or body of which he is a representative, parol evidence is undoubtedly admissible; not indeed, to show the intention of the parties to the contract, but to prove extrinsic circumstances by which the respective liability of the principal and agent may be determined; such as, to which the consideration passed and credit was given, and whether the agent had authority, and whether it was known to the party that he acted as agent. The extent of the principle as to the admissibility of parol evidence, appears to be this: Where the names of both principal and agent appear on the instrument, and the contract, though in the name of the agent, discloses a reference to the business of the principal, so that the instrument, as it stands, is consistent with either view, of its being the engagement of the principal or of the agent, parol evidence is admissible, in a suit against the agent to charge him by showing either that credit was given to him, or that he had not authority to bind the principal by that contract, which would create a consideration for a liability on his part, or to discharge him by proving that the consideration passed directly to his principal, as, that credit having been given to the principal alone, the consideration of the note

signed by him was an antecedent liability on the part of the principal, and that the other party knew that he acted as agent, and thus destroying all consideration for a liability on his part; and in like manner, to charge or discharge the principal by similar circumstances: see *Mechanics' Bank* v. *Bank of Columbia*, 5 Wheaton, 326; *Bank of Utica* v. *Magher*, 18 Johnson, 341, 346; *Brockway* v. *Allen*, 17 Wendell, 40; *Stanton* v. *Camp*, 4 Barbour's Supreme Court, 275, 278; *Wyman* v. *Gray*, 7 Harris & Johnson, 409; *Lazarus, use, &c.* v. *Shearer*, 2 Alabama, 719; *Underhill et al.* v. *Gibson et al.*, 2 New Hampshire, 352; *Cleaveland* v. *Stewart and others*, 3 Kelly, 283, 297; *Kean* v. *Davis*, 1 Zabriskie, 683. But if the name of the principal does not appear in the instrument, and the instrument is without ambiguity, and asserts a positive liability on the part of the person contracting, parol evidence to bind the principal, or to discharge the agent, is not admissible: see *Savage* v. *Rix et al.*, 9 New Hampshire, 263, 270; and the cases of *Mayhew et al.* v. *Prince, &c.*, cited presently.

As to the liability of the principal upon *verbal* contracts, the rule is similar; that where the relation of principal and agent exists in regard to a contract, and is known to the other party to exist, and the principal is disclosed at the time as such, the contract is the contract of the principal, and the agent is not bound, unless credit had been given to him expressly and exclusively, and it was clearly his intention to assume a personal responsibility; *La Farge* v. *Kneeland*, 7 Cowen, 456, 459; *Stanton* v. *Camp*, 4 Barbour's Supreme Court, 275, 278; *Bradford et al.* v. *Eastburn*, 2 Washington, C. C. 219; *Hall* v. *Huntoon*, 17, Vermont 244: but, if credit was given to him exclusively, and he intended to give his own personal engagement, he will be bound; and this, upon sufficient evidence, is a question for the jury on all the circumstances of the case; *Torry* v. *Holmes*, 10 Connecticut, 500, 510; *Cunningham* v. *Soules*, 7 Wendell, 106; *Beebee* v. *Robert*, 12 Id. 413, 417; *Scott* v. *Messick*, 4 Monroe, 535, 536; *Wilkins, &c.* v. *Duncan*, 2 Littell, 168; *Hudson* v. *Wilkins*, 5 Id. 196; *Presbyterian Church* v. *Manson, &c.*, 4 Randolph, 197; *Andrews* v. *Allen et al.*, 4 Harrington, 452; and see *Longbottom* v. *Rodgers*, 2 Manning & Granger, 427.

Previously to the late case of *Beckham* v. *Drake*, 9 Meeson & Welsby, 79 (affirmed 11 Id. 315: See 2 H. of L. Cases, 579, 623); but little hesitation would have been felt in saying that the doctrine of the liability of an undisclosed principal, on contracts made by his agent, was applicable only to implied contracts; except in the case of a partnership. There is no doubt that on express contracts made in the firm name, a dormant partner is liable; because that is a representative name, and all the partners may legally be charged as having contracted under that name. But no case had ever established such a liability, in cases of express contracts, where merely the relation of principal and agent existed. But in *Beckman* v. *Drake*, it is declared, by Lord Abinger, and Mr. Baron Parke, in the clearest and most decided manner, that an unknown principal, is liable when discovered upon all express contracts verbal or written, entered into by his agent in his own name, as principal. That indeed was the case of partnership; and how far the decision is an *authority* in regard to principal and agent merely, may perhaps be questionable. Considering it, however, as establishing the rule just stated, it seems to be opposed to principle, and not supported by cases previously decided. In what form is the declaration to be framed? It certainly cannot be averred that A. (the principal), by the name and style of B. (the agent) made the contract, for the facts would not sustain the allegation; and such a view would be inconsistent with the acknowledged personal liability of the agent. If it be stated in the declaration, as was done in *Beckham* v.

Drake, that B. (the agent) on behalf of A. (the principal) made the contract with C. (the plaintiff), the difficulty is not removed. Express contracts have an identity in law: a contract set out in a declaration as made by B. on behalf of A., is in law either a contract by B. or by A. If it be regarded as the contract of B., it will not charge A. It must be considered then as the contract of A.; but a contract between B. and C., dealing as principals, and without reference to any third person, is not a contract between A. and C. The contracts are not identical in law; in other words there is a variance. The method of declaring adopted in *Beckham* v. *Drake*, is supposed to be just the same in law, as a declaration averring that the principals themselves contracted; it, indeed, conceals the difficulty, but does not remove it. No doubt, as stated above, a principal may be declared against on a parol contract, and if there be evidence to satisfy the jury of an actual contract between the parties to the action, a written or verbal engagement made by the agent may be given in evidence to show the terms of that contract: but it is impossible to establish an actual express contract between the plaintiff and a person whose existence, or connexion with the subject, was unknown and unthought of by him. Such an undisclosed principal, is in fact not a *principal* in the *express contract*. He is the principal in the beneficial interest of the transaction, and he is the employer of the party contracting: but where an express contract is made by one in his own name alone, though for account of another, the relation of principal and agent, between the person making it and his employer, does not exist in that *express contract*. The agent, and not his employer, is the principal in that express contract. These remarks have reference to the case where the existence of an ulterior principal is not known to the other contracting party, and the agent treats, and is treated with, as principal. If a principal is known to exist, though it be not made known who he is, he may be bound on express contracts, the engagement being with the principal whoever he may be. But where the existence of an ulterior principal is not thought of, such person, it is believed, cannot be bound on an express contract made by his agent in his own name, and acting as principal. It must be observed that these are *dicta* recognising *Beckham* v. *Drake*, in *B. U. S.* v. *Lyman et al.*, 20 Vermont, 668, 673, and by Parke B. in *Beckham* v. *Drake*, 2 H. of L. Cases, 579, 623.

Such are the general rules as to the liability of a principal on express contracts. In regard to the liability of an AGENT, one case has already been stated; that, namely, where credit has been given exclusively to the agent, or he has expressly bound himself to fulfil a contract made for the benefit of his principal. The other ground of liability in an agent exists where he has made a contract without giving a right of action against the principal on that contract; and of this there are two cases: 1. Where the name of the principal is not disclosed in the contract. 2. Where the agent had not authority to bind the principal.

1. The first of these cases, where a contract is made and no right of action given against the principal *on the contract*, is where, in a written contract in the agent's name, the name of the principal is not introduced, or on a verbal contract the principal is not disclosed; in either case, unless the agent disclose his principal in the contract so as to give an immediate right of action against him, on that written or verbal contract, his own name appearing, he is himself liable upon it. The rule, as it applies to written instruments, is illustrated in *Pentz* v. *Stanton;* that an agent signing a written instrument, and not stating the name of his principal in it, is himself liable upon it; and that it is not enough that he describes himself as 'agent,' because, unless the name is stated in the instrument, there is no right of

action against the principal upon it: and see to the same effect, *Taber* v. *Cannon and others*, 8 Metcalf, 456, 460; *Mayhew et al.* v. *Prince*, 11 Massachusetts, 54; *Arfridson* v. *Ladd*, 12 Id. 173; *Hancock* v. *Fairfield*, 30 Maine, 299, 302; and the rule is general, that whenever an agent puts his name to a negotiable instrument as a party to it, he is legally liable to the promisee and to endorsees upon it. The case of *Roberts* v. *Austin*, 5 Wharton, 313, is believed to have been an oversight on the part of the learned court in which it was decided, in carrying beyond its proper limit the principle established in *The Mechanics' Bank* v. *Earp*, 4 Rawle, 385, 389, and *Sharp* v. *Emmet*, 5 Wharton, 288; and the law appears to have been held correctly in the court below; *Austin* v. *Roberts*, 2 Miles, 254. See *Higgins* v. *Senior*, 8 Meeson & Welsby, 834. So in verbal contracts, if the agent does not disclose his agency, and name his principal, he binds himself, and is subject to all liabilities, express and implied, created by the contract and transaction, in the same manner as if he were the principal in interest; *Keen* v. *Sprague*, 77, 80; *Davenport & Co.* v. *Riley & O'Hear*, 2 M'Cord, 198; *Allen & another* v. *Rostain*, 11 Sergeant & Rawle, 362, 375; *Mauri* v. *Heffernan*, 13 Johnson, 58, 77; *M'Comb* v. *Wright*, 4 Johnson's Chancery, 659, 669; and the fact that the agent is known to be a commission merchant, broker, auctioneer, or other professional agent, makes no difference; *Waring* v. *Mason*, 18 Wendell, 426, 435; *Hastings* v. *Lovering*, 2 Pickering, 214, 221; *Baxter* v. *Duren*, 29 Maine, 434, 439. "At this day," said the Chancellor in *Mills* v. *Hunt*, 20 Wendell, 431, 434, "the law must be considered as settled, that a vendor or purchaser dealing in his own name, without disclosing the name of his principal, is personally bound by his contract; and it makes no difference that he is known to the other party to be an auctioneer, or broker, who is usually employed in selling property as the agent for others. Even where he discloses the name of his principal, if he signs a written contract in his own name merely, which contract does not upon its face show that he was acting as the agent of another, or in an official capacity on behalf of the government, he will be personally bound thereby." It has been held, however, that if the agent expressly discloses that he acts for others, and designates his principals by a descriptive title so intelligibly and distinctly that they may be readily pursued, though not by their individual names, it is enough, if more be not required by the other party; and, therefore, that where the master of a ship receipted in the form "Received, &c., on account of passage of slaves on board the brig Endymion. For the owners, M. C. Mordecai," he was not personally liable; *Waddell* v. *Mordecai*, Riley, 17; S. C. 3 Hill's So. Car. 22.

2. The other instance of an agent's liability against his intentions, is where he acts wrongfully and has not authority to bind his principal. In case of a *verbal* contract made by one as agent, but without authority, the person himself is liable in an action on the contract, and it is not necessary to bring an action on the case; *Meech* v. *Smith*, 7 Wendell, 315, 319; *Bay* v. *Cook*, 2 Zabriskie, 343, 352; and the burden of proving his authority is on the agent; *Miller* v. *Stock*, 2 Bailey, 163; and if an agent be authorized to go to a certain extent, for example, to pay a certain price, and he go beyond, the person with whom he contracts may hold him personally responsible for the whole amount due on the contract, although the agent may have a right to claim from his principal, remuneration to the extent of the price which he was authorized to give; *Feeter* v. *Heath*, 11 Wendell, 478, 485. On written contracts, made without authority, the agent is equally responsible, but there is this distinction as to the mode of charging him:

if the name of the agent does not appear in the contract, and the agreement purpose to contain the promise of the principal only, the agent cannot be made liable in assumpsit upon the contract, but the remedy against him must be an action on the case; but if his name does appear in it, either in the form of his contracting as agent for the principal, or of the principal's contracting by him as agent, if the language used is not necessarily exclusive of a personal engagement by him, or, if rejecting what the person assuming to be agent had no right to put, there remain apt words to bind the agent, he is personally liable in assumpsit on the contract; *Woodes* v. *Dennett*, 9 New Hampshire, 55, 58; *Pettingill* v. *McGregor*, 12 Id. 180, 191, in which this principle is satisfactorily established; see, also, *Lazarus, use, &c.* v. *Shearer*, 2 Alabama, 719, 726; *Delius et al.* v. *Cawthorn*, 2 Devereux, 90; *Bank of Hamburg* v. *Wray*, 4 Strobhart, 87; *Hite* v. *Kendall*, 2 Pike, 338; *Underhill et al.* v. *Gibson et al.*, 2 New Hampshire, 352; *Roberts* v. *Button et al.*, 14 Vermont, 195, 202; and see *Jones* v. *Downman*, 4 Q. B. 235, note; and note (*a*) to *Thomas* v. *Hewes*, C. & M. 530. This is illustrated also in the principal case of *Dusenbury* v. *Ellis;* so also in *Rossiter* v. *Rossiter*, 8 Wendell, 494; where Rossiter, the agent, exceeding his authority, signed a note, "H. R. P. by his attorney, W. S. Rossiter," and was held to be liable on the note; and again in *Palmer* v. *Stephens*, 1 Denio, 472, 480. These cases may fairly be considered as overruling *Ballou* v. *Talbot*, 16 Massachusetts, 461. See *Kingman* v. *Kelsie*, 3 Cushing, 339. However, whenever the agent is made liable for contracting in another's name without authority, though the form of the action may be *ex contractu*, the real ground of his liability, is his wrongful conduct, and he will not be liable where he was in no fault, as where his power was terminated by the death of his principal without his knowledge. This is shown in *Smout* v. *Ilbery*, 10 Meeson & Welsby, 1; where Baron Alderson stated that the true principle derivable from the cases is, that there must be some wrong, or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of the principal, and that in all cases in which the agent has been held personally responsible, he has either been guilty of some fraud, or has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party, as would enable him equally with himself to judge as to the authority under which he proposed to act. So, an action on the case for claiming to have authority, can be sustained only where the claim is fraudulent, that is, where the agent knows that he has not authority; if the ground of the supposed authority be disclosed and known to the other party, and there is a common mistake as to the nature or extent of it, the agent will not be liable; *Inhabitants of Webster* v. *Larned*, 6 Metealf, 523, 528.

If a contract be made by one, on behalf of another, and he be sued upon it, he is bound to show that he had authority to bind his principal, and that he has given a right of action against him, or else he will be liable; *Mott* v. *Hicks*, 1 Cowen, 513, 536; *Brockway* v. *Allen*, 17 Wendell, 40; *Bay* v. *Cook*, 2 Zabriskie, 343, 352; *Gillaspie et al.* v. *Wesson*, 7 Porter, 455, 461; *Hite* v. *Kendall*, 2 Pike, 338; *Harwood's Ex'rs* v. *Humes, use, &c.*, 9 Alabama, 659. In some cases also, it has been said, that to absolve the agent he must have had authority at the time, so that he gave an immediate right of action against the principal, and that a subsequent ratification will not relieve him; *Rossiter* v. *Rossiter; Palmer* v. *Stephens*, 1 Denio, 472, 481; *Lazarus, use, &c.* v. *Shearer*, 2 Alabama, 719, 725;

Taber v. *Cannon and others*, 8 Metcalf, 456, 461: but there seems to be no ground for this distinction, at least where the ratification is before suit brought against the agent. In *Gregory* v. *Mack*, 3 Hill's N. Y. 380, 384, there is a dictum of Bronson, J., in opposition to such a distinction; where an agent had made a contract different from his instructions, and it had been ratified by his principal; "That," said Bronson, J., "has relieved the plaintiff from any claim which the other party might otherwise have made upon him on the ground of his having undertaken to act as the attorney or agent of another, without sufficient authority;" and in *Despatch Line of Packets* v. *Bellamy Man. Co.*, 12 New Hampshire, 206, 229, it was said that a note, "I promise, &c.," signed "R. H. P. agent," &c., would be the note of P. if he had no authority, but that a ratification would exonerate him.

(2) With regard to IMPLIED liabilities arising out of the transactions of agents, it has been stated above, that if the agent does not disclose his principal, he is himself liable on all contracts, express and implied, arising out of his transactions, as if he were principal: but an unknown principal, receiving in law the consideration of a contract, becomes liable upon all those implied liabilities which arise from the receipt of a consideration. Accordingly, on a sale to an agent, the principal, though undisclosed, is liable for the purchase-money, because the property vests at once in law in the principal, and creates the legal liability for goods sold and delivered, or bargained and sold; see *Pentz* v. *Stanton*; *Beebee* v. *Robert*, 12 Wendell, 413, 417; *Ep. Church of Macon* v. *Wiley*, 2 Hill's Chancery, 584, 590; *Bacon & Raven* v. *Sondley*, 3 Strobhart, 542; *Violett* v. *Powell's Ad'r.* 10 B. Monroe, 347; *Carney* v. *Dennison & Gore*, 15 Vermont, 400; *Upton et al.* v. *Gray*, 2 Greenleaf, 373; *Taber* v. *Cannon and others*, 8 Metcalf, 456, 459; *Clealand* v. *Walker*, 11 Alabama, 1059, 1064; *Downer & Co.* v. *Morrison*, 2 Grattan, 237. And the doctrine, that a principal is not bound where credit has been given exclusively to the agent, has no application to a case of this kind where the principal is not known; and to determine an election in favour of the agent's liability, and in discharge of the principal interested in the consideration, it is not enough that the other gives credit to the agent, as, by taking his note, knowing that he acts as agent, and having the means of knowledge who the principal is, if he has not actual knowledge: *Pentz* v. *Stanton*; *Raymond and another* v. *Crown and Eagle Mills*, 2 Metcalf, 319, 324; *Paige* v. *Stone and another*, 10 Id. 161, 169; *Bate* v. *Burr*, 4 Harrington, 130; *Ahrens* v. *Cobb*, 9 Humphreys, 643; but after the principal is discovered, the other may by his acts, and perhaps by his laches, discharge the principal, and have no recourse but against the agent, as where he sues the agent and recovers judgment; *Jones* v. *The Ætna Insurance Company*, 14 Connecticut, 502, 508; but suing both would not discharge the principal; *Raymond and another* v. *Crown & Eagle Mills*, 2 Metcalf, 319, 326. And this liability of an undisclosed principal, is not confined to sales, but exists in all cases of considerations executed for the benefit of the principal, from which a liability in general assumpsit is raised by the law; as in case of money received by, paid for, or lent to, an agent, in a matter directly concerning the business of the principal, and enuring to his use; see *Tiernan* v. *Andrews*, 4 Washington, 474: S. C., Id. 565; *The Bank of Rochester* v. *Monteath*, 1 Denio, 402, 406; *Comly* v. *M'Bride*, 4 Wharton, 526; *The Merchants' Bank of Macon* v. *The Central Bank of Georgia*, 1 Kelly, 418, 428. This was carried very far in the case of *Insurance Company of Pennsylvania* v. *Smith*, 3 Wharton, 521; it is not

quite evident how a contract could be implied in that case, and the decision in *Insurance Company* v. *Smith*, 6 Harris & Johnson, 166, 171, is more satisfactory. The cases of *Allen* v. *Coit*, 6 Hill, 318, and *Rogers* v. *Coit*, Id. 322, which confirm the principles laid down in *Pentz* v. *Stanton*, illustrate very satisfactorily the ground on which there is a right of recourse against the principal, viz., his interest in the consideration. In the former, the defendant's agent, having authority, drew a bill in his own name, on some of the defendants, to the plaintiff's order, to raise money for the defendants; it was accepted, and discounted at a bank, and the proceeds applied by the agent to the defendants' use; the plaintiff was obliged to pay the note at maturity, and then brought this action against the defendants: it was held that the plaintiff could not recover against the defendants on the bill, because all their names were not upon it, but could recover for money paid to their use. In the latter, the same agent had drawn on the same drawee, to the order of B., to pay him for stock sold by him to the defendants: and after the bills were accepted, B. endorsed and delivered them to the plaintiff: and it was decided, that the defendants were not only not liable on the bills, not being parties to them, but were not liable at all to the plaintiff, from the want of privity; though they might have been liable to B. in an action for the stock sold.

The question of the liability of a foreign principal, upon contracts made by his agent or correspondent, has in some instances been greatly misunderstood. There is certainly no such rule in American law, as that agents or factors, acting for merchants resident in a foreign country, are held personally responsible upon all contracts made by them for their employers. On an executory contract made by an agent for a foreign principal, where the principal is disclosed, the agent is not personally liable, and the liabilities in all respects appear to be the same as in the case of a domestic principal; *Joyce* v. *Sims*, 1 Yeates, 409; *Bradford et al.* v. *Eastburn*, 2 Washington, C. C. 219; *Kirkpatrick* v. *Stainer*, 22 Wendell, 244, in the last of which the whole doctrine is excluded from American law. But what is the extent of the principle in England? It is difficult to determine, because the whole matter rests on dicta, and there is no decision establishing or illustrating it. The *dicta*, however, do not carry it beyond the case of a purchase by a merchant in England for his foreign correspondent, in which case credit is usually understood to be given to the purchasing factor, that is, the circumstance that the person ordering the goods is a foreigner, is evidence to the jury that credit was given to the factor, and if that fact be found, he is liable. There may be some cases in England, in which an established legal usage exists to give credit to the factor in England, alone; thus, in *Longbottom* v. *Rodyers*, 2 M. & Gr. 427, 429, Tindal, C. J., remarked, that in the case of *West India estate*, "credit is *always* given by the person who furnishes the supplies, to the merchant in England, and not to the planter abroad." In this country, if the foreign principal is disclosed, and credit given to the domestic agent exclusively, he is certainly liable; *M'Kenzie* v. *Nevius*, 22 Maine, 138, 143, 144; *Merrick's Estate*, 5 Watts & Sergeant, 10, 14: and perhaps an intent to give such exclusive credit, may be inferred by the custom of trade, from the principal's being known to reside in a foreign country; *Taintor* v. *Prendergast*, 3 Hill's N. Y. 72, 73; but except as evidence of such an intent, it is to be doubted whether the circumstance of the principal residing abroad has any operation, either in England or in this country, and to what extent it is evidence of such an intention is altogether doubtful.

If money is paid to an agent, for his principal, and becomes recoverable

back on account of mistake or failure of consideration, the agent himself is not liable to a suit if he has paid it over to his principal, *bonâ fide*, before notice; *Gray* v. *Otis*, 11 Vermont, 628; *Waddell* v. *Mordecai*, Riley, 17, 23; *Pool* v. *Adkisson et al.*, 1 Dana, 110, 117; and the settling and closing of an account between the agent and principal, and in it allowing the principal a credit for the sum, or allowing it to the agent for a demand due to him, is equivalent to a payment over; *Mowatt* v. *McClelan*, 1 Wendell, 173, 178; *State Bank* v. *Robards*, 2 Devereux & Battle's Law, 111; but the agent is liable to suit, if he has not paid the money over; *Wharton and another* v. *Hudson*, 3 Rawle, 390; *Law* v. *Nunn*, 3 Kelly, 90; or if he has paid it after notice; *Hearsey* v. *Pruyn*, 7 Johnson, 179; *Parkerson* v. *Dinkins*, Rice, 185; *Griffith* v. *Johnson's Adm'r*, 2 Harrington, 177; *Houston* v. *Frazier*, 8 Alabama, 82, 85. And the agent is always personally liable, if he has obtained the money, wrongfully, fraudulently, or by compulsion; *Frye* v. *Lockwood*, 4 Cowen, 454; *Ripley* v. *Gelston*, 9 Johnson, 201, 209; *The Bank of the United States* v. *The Bank of Washington*, 6 Peters, 8, 19; *Seidel* v. *Peckworth & wife*, 10 Sergeant & Rawle, 442. With regard to the right to recover back money, wrongfully exacted by public agents, see *Elliott* v. *Swartwout*, 10 Peters, 138; *Bend* v. *Hoyt*, 13 Id. 263; *Cary* v. *Curtis*, 3 Howard's Supreme Court, 236.

2. With regard to the RIGHT OF ACTION on contracts made by an agent, the general rule of law prevails, that the person to sue is he who has the legal interest in the subject of the action: See *Sailly* v. *Cleveland*, 10 Wendell, 156, 159; *Spencer* v. *Field*, Id. 87, 91; *Treat* v. *Stanton*, 14 Connecticut, 446, 451; *Manlove* v. *McHatton et al.*, 4 Scammon, 95; *Fortune* v. *Brazier*, 10 Alabama, 791. And, in assumpsit, this gives rise to a distinction between express and implied promises, founded on the difference in the ground of the legal right of action. On express contracts, the suit should be brought in the name of the person who, upon the legal construction of the agreement, is the party principal in the contract; on implied promises, suit must be brought by the person interested in the consideration from which the promise is implied.

Of express contracts, the principal instances are written agreements: and of these, two cases may be noted; one, where the names of the principal and agent, both are disclosed in the agreement; the other, where only the agent's name appears. (1) If, upon the face of the agreement, the agent be the party with whom the contract is made, and the beneficial interest appear to be in the principal, that is, if there be an express engagement to or with the agent, and obviously for the benefit of the principal, either party may sue; the agent as having the legal interest, (see *Van Staphorst et al.* v. *Pearce*, 4 Massachusetts, 258, 263, and *Underhill et al.* v. *Gibson et al.*, 2 New Hampshire, 352, 357,) and the principal as having the beneficial interest; but if the contract be clearly made with the principal alone, though through the agent, the principal alone is entitled to sue; (see *Tharp* v. *Farquar*, 6 B. Monroe, 3, and other cases there cited, of sealed instruments.) The cases most frequent in the books, are of corporations, and unincorporated associations; and they show a distinction of this kind. If a promissory note or written agreement be made to one *by name*, described as the treasurer, committee, cashier, or agent, of either a corporation or an unincorporated association, here the agent, being a party to the contract, may sue upon it in his own name, especially where he has *some* beneficial interest in the contract; *Clap* v. *Day*, 2 Greenleaf, 305; *Potter* v. *Yale College*, 8 Connecticut, 52, 60; *Fisher* v. *Ellis*, 3 Pickering, 322; *Fairfield* v. *Adams*, 16 Id. 381; *Porter* v. *Neker-*

vis, 4 Randolph, 359; *McHenry* v. *Ridgely*, 2 Scammon, 309; *McConnel* v. *Thomas*, Id. 313; *Binney et al.* v. *Plumley*, 5 Vermont, 500; *Buffum* v. *Chadwick*, 8 Massachusetts, 103; and, in such a case, the corporation, or association, where it is, upon the face of the instrument, obviously the party interested in the contract, and is in law capable of suing, may also sue in its or their own name; *Trustees &c.* v. *Parks et al.*, 1 Fairfield, 441; *Garland* v. *Reynolds*, 20 Maine, 45: but where the engagement is to the treasurer or cashier, &c., of such a corporation or unincorporated association, as the official representative of it, and not to him *by name*, the principal alone can sue, and the agent cannot; for it is obvious that the engagement is made directly with the principal, and though it is made through the agent, he is not a party to the contract, and has no interest in it legal or beneficial; *Commercial Bank* v. *French*, 21 Pickering, 486; *Ewing* v. *Medlock*, 5 Porter, 82; *Alston* v. *Heartman, Treasurer, &c.*, 2 Alabama, 699; *Harper* v. *Ragan*, 2 Blackford, 39; *Crawford* v. *Dean*, 6 Id. 181; *Vt. Central R. R. Co.* v. *Cloyes*, 21 Vermont, 31, 37; *Pigott* v. *Thompson*, 3 Bosanquet & Puller, 147. See *Bayley* v. *The Onondaga County Mutual Insurance Company*, 6 Hill, 476. There are cases, also, in which, though there be an express promise to the agent by name, he is yet not a party to the *contract*, the consideration and the liability being direct between the principal and the other party, and not through the interventiou of the agent; as, where an express promise is made to the agent in consideration of a legal liability to the principal, or the promise is to the agent in a public capacity, as an officer of the state, the official character appearing on the face of the contract; here there is no consideration for the promise to the agent, and the principal, alone, must sue; *Gilmore* v. *Pope*, 5 Massachusetts, 491, (which went upon the ground that a liability directly to the corporation which they by statute were capable of enforcing, was created by the fact of subscription); *Irish* v. *Webster et al.*, 5 Greenleaf, 171; *Commonwealth* v. *Wood*, 1 J. J. Marshall, 310, 313. (2) The other case is where the agent's name alone appears in the written agreement. In the case of a legal instrument, which vests a right of action by delivery, and is declared on as a cause of action in itself, there seems to be no doubt, that the promisee alone can sue; and that the principal, claiming not as endorsee, but only as principal, cannot. Thus where a note was made payable to "S. J. Esq. Cashier, or order," it was held that the bank, of which he was cashier, and for which as principal the contract was made, could not sue upon the note, without his endorsement. *Bank of U. S.* v. *Lyman et al.*, 20 Vermont, 668. In the case of mere written agreements, the agent to whom the promise is made, may sue in his own name, *Harp* v. *Osgood*, 2 Hill's N. Y. 217: but as to the point, whether the principal may sue in his own name, upon such an agreement, by proving that the contract was made for his benefit by his agent, there may be some diversity of practice, but upon principle, it seems to be clear, that he cannot. The case of the *United States* v. *Parmele*, illustrates this in a very satisfactory manner. In *Newcomb* v. *Clark*, 1 Denio, 227, which was a suit by Clark against Newcomb, one H. Peters proved, that he was the agent of Clark for letting a house; that one Ward applied to him to rent it, but that the witness refused to let him have it, unless he procured security, whereupon he brought a letter signed by the defendant in these words; "Mr. H. Peters, Dear sir, I hereby agree to pay you the rent of the part of the house hired of you by Mr. J. Ward, &c.:" but the Court were of opinion that the suit could not be maintained in the name of Clark, but must be brought by Peters: "The rule in regard to parties to actions," they said, "seems to be, that every action on an express

contract must be brought in the name of the person to whom the engagement violated was originally made, unless it is transferable, as a negotiable note, &c. In the present case, the promise or agreement is expressly made with Peters; Clark's name does not appear in the writing. It is not competent to contradict or amend the agreement by parol proof, by substituting Clark's name as the promisee in the place of Peters." In *Hunter* v. *Humble*, 12 Q. B. 310, the Court of Queen's Bench decided that a charter party made with one who on the instrument called himself "owner" could not be sued upon by the person who really was his principal. In *Hubbert* v. *Borden*, 6 Wharton, 79, 92, it appears to be laid down by the learned judge who delivered the opinion of the court, that in suing on a written agreement made to the agent in his own name, parol evidence is admissible to prove, that the contract was made by the agent for the benefit of another as principal, so as to give a right of action to the latter in his own name. It is apprehended, however, that the views of the learned judge in that case are not sound, and are to a great extent extra-judicial, being not called for by the case before him, which was put on the proper ground by the judge below, pp. 88, 89, who showed that the action was not brought on the written agreement, but that there was evidence of a contract between the principal and the third party, made through the former's agent, and that the written paper was relied on only as a statement of the terms of the contract. The distinction is supposed to be this: if it be proved that the principal was disclosed to the third party, and that there was an intention to contract with him, a written agreement in the names of the agent and third party may be given in evidence to show the terms of that contract: (see *Bateman* v. *Phillips*, 15 East, 272; *Garrett* v. *Handley*, 4 B. & C. 664; *Higgins* v. *Senior*, 8 M. & W. 834, 844:) but where no other evidence of an agreement is offered but a contract in the name of the agent, and it does not appear, that the existence of a principal was known to the other party, it is not competent to the principal, merely by showing that express contract in evidence, and proving that he was the principal of one of the parties, to recover in his own name. In truth, in such a case, the person interested is not the principal in the *express contract* which is relied on. And this is supposed to depend, not on the rule which forbids parol evidence to be used in contradiction of a written agreement, but upon the law of express contracts.

On an *implied* promise, the action is properly brought in the name of the person interested in the consideration, or in the property, from which the right of action arises. In case of a purchase or exchange of goods, by an agent, even if the principal be not disclosed, or the bill of sale be made to the agent himself, the property, immediately upon the execution of the contract, vests in the principal; *Lowry & Bruce* v. *Beckner*, 5 B. Monroe, 41, 44; *Waldo* v. *Peck*, 7 Vermont, 434; and the right of action upon an implied warranty, or on fraudulent representations made to the agent, is in the principal, for, the damage, which grounds the action, follows the property; *Beebee* v. *Robert*, 12 Wendell, 413, 417; *White* v. *Owen*, 12 Vermont, 361; *House* v. *Fort*, 4 Blackford, 294. In case of a sale by an agent, or other contract executed by him, whereby a consideration is delivered to the other party, which raises an implied promise of compensation, there are rights of action, according to the circumstances, in both the principal and agent. The rights of suit in the principal appear to be these. If a sale of the principal's property is made by an agent, the principal may sue on the contract of sale, for the purchase-money, in his own name, grounding his claim upon the implied obligation to pay for a consideration received: and this, although his name was not disclosed, or although a promissory note were given to the agent in

his own name; *Edmond* v. *Caldwell*, 15 Maine, 340; *Pitts* v. *Mower*, 18 Id. 361; *Higdon* v. *Thomas*, 1 Harris & Gill, 139, 153; *Girard* v. *Taggart*, 5 Sergeant & Rawle, 19; *Lapham* v. *Green*, 9 Vermont, 407, 409; *Edwards* v. *Golding et al*, 20 Id. 40: although the principal's rights are subject to any set-offs lawfully existing against the agent who has been allowed to deal in his own name as principal: See *Fish* v. *Kempton*, 7 C. B. 687. And the right of action in the name of an undiscovered principal is not confined to the contract of sale, but extends to every case of an executed consideration vested in the third party, and thereby raising an implied assumpsit; as, money paid or lent, work and labour done, &c. Thus, in *Tutt* v. *Brown*, 5 Littell, 1, it was held, that where an agent had agreed to carry goods in the principal's wagon, not disclosing his principal, and had carried them accordingly, the principal might sue for the compensation, subject to set-offs against the agent; the right of property drawing the right of action to it. So, in *Taintor* v. *Prendergast*, 3 Hill's N. Y. 72, 73, where money had been advanced by the plaintiff's agent, without disclosing his principal, to the defendant in part payment of articles agreed to be delivered to the agent, and the defendant failed to deliver them, it was decided that the principal might sue in his own name to recover back the money. If property which an agent is transmitting for his principal, under an agreement made between the agent and the carrier, is lost, the principal may sue the carrier; *N. J. Steam N. Co.* v. *Merchants' Bank*, 6 Howard's S. C. 344, 380. If upon a sale, a note has been given to the factor or agent, in his own name, the beneficial interest is in the principal, who has a right to the possession of it, and to collect it; but, upon the note he must sue in the promisee's name, unless he claim by endorsement; though upon the contract of sale, he might sue in his own name; *West Boylston Man. Co.* v. *Searle*, 15 Pickering, 225, 230. The rights of suit in the agent appear to be these. If he has sold in his own name, without disclosing a principal, he may sue in his own name on the implied contract of sale, unless controlled by the principal; see *Atcherson's Adm'r* v. *Talbot*, 5 Dana, 324, 326; *Lapham* v. *Green*, 9 Vermont, 407, 409; *Whitehead* v. *Potter*, 4 Iredell's Law, 257, 263: and if he have possession of the goods which he sells, as a factor or auctioneer, he may sue in his own name on the implied contract of sale, even where the property is known to be the principal's, unless the principal dissent; *Williams* v. *Millington*, 1 H. Blackstone, 81; *Blum* v. *Torre*, Riley, 153, S. C. 3 Hill's So. Car. 155; *Towles* v. *Turner*, 3 Hill's So. Car. 178, 180; *Adm'r of Conyers* v. *Magrath*, 4 M'Cord, 392; *Depeau & Co.* v. *Hyams*, 2 Id. 146. The reason in the latter case, appears to be, that such bailee has a possessory interest and a liability over; and as in case of an injury or amotion of the goods, he would be allowed to recover the whole damage in trespass, trover, or case, so in an action of implied assumpsit, as he has some interest, he is allowed to recover the whole damages resulting from the breach of the contract; for implied assumpsit, in its legal nature and gravamen, retains some of the properties of an action on the case. It is believed, that it is not the lien of the agent as between himself and the principal, that gives this right of action, but the possession and qualified property of the agent as bailee. Except in these cases, namely, where there is an express promise to the agent, or where he has contracted in his own name, apparently as principal, or has sold as bailee of the goods, it is supposed that the agent cannot sue in his own name, but that the suit must be brought by the principal. In *Branch Bank at Montgomery* v. *Sydnor, use, &c.*, 7 Alabama, 308, it was decided that where a note payable to one as agent, had been entrusted by the agent to an attorney for collection, who had fraudulently transferred

it to a bank, and the bank had received the money due upon it, the action against the bank for money had and received, could not be brought by the agent, but must be brought by the principal, the implied promise being raised by the law to him.

Of the liability of a principal for injuries done to others by his agent, in the course of his duty as agent.—Respondeat Superior.

STEPHEN WILSON *v.* THOMAS PEVERLY.

In the Supreme Court of Judicature of New Hampshire.

MAY TERM, 1823.

[REPORTED, 2 NEW HAMPSHIRE, 548–550.]

When a servant acts under the special orders of his master, the master is not liable for his negligence in doing business not ordered.

THIS was trespass on the case, for rashly setting a fire on land of the defendant, which fire was so negligently guarded, that it spread to land of the plaintiff, and there caused much damage.

At the trial here in November, A. D. 1822, on the general issue, it appeared in evidence, that a fire was set upon the land of the defendant by his orders, and the charge of it given to a hired labourer; that the defendant then left home on business, directing this labourer, after setting the above fire, to employ himself in harrowing other land of the defendant in the same neighbourhood; that in the course of the day, fire communicated from the farm of the defendant, to that of the plaintiff, and caused great damage; and as to the other facts in the case, about which the evidence was contradictory, the jury found specially that the damages amounted to $164.17; that they were not caused by any neglect in setting or watching the fire first kindled, but were produced by the labourer of the defendant, who after his master's absence, and before he commenced harrowing, undertook to carry brands from the first fire into the ploughing field to consume some piles of wood and brush, which were there collected, and on his way dropped some coals, from which all the subsequent injury arose; that carrying the fire in this manner from one field to the other was under all the circumstances dangerous, and was not in conformity to any express directions of the

master, and that this labourer was accustomed to work under the particular directions of the defendant, and could conveniently have harrowed without first burning the piles of wood, though to burn them first is the usual course of good husbandry.

Upon this finding, a general verdict was taken for the defendant, subject to the opinion of the court on the whole case.

Stuart and *Sullivan*, counsel for the plaintiff.

Peverly and *Bell*, for the defendant.

WOODBURY, J. When a servant causes an injury to a third person, the master is liable for it, if he directed the injury to be done. This principle extends to all cases, where wrongs are committed by the express orders of others, whether the particular relation of master and servant exist between them or not.

In the present case the jury find that the master did not order the fire to be kindled in the second field; and that such order was not implied in directing him to harrow in that field seems inferrible from the fact that, though the piles of wood are usually burned before harrowing, yet the harrowing could in this case have been conveniently performed first; and to burn the piles at that time would have been dangerous. The servant also was a labourer under the daily directions of the master, and hence had less discretion to presume or imply orders, which were not actually expressed.

The next ground on which the master is liable for wrongs of his servant is, that the wrongs are performed by the servant in the negligent and unskilful execution of business specially entrusted to the servant. 6 D. & E. 125. 411.—5 D. & E. 648.—2 Hen. Bl. 442.—1 Salk. 441.—Burr. 562.—1 Bos. & Pull. 404.—4 Taunt. 649.—Reeve's Dom. Re. 356.

This rests on the ground, that the master should not do an act himself, or cause it to be done with such negligence or want of skill as to injure third persons.

But it will at once be perceived, that this principle does not reach a wrong done by the servant, while not engaged in business of his master, such as wanton and wilful trespasses on the person or property of others. 1 East, 106, M'Manus vs. Cricket. 8 D. & E. 533. 17 Mass. Rep. 509, Foster et al. vs. Essex Bank. 5 Wheaton, 326.

Nor does it reach wrongs caused by carelessness in the performance of an act, not directed by the master; as a piece of business of some third person, or of the servant himself, or of the master, but which the master did not either expressly or impliedly direct him to perform. 1

East, 106, supra. Noy's Max. ch. 44. 2 Rolle Ab. 553. 4 Barn. & Ald. 590, Croft et al. vs. Alison.

When a general agent is employed, then all acts within the scope of his agency are the master's acts; but when a labourer works under the special orders of the master, the master is responsible only for his skill and care in executing those orders. 1 Bos. & Pull. 404, Bust vs. Stierman. 3 Wils. 317. 1 Ld. Ray. 264, Tuberville vs. Stump.

Thus a piece of labour might be very properly and safely performed at one time and not at another, as in this case the setting of a fire in the neighbourhood of much combustible matter. And if the master, when the fire would be highly dangerous in such a place, forbore to direct it to be kindled, and employed his servant in other business, it would be unreasonable to make him liable, if the servant before attending to that business, went in his own discretion and kindled the fire to the damage of third persons.

The master, *quod hoc*, is not acting in person or through the servant; neither *per se*, nor *per aliud;* and the doctrine of *respondea superior* does not apply to such an act, it being the sole act of the servant.

It is a general rule, that a principal is civilly liable for the neglect, fraud, deceit or other wrongful act of his agent in the course of his employment, though the principal did not authorize the specific act; but the liability is only for acts committed in the course of the agent's employment; *Locke* v. *Stearns & another*, 1 Metcalf, 560; *Parkerson* v. *Wightman*, 4 Strobhart, 363, 367. This proceeds upon the ground that the act of the agent within his employment, is the act of the principal; or, that, in law, the principal is considered as doing the business by, or through, the agent. So, wherever the relation of master and servant exists, the master is liable for the negligent or wrongful conduct of his servant while acting in his employment. The owner of a stage or boat is liable for injuries occasioned to passengers or strangers, by the negligence of his driver, master or pilot; *Johnson & Co.* v. *Bryan*, 1 B. Monroe, 292; *Johnson & Co.* v. *Small*, 5 Id. 25; *McFarland, &c.* v. *McKnight*, 6 Id. 500, 506; *Shaw* v. *Reed*, 9 Watts & Sergeant, 72; *Smith* v. *Berwick & another*, 12 Robinson, 20, 27; *McDaniel* v. *Emanuel*, 2 Richardson, 455, 459; *Yates et al.* v. *Brown et al.*, 8 Pickering, 23; *Penn. Delaware & Maryland Steam Nav. Co.* v. *Hungerford*, 6 Gill & Johnson, 292; *Martin* v. *Temperley*, 4 Q. B. 298; *Huzzey* v. *Field*, 2 C. M. & R. 432, 440; but the superior or principal is not liable where there is a departure from his business, as is shown in the principal case; and therefore is not liable for acts of wilful misconduct on the part of a servant or agent, for that is a departure from the employment; *Brown* v. *Purviance*, 2 Harris & Gill, 317; *Wright* v. *Wilcox*, 19 Wendell, 343; *Richmond Turnpike Co.* v. *Vanderbilt*, 1 Hill's N. Y., 480; *McGary* v.

The City of Lafayette, 12 Robinson, 668, 676; *Legget* v. *Simmons*, 7 Smedes & Marshall, 348. This liability of a principal or master for the negligence of his agent or servant, is to strangers; a master or principal is not liable to one servant or agent, for injuries occasioned to him by the negligence of another servant or agent, employed in the same service or business; *Priestley* v. *Fowler*, 3 Meeson & Welsby, 1; *Murray* v. *S. C. Rail Road Company*, 1 McMullan, 385; *McDaniel* v. *Emanuel*, 2 Richardson, 455, 458; *Farwell* v. *Boston & Worcester Rail Road Corporation*, 4 Metcalf, 49; *Coon* v. *The Utica & Syracuse R. R. Co.* 6 Barbour's S. Ct. 231; *Hayes* v. *The Western Railroad Corporation*, 3 Cushing, 270; but for fraudulent neglect, in the appointment or choice of the person whose negligence occasioned the injury, the superior might be made liable upon a declaration specially framed. In one of the Southern States, however, it has been decided, that the doctrine of the non-liability of a principal to one agent for the acts of another agent, must be restricted to the case of free white agents, and cannot extend to slaves; the ground of the doctrine being, it is said, that each participant in a business is bound to see that all others employed in the same service do their duty with the utmost care and vigilance, and that the want of recourse against the principal, will not only make each agent more careful himself, but will prompt him to stimulate others to like diligence; which considerations are inapplicable to slaves, who can neither interfere with the conduct of others, nor be responsible for their own; *Scudder* v. *Woodbridge*, 1 Kelly, 195. For acts of omission and neglect, an agent is not personally liable, but only the principal; *Conwell* v. *Voorhees*, 13 Ohio, 523, 542; *Denny* v. *The Manhattan Company*, 2 Denio, 116, 118; 5 Id. 639; *Colvin* v. *Holbrook*, 2 Comstock, 126: because, the duty is the principal's, and not the agent's; but for substantive acts of tort, or tortious negligence, there is no doubt that an agent is personally liable; *McFarland, &c.* v. *McKnight*, 6 B. Monroe, 500, 506. An intermediate agent, between the principal and the direct agent, is not liable for tortious negligence; *Brown* v. *Lent*, 20 Vermont, 529.

But the maxim, *respondeat superior*, is applicable only where the relation of principal and agent, or of master and servant, exists, and not where the relation is only that of contractor; that is to say, if a man employs another to do a work for him, or for his benefit, so that the person employed is not his agent or servant, but merely a contractor with him, he is not responsible for his acts or those of his servants: but the application of this distinction has been found to be a matter of great nicety; *Quarman* v. *Burnett*, 6 Meeson & Welsby, 499; *Rapson* v. *Cubitt*, 9 Id. 710; *Milligan* v. *Wedge*, 12 Adolphus & Ellis, 737. It appears, however, to be a rule, that where property remains in the possession of the owner, those employed about it are, in law, with regard to third persons, his servants, whatever contracts may be made among the parties, so long as those contracts leave the owner in the legal possession and control; and the owner is responsible for injuries occasioned by the condition in which the property is, or by the acts of any of those employed upon it; and this is the ground of the distinction betweeu land or fixed property, which remains in the legal possession of the owner, and mere personal contracts, or personal property, delivered into the possession of the contractor as bailee; but it is equally applicable to personal property, such as ships, continuing in the legal possession of the owner: *Bush* v. *Steinman*, 1 Bosanquet & Puller, 404; *Matthews* v. *West London Waterworks Company*, 3 Campbell, 403; *Stone* v. *Cartwright*, 6 Term, 411; *Burgess* v. *Gray*, 1 Common Bench, 578; *Randleson* v. *Murray*, 8 Adolphus & Ellis, 109;

Fenton v. *The City of Dublin Steam Packet Company*, Id. 835; *Stone* v. *Codman*, 15 Pickering, 297, 299; *Lowell* v. *Boston & Lowell Rail Road Corporation*, 23 Id. 24, 31; *The Mayor, &c., of New York* v. *Bailey*, 2 Denio, 434, 444; *Gardner* v. *Heartt*, 3 Barbour, 166, 168; *Wiswall* v. *Brinson*, 10 Iredell, 554. There is, however, so much perplexity in these cases as to the ground of the distinction on which they proceed, that the foregoing principle is stated with some hesitation. The liability of the owner of land for injuries resulting from the acts of those employed by one with whom he contracts for something to be done upon it, certainly goes beyond the case of a mere nuisance left on the land, as is shown by *Randleson* v. *Murray*, and *Lowell* v. *B. and L. R. R. Corporation*. But the subject is confused. If the owner of land has devested himself of the legal possession, by a lease, he is not responsible for the acts of injury done or occasioned by his lessee; *Fiske* v. *Framingham Man. Co.*, 14 Pickering, 491; *Rich* v. *Basterfield*, 4 Common Bench, 782.

With regard to the responsibility of a public officer for the misconduct or negligence of those employed by or under him, the distinction apparently turns upon the question whether the persons employed are his servants, appointed voluntarily and privately, and paid by him and responsible to him, or whether they are his official subordinates, nominated perhaps by him, but officers of the government; in other words, whether the situation of the inferior is a public office, or a private service. In the former case, the official superior is not liable for the inferior's acts; in the latter he is. Accordingly, the post-master-general is not responsible for losses arising from the negligence of his deputies, nor a deputy post-master for the negligence of official assistants appointed by him; for, one is not the servant of the other, but all are the officers of the government; *Schroyer* v. *Lynch*, 8 Watts, 453; *Dunlop* v. *Monroe*, 7 Cranch, 242, 269; *Wiggins* v. *Hathaway*, 6 Barbour's S. Ct. 632; *Boody et al.* v. *The U. S.*, 1 Woodbury & Minot, 151, 170; following *Lane* v. *Cotton*, 1 Ld. Raymond, 646; *Whitfield* v. *Lord Le Despencer*, Cowper, 754. Apparently on the same ground, a mail contractor is not liable to the owner of a letter for a loss occasioned by the carelessness of the drivers in carrying the mail; *Conwell* v. *Voorhees*, 13 Ohio, 523, 541; for though this exemption is put by the court on the ground that the principal contract is with the government and not with the owner of the letter, yet probably the true ground of the decision (if it be correct) is, that stated by the counsel at p. 529, that the driver holds an official situation, known to and recognised by, the law, and that he is really in the employment of the post-office department. In fact, the liability of a public officer is only for his own misfeasance or neglect, and he is not liable for losses occasioned otherwise; a public treasurer is not liable for money stolen from his office without any imputation of negligence or default in him: *Supervisors of Albany Co.* v. *Dorr, &c.*, 25 Wendell, 440. But though the neglect of official subordinates is not in law the neglect of their superior, yet the latter may be liable for his own neglect in not properly superintending the discharge of their duties, in his office, and perhaps for his fraudulent neglect in appointing them; but the declaration must be especially framed to refer to this kind of negligence; *Dunlop* v. *Monroe*, 7 Cranch, 242, 269; *Bishop* v. *Williamson*, 2 Fairfield, 495, 506. On the other hand, where the inferior holds not an office known to the law, but his appointment is private, and discretionary with the officer, the principal is responsible for his acts; as, a sheriff for the negligence of his deputies, or a superintendent of repairs on a public

canal for negligenee of workmen employed by him; *Shepherd* v. *Lincoln*, 17 Wendell, 250.

With regard to the liability of a public municipal eorporation for the acts of its officers, the distinetion is between an exereise of those legislative powers which it holds for public purposes, and as a part of the government of the country, and those private franehises which belong to it as a creature of the law: within the sphere of the former, it enjoys the exemption of government, from responsibility for its own acts, and for the acts of those who are independent eorporate officers deriving their rights and duties from the sovereign power; *White* v. *City Council*, 2 Hill's So. Car. 571; *Martin* v. *Mayor, &c., of Brooklyn*, 1 Hill's N. Y. 545, 550; *The Mayor, &c., of the city of New York* v. *Furze*, 3 Id. 612, 618; but in regard to the latter, it is responsible for the acts of those who are in law its agents, though they may be appointed not by itself; *Bailey* v. *The Mayor, &c., of the city of New York*, 3 Hill's N. Y. 532; S. C. on error, 2 Denio, 434, 450; *Thayer* v. *Boston*, 18 Pickering, 511; *Rhodes* v. *Cleveland*, 10 Ohio, 159; see *M' Combs* v. *Town Council of Akron*, 15 Ohio, 474; S. C. 18 Id. 229; *Wilson* v. *The Mayor, &c., of New York*, 1 Denio, 566, 601; *The Rochester White Lead Co.*, v. *The City of Rochester*, 3 Comstoek, 464; *Meares* v. *Com'rs of Wilmington*, 9 Iredell, 73; *Mayor & Aldermen of Memphis* v. *Lasser*, 9 Humphreys, 757. But the application of this distinetion is confessedly nice.

A factor is authorized to sell on credit. Of the circumstances by which a factor may become liable upon sales.

ELIJAH GOODENOW versus JOHN E. TYLER.

In the Supreme Judicial Court of Massachusetts.

SEPTEMBER TERM, 1810.

[REPORTED, 7 MASSACHUSETTS, 36–47.]

If a consignee sell the goods of his principal, upon such credit as is usual at the place of sale, and take the purchaser's negotiable note, payable to himself or order, he does not thereby become personally liable to his principal, although the purchaser should fail before the note is due, and nothing should be paid by him.

[In this case, the defendant, a commission merchant at Boston, sold a pipe of gin, as factor of the plaintiff, and took the purchaser's note payable to himself, or order, at ninety days. The purchaser, before the time of payment, failed, and no dividend was paid to his creditors. No

particular orders had been given by the plaintiff, as to selling on credit. A custom was proved at Boston, and at the defendant's store, for factors to sell on credit, at the principal's risk. In this action, of assumpsit by the principal against the factor, a verdict for the plaintiff was directed, because the factor had received in payment the purchaser's negotiable note. The reporter's statement is omitted.]

PARKER, J. (*a*) The plaintiff would insist that a factor, under the circumstances of this case, had no authority to trust the purchaser; and that having so done, he became immediately chargeable to the principal for the price. But the law merchant clearly contradicts this principle, it being well settled that a factor may sell upon credit, without taking upon himself the debt; unless he is restricted from so doing by the orders of his principal. And this principle is reasonable, and for the benefit of those who send their goods to market: for otherwise they would be frequently sold at a sacrifice, or remain unsold at the expense of the owner.

But even if this were not settled law, it is very clear that the usage of the market where the goods are sold, would bind the owner, for he is presumed to be conusant of that usage; and if he is silent in his directions to the factor as to the terms of the sale, he is considered as intending to be governed by the usage. Then if the factor had authority in this case to sell on credit at the risk of his principal, there being no complaint of negligence, carelessness, or want of skill in making his bargain, either of which might have made him liable to the owner, notwithstanding his general authority; the question arises whether the mode in which the defendant gave the credit in this case, has fixed the debt upon him. A promissory negotiable note, payable to himself, was taken; and this is the point upon which the judge at the trial, thought the liability of the defendant rested. But I do not see why this should change the nature of the case.

The relation between the principal and factor remains the same, as if the factor had taken a note not negotiable; or had charged the article sold in his book, and had made the purchaser debtor to himself; which he certainly might have done, keeping an account at the same time between himself and the principal. That the note was negotiable, was favourable to the principal; because it could easily be assigned by the factor to him. It is considered by the law as taken in trust for the

(*a*) The principle stated in this case, as to the receipt of a negotiable note being payment, is peculiar to the states of Massachusetts and Maine, in this country; and even there, has been much modified by later decisions. See American note to Cumber v. Wane, 1 Smith's Leading Cases, 3d American edition.

principal; and if the factor should refuse to assign it on demand, doubtless he would be liable in an action by the principal.

It is said that a negotiable note, given for the amount of an account for goods sold, discharges the original contract. This is true, as settled in this commonwealth, between the vendor and vendee: but it surely does not follow, that because the factor has changed an account on his book into the more simple and convenient evidence of debt, a note of hand, that for this cause only, he has burthened himself with a debt, for which he received no consideration.

I am therefore of opinion that there ought to be a new trial.

SEWALL, J. If I was satisfied that, upon established principles, a factor, who sells the goods of his principal upon credit, and receives a promissory note for the amount of the sales, payable to himself, and negotiable, became thereby immediately accountable, as if he had sold for money, I should think a new trial ought not to be granted. But I am not satisfied that this is the law. I think the rule in this respect must depend upon the particular usages of commission merchants, and that the law upon this subject, as to the authority of the factor, and the extent of his liability, is referable to known and established usages; where the parties rely altogether upon the general relation and implied duty of a merchant and factor, no directions or agreement having been expressed between them, or proved in the case.

I think usage is competent evidence in a case of this nature, to show the implied intention and understanding of the parties. As evidence to the effect of proving a usage of selling upon credit, and of taking negotiable promissory notes payable to the commission merchant, was offered in this case, and rejected at the trial, I think there ought to be a new trial; leaving it for the present undetermined how far the usage will justify the conduct of the defendant in the case at bar.

It is very certain that no usage can justify the defendant in any wilful negligence, in securing the property of his principal. And if his conduct has been such as to show that he had received and treated the note given for the gin as his own demand, he may be liable; notwithstanding a usage to sell upon credit, and to take notes in payment should be fully proved.

SEDGWICK, J. The question is, whether a promissory negotiable note taken by a commission merchant payable to himself, in payment for goods sold for his principal, at the time of the sale, the custom of the place authorizing a sale upon credit without express authority from the principal, is at the risk of the principal or of the factor.

I have no doubt that the evidence of selling upon credit, where no

particular instructions were given, was properly admitted. But evidence offered to prove that, in cases where credit was given by a factor, it was customary to take promissory negotiable notes payable to the factor, was rejected because it was deemed inadmissible. Perhaps it might be proper that a unanimous opposing opinion of all the other members of the court should induce such a modest diffidence of my own judgment, as would lead me silently to acquiesce. But of the opinion which I delivered at the trial, I had then very little doubt; and I confess that neither my own reflections, nor what I have heard since, have entirely altered the view which I then had on the subject. Under these circumstances it is my duty to declare (and I shall do it as concisely as possible) the reasons on which my opinion was founded.

We know that a promissory note, given and received for goods at the time of a sale of them, is payment, as much and as effectual, to all intents and purposes, as cash. Now in this case, at the time of the sale, the defendant took a promissory note in his own name; and of consequence then received payment:—as much so as if he had received cash. He did not leave it in the power of the plaintiff to resort to Chapin, the vendee, but he was compelled to look only to the defendant. The note which was thus taken, and which gave evidence of a contract between the defendant and Chapin, to the exclusion of the plaintiff, was negotiable, or in other words, the very form, as well as nature of it, was currency: as much circulating medium as a bank note: of such nature, that a previously existing parol contract, as the law is here understood, would have been merged by it as completely as it would have been by a bond, recognisance, or deed of any kind. Now can it be believed that if the defendant had taken a bond or other deed, in payment for the goods sold, the sufficiency of the debtor would have been at the risk of the plaintiff? No more, in my opinion, than if the defendant had taken a conveyance of real estate in payment. It seems to me, that in such a case the factor must be considered us assuming the risk of the responsibility of the vendee.

It is in general undoubtedly true, where a factor sells the goods of his principal on credit, that on non-payment according to the contract, an action may be supported against the vendee in the name of the principal. The principal has in such case a double security, the fidelity of the factor, and the sufficiency of the debtor. But if he is deprived of the latter, the sufficiency of the debtor, by the act of the factor, as in this case by taking a promissory note in payment, it seems to me reasonable that he should have direct recourse to his factor.

It is said that the factor is bound to permit, in such a case as this, the principal to make use of his name in commencing an action upon the note. But suppose he will not: the principal is then deprived of any

remedy against the debtor; which instead of being an absolute right in the principal, and available at his pleasure, is made to depend on the will of the factor. The factor may also assign the note, or he may die, become insolvent, or a bankrupt, and thereby the remedy, which ought to exist against the debtor for the security of the principal, be wholly lost.

The principle, contended for in the defence of this action, is not supported by any rule of commercial law laid down, or even suggested, by any approved authority. It is attempted only to be supported by the custom of commission merchants in Boston. For myself, I am not disposed to authorize any description of merchants to alter the known principles of law, in cases materially affecting the important interests of others; as this would do, by depriving principals of the means of looking immediately to their debtors, made such by their contracts with factors. It is not like the custom of notice, established by the banks in this state, and which has been approved by the court, of demanding the money due upon negotiated notes of the makers, when they fall due, according to the terms of them, without an allowance for the days of grace, and afterwards at the end of those days, giving notice to the endorsers. This is undoubtedly an alteration of what was previously the law, in respect to notice; but it is an alteration only of the *manner and form*, and does not affect, as this supposed custom does, the *substance*, by depriving the principal of an immediate remedy against a debtor who justly owes him.

I know that it may be said in this case, that as Chapin became a bankrupt before the note became due, and as he had no estate from which a dividend could be made, it is impossible that the plaintiff should be a loser. But to this it may be answered, that in establishing general principles, care should be taken to look at their consequences in all respects: and although there may be cases, in which no injury would result, yet if certain mischiefs could, in other cases, be foreseen, an approbation ought to be withheld. But there is no certainty that there may not, even in this case, have been a loss to the plaintiff: for, if by being the creditor of Chapin, he might have taken an active part in the proceedings against him under the commission of bankruptcy, it cannot with certainty be known but that property enough might have been found to satisfy, in whole or in part, the debts of Chapin. At any rate, it was a chance, of which the conduct of the defendant has unduly deprived him. But however this may be, yet in the cases which have been mentioned, of an assignment of the note by the factor, of his insolvency or bankruptcy, the principal will be liable for losses, which might be avoided by the rule which I have always supposed governed such cases.

But even if this custom, on which the defendant relied, could in any case be supported, it seems to me to be necessary for that purpose, that it should have been made known to the plaintiff. This is not pretended to be the case, The defendant was authorized, by implication, to sell on credit: but in this case, as respected the plaintiff, he did not sell on credit; for the note that was given was payment; on which and which alone, could an action be supported for the value of the goods. A note too, which to many purposes, and to all which have any relation to the case before us, has the properties of money; over which the defendant had absolute control, and over which the plaintiff had none.

I am much opposed to innovations, by the establishment of new rules, affecting the rights of property. They are generally intended to conform to an existing state of things, or the equity of a particular case: but there has hardly been an instance, in which they have not been productive of mischief. Until now I have never heard it suggested that any such custom, as that offered to be proved, existed anywhere; but surely it ought not to conclude the plaintiff, without being made known to him. As I thus continue of the opinion I held at the trial, and as the verdict of the jury was conformed to that opinion, I am not for sending the cause to a new trial.

PARSONS, C. J., stated the nature of the action, and the substance of the judge's report, and proceeded:—Without consideration, how far the evidence comports with the declaration, which point is not before us on the report, I shall confine my opinion to the direction of the judge.

The court will take notice, as a part of the law merchant, that a factor may sell goods at a reasonable credit, at the risk of his principal, when he is not restrained by his instructions, nor by the usage of the trade. He is not however authorized to give credit to any but persons in good credit, and whom prudent people would trust with their own goods. If through carelessness, or want of reasonable inquiry, he sell on credit to a man not in good credit, and there be a loss, the factor must bear it.

When a factor sells on credit, he may take from the purchaser some instrument, by which the purchase may appear, with the price and the time of payment, and on which the purchaser may be charged in an action at law. And it is very clear, that he is not obliged to disclose to the purchaser the name of his principal, or even to state to him that he sells as factor. Upon these principles he may take a promissory note payable to himself, and when the principal lives in a foreign country, it may be most convenient for him to have the security payable to himself, so that he may sue it in his own name.

When the security is in the name of the factor, he holds it in trust for his principal. If the principal demand it, offering to pay the commission, and the factor refuse to assign it, he then becomes answerable for the money. So if the money be lost by his negligence, in not seasonably demanding it, the factor is responsible for his negligence. Upon these principles it seems very clear, that in this case, if the defendant had taken a note to himself not negotiable, to secure the payment of the money, he would have been a trustee of such note for the plaintiff; and if the money could not be recovered, without any laches on the part of the defendant, he would, in law, be discharged.

But, in this case, the defendant took as security a negotiable note, in his own name. And it is said that such note is payment, by which the purchaser is discharged from the principal: and consequently, that the defendant assumed the debt on himself, and is at all events answerable.

It must be admitted that in this state it has been settled by a series of decisions, which can be traced back sixty years, that where a negotiable note is given to secure the payment of money due by a simple contract, the simple contract is holden to be satisfied, or merged in the note; lest the debtor, on the simple contract, should be holden to pay it to the creditor, and afterwards, as promisor of the note, be holden to pay its contents to an innocent endorsee. But the discharge of the debt, due by the simple contract, is the consideration for the negotiable note.

When a factor shall receive a negotiable note, in payment for goods sold on commission, as the consideration arises from the sale of his principal's goods, the note may be holden in trust for the principal. But if it be so holden in trust, and the principal demand the note, offering to pay the commission, and the factor refuse to assign it, without a right of recurring to himself, this is a breach of his trust which will make him answerable. He is also answerable if he negotiate the note for his own use, or if the money be lost by his neglect of demanding it of the parties to the note.

Although a negotiable note may change the remedy against the purchaser on credit, if he fail to pay, yet the relation between the principal and factor may not be affected. If the law, or the usage, were not so, the disadvantages to the principal would be great. No factor would ever take a negotiable note, as security in his own name, unless for an extra commission as guarantying the payment.

By taking such a negotiable note, the principal is not obliged to wait for his money until due; but the factor may immediately discount the note and receive the money. But when the principal lives abroad, such discount is impracticable, unless by sending the note and having it re-

turned endorsed by him. Another great benefit of a negotiable note, in the name of the factor, is, that he may, on the credit of it, make advances to his principal, which is often desired before the money is due. And the advances are easily procured by the factor's discounting the note. But if the note is in the name of the principal, the factor cannot, on the credit of it, make any advances to his principal.

For these reasons I am satisfied that the principle holden by our courts, that a negotiable note is a bar to an action on the simple contract, which is the consideration of the note, does not necessarily and absolutely affect the relation between a factor and his principal, as to the authority of the former to take a negotiable note, in his own name, in trust for the latter.

Whether, in deciding this point, we can judicially take notice of the usage in Boston, to which place the plaintiff sent his goods to be sold on commission, may be questioned. But a general usage in any place, by which sales on commission are regulated, may be given in evidence. For it is a reasonable and legal presumption, that every man knows the usage of the place in which he traffics, whether by himself or his factor, and if the usage be not illegal, he is bound by it. If, then, it be the well-known and uniform usage in Boston for the factor to take negotiable notes, in his own name, as a security for the payment for the goods of his principal sold on credit, but in trust for his principal, such usage must bind the principal, unless he give his factor instructions repugnant to it, and such usage may be proved to a jury. Now, I am satisfied that such is the usage in Boston, and believe in every commercial city in the United States, where goods are sold by factors on commission.

In applying these observations to the case before us, there seems to be no imputation in the report, whatever may appear to be the case on another trial, of laches in the defendant, in selling the plaintiff's gin on credit to Chapin, nor in collecting the money. Chapin failed before the money was payable. But the defendant took, as security from Chapin, his negotiable note payable to himself or his order. It is not pretended that the defendant was to guaranty Chapin's payment, or that he had any commission on that account. The only point is, whether the defendant, by receiving from Chapin his note payable to himself, or his order, made himself liable, in all events, to the plaintiff, for the payment of the money due on the note?

My present opinion is, that on general principles of the law merchant, independent of any usage in Boston, the defendant did not make himself thus liable; but if there be any doubt as to these general principles, evidence of the general and uniform usage in Boston, where the plaintiff sent his goods for sale on commission, that the factor takes negotiable

notes for payment in his own name, but in trust for the principal, may be legally given in evidence.

Upon these grounds I am satisfied that the verdict ought to be set aside, and a new trial granted.

PER CURIAM. New trial ordered.

The most accurate notion of the character of a Factor, in law, is to be derived from the language of the declaration in the old action of Account against a factor. He is there described as the Bailiff of the plaintiff, having the care and administration of divers goods, &c., "ad merchandizandum et proficuum ipsius querentis inde fiendum et ad rationabilem computum inde cum requisitus esset reddendum;" "to merchandise and make profit thereof for the plaintiff, and to render a reasonable account thereof to the said plaintiff, when he should be thereunto required." See Brownlow's Entries, 9, Account (19); Lilly's Entries, 13, Account; *Sadock* v. *Burton*, Yelverton, 202; S. C. Bulstrode, 103; *Godfrey* v. *Saunders*, 3 Wilson, 73. A factor, therefore, may be described, strictly, as a bailee of goods or money, to merchandise (or buy and sell) for the profit of his principal, and render him an account thereof. "The factor's contract," says Savage, Ch. J., in *Leverick* v. *Meigs*, 1 Cowen, 645, 668, "is to sell and render an account."

It has been stated, before, that a mere special authority or direction to sell an article, does not authorize a sale on credit; *Delafield* v. *The State of Illinois*, 26 Wendell, 193, 223; *Ives* v. *Davenport*, 3 Hill's N. Y. 374, 377. But the rule laid down by Parsons, C. J., in the principal case, that by the general law merchant, a factor is authorized to sell on credit, provided it be a reasonable and usual credit, and to persons at the time in good standing, is universally established as a principle of law; *Scott* v. *Surnam*, Willes, 400, 407; *Van Alen and another* v. *Vanderpool and others*, 6 Johnson, 69; *M'Connico et al., Ex'rs* v. *Curzen*, 2 Call, 358, 365; *Hamilton, Donaldson & Co.* v. *Cunningham*, 2 Brockenbrough, 351, 364; *Geyer* v. *Decker*, 1 Yeates, 486; *De Lazardi* v. *Hewitt, Allison & Co.*, 7 B. Monroe, 697. This appears to be a legal consequence of the nature of the agency entrusted to a factor, as affected by commercial usage. His agency being to sell so as to make a profit for his principal, and, not to pay over at once, but to account upon demand, is, in its nature, discretionary as to the time and manner of sale; and the usage of trade being to sell at a certain customary credit, that mode of sale is for the benefit of the principal, and is not a fraudulent or negligent exercise of the factor's discretion. A special agent assuming the duty of a factor, will have the same powers. See *May* v. *Mitchell*, 5 Humphreys, 365, *supra*. In *Leland* v. *Douglass*, 1 Wendell, 490, the declaration, in assumpsit, stated that the defendant had received a yoke of oxen from the plaintiff, on a contract to sell them for a reasonable reward, and to account for, and pay over the proceeds; and the court held that under this contract, the defendant would have been justified, under the exercise of a sound discretion, in selling the cattle upon a reasonable credit; and, therefore, that a contract to sell for cash only, could

not have been given in evidence under this count.

The principal case also establishes, that a factor's taking a negotiable note of the buyer for the amount of the sale, payable to himself, will not make him liable for the debt, if the buyer be in good credit; and this has repeatedly been decided; *Goldthwaite and Tarlton* v. *M' Whorter*, 5 Stewart & Porter, 284; *Kidd* v. *King*, 5 Alabama, 84; *Greely* v. *Bartlett*, 1 Greenleaf, 172; *Rogers* v. *White*, 6 Id. 193, 196; *Dwight* v. *Whitney*, 15 Pickering, 179, 184; see *West Boylston Man. Co.* v. *Searle*, Id. 225. Auctioneers, also, may take notes payable to themselves: "As bailees to sell," said the court in *Townes* v. *Birchett*, 12 Leigh, 174, 194, "they are bailees to receive payment; and hence they confessedly have a right of action in their own names against the purchasers: if so, it is not perceived that there is anything improper in the ordinary custom of taking notes to themselves for the proceeds of sale." And a factor may change the notes which he takes, for other notes involving the liability of the buyer, provided the security be not altered, nor the credit extended, and he will not thereby make himself liable; *Corlies* v. *Cumming*, 6 Cowen, 181, 185. The reason of the factor's incurring no liability by such acts is, that taking such a security, or changing it in such manner, does not impair any of the principal's rights of action against the buyer; the principal may still sue in his own name upon the contract of sale; and the notes taken by the factor belong to the principal, who may control the collection of them and sue upon them in the factor's name.

Whether a factor becomes liable, by including in the promissory note which he takes for the sale of his principal's goods, the amount of other goods sold on his own account, or on account of other principals, has been somewhat doubted. The best conclusion appears to be, that by the mere circumstance of taking a note in that way, he does not become liable, because the principal's rights against the buyer remain as before; *Corlies* v. *Cumming*, 6 Cowen, 181, 187; *Hapgood and another, executors* v. *Batcheller and another*, 4 Metcalf, 573; *Hamilton, Donaldson & Co.* v. *Cunningham*, 2 Brockenbrough, 351, 363; but that, as the principal is entitled to the possession of the securities held by the factor for him, the factor becomes liable, prima facie for the whole value, if he refuse to deliver on demand. But in the able case of *Symington* v. *M'Lin*, 1 Devereux & Battle's Law, 291, 303, where the practice of thus mixing different accounts is condemned as irregular, and tending to fraud, a strong opinion is indicated that the mere circumstance of the factor's including in the same note a debt due to his principal and a debt due to himself, makes him at once liable to the principal, as being in effect an appropriation of the note to his own use. The true question in the case, said Chief Justice Ruffin, is, did the agent intend, when he took the note, to keep it as his own; or did he intend to transfer it, if asked? It must be seen in such a case, that he did not mean to transfer, at least not absolutely, and not unless the principal would advance in cash, or render himself responsible for, the part belonging to the factor; and as he had no right to impose that condition nor to expect that the principal would comply with it, and as without a compliance, it is not to be supposed that the factor would have parted with the security or even intended to do so, it is an appropriation. It is a strong presumption of reason, continued the Chief Justice, that the note was made payable to himself because he had an interest in it; and therefore that he intended to keep it: It is tantamount to a refusal on demand; for, if demanded, it would not have been delivered. In like manner, in *Brown* v. *Arrott*, 6 Watts & Sergeant, 402, 423, where the agent had

included a debt of his own in a note taken for the principal's debt, and then released the note without authority from the principal, the court referred to the rule that if an agent improperly deposits the money of his principal in his own name with a banker who fails, he becomes responsible for the loss, because he must not so deal with his principal's money as that if the banker's solvency continue he may treat it as his own, and if insolvency happen, he may escape by considering it as belonging to his principal, and said that this reason was directly applicable to the case then before them, where the agent by having taken the note in his own name, including money coming to himself on his own account, had it in his power, as long as the buyer continued solvent, to treat the whole of it as his own, and now sought, when the buyer had become insolvent, to show that the note was taken to secure money coming to the principal, as well as to himself: but the court would not decide the case on this ground, but decided it on the ground of the release: see *Morris* v. *Wallace*, 3 Barr, 319, 323. As, however, the principal's direct right of action on the contract of sale, remains unaffected by the note's being taken for more than his own debt, and as the circumstance of the factor's including in the same security a trust for himself, is not of itself a denial of the trust for his principal, there seems to be no sufficient reason for holding him liable before a demand and refusal. There is no doubt, however, that it is the general duty of a factor to keep the concerns and accounts of his principals distinct; *Shipley* v. *Kymer*, 1 Maule & Selwyn, 484, 490; *Newbold* v. *Wright and Sheldon*, 1 Rawle, 195, 214: and he would be liable in damages for any actual loss occasioned by neglecting to do so.

But if the factor, at the time of the sale, discharge the principal's direct right of action, and receive a satisfaction vesting in himself and not in the principal, or if, after a sale, he has the notes which he has taken discounted for his own use, it seems from some of the cases, that he makes himself liable for the whole debt.

Accordingly, it has been decided, that if an agent employed to receive money due on a debt, release the debt and take a new note payable to himself for a larger amount, and in part for himself, he does in law receive payment of the debt as relates to the principal, and becomes at once liable to the principal for the whole amount, in an action of assumpsit, as for so much money received for the principal's use; *Floyd* v. *Day*, 3 Massachusetts, 403; *Opie* v. *Serrill*, 6 Watts & Sergeant, 264. It has been held, also, that if at the time of sale a factor receive, in satisfaction and discharge of the buyer's liability, the promissory note of a third person for a larger amount, made payable to himself, and including a debt due to himself, he becomes at once liable to the principal; *Symington* v. *M'Lin*, 1 Devereux & Battle, 291, 298. And in *Jackson* v. *Baker*, 1 Washington, C. C. 394, Judge Washington held that the factor's taking a bond from the purchaser to himself for a greater amount, and including in it a debt due to himself, made him immediately liable for the amount of the sale; because, as the bond was an extinguishment of the simple contract debt, the principal could not sue the buyer himself, and the factor's having mixed the debt due to himself and that due to the principal, in one bond, taken in his own name, the plaintiff had no remedy on the bond. It may perhaps be deduced from these cases that if a factor make a sale, upon which he gives the principal no right of action against the buyer, and no right to the proceeds of the sale, he becomes a debtor for the whole amount to his principal: see, also, *Schee* v. *Hassinger*, 2 Binney, 325; *Doebler and others* v. *Fisher*, 14 Sergeant & Rawle, 179; *Ainslie* v. *Wilson*, 7 Cowen, 662, 668. But it cannot be admitted that

if, after a sale, the factor release the purchaser, he thereby assumes the debt, and makes himself liable for its whole nominal amount. It seems indeed to have been thought in *Brown* v. *Arrott*, 6 Watts & Sergeant, 402, 423, that such was the consequence of a release without authority. But it seems to be clear that the factor in such a case ought to be made liable only for the value of the debt; and that though, prima facie, he would be chargeable to the whole amount, he ought yet to be permitted to show the insolvency of the purchaser.

It has been held, also, that if a factor who has taken notes in his own name, afterwards has them discounted for his own use, at a time when he is not in advance to his principal, he thereby assumes the debt himself, and becomes absolutely liable for it; *Myers* v. *Entriken*, 6 Watts & Sergeant, 44; and see *Johnson and Duggan* v. *O'Hara*, 5 Leigh, 456: but if, being under responsibilities for his principal, or in advance to him, he has the notes discounted, not for his own use, but for the legitimate purpose of discharging the responsibilities of the principal to him and paying off his advances, it is not a conversion which makes him responsible to the principal; *Townes* v. *Birchett*, 12 Leigh, 174, 194. If an agent, having taken notes in his own name, refuse to transfer them to his principal on demand, he at once becomes liable as for a conversion; *Kidd* v. *King*, 5 Alabama, 84; but, it is supposed, that in a case of this kind, the actual value of the notes will be the measure of damages.

An agent may, by other conduct, assume the outstanding debts of his agency. Settling a *final* account, and paying over, or engaging to pay, the balance, for the purpose of closing the account, is an assumption of the debts; at least, it is so, *prima facie*; *Consequa* v. *Fanning*, 3 Johnson's Chancery, 587, 600; *Oakly* v. *Greenshaw*, 4 Cowen, 250. But where debts appear in an account, as outstanding claims remaining in the agent's hands for collection, or, where a note is given for a balance, payable after the time when the debts become due, or where the balance is paid with an exception in the account, of outstanding debts, no presumption arises that the agent intended to make himself absolutely liable, and the settlement would be a mere liquidation of the account, and not an assumption by the agent of any responsibility which he had not previously incurred in relation to the solvency of the debtors; *Winchester* v. *Hackley*, 2 Cranch, 342, 344; *Robertson* v. *Livingston*, 5 Cowen, 473; *Hapgood and another, Executors* v. *Batcheller and another*, 4 Metcalf, 573; *Elliott and others, Executors of Field* v. *Walker and another, Administrator of Wilson*, 1 Rawle, 126, 128.

In *Shaw* v. *Picton*, 4 Barnewall & Cresswell, 715, 729, Bayley, J., declared it to be quite clear, that if an agent (employed to receive money, and bound by his duty to his principal from time to time to communicate to him whether the money is received or not), renders an account from time to time, which contains a statement that the money is received, he is bouud by that account, unless he can show that that statement was made unintentionally and by mistake. In *Harvey* v. *Turner & Co.*, 5 Rawle, 223, 229, this was carried a great deal further. It was there held, that where an agent credits the principal in account, which in that case was an annual account current, with a debt outstanding, and the debt afterwards proves bad, it is the agent's duty to give the principal notice within a reasonable time that the debt is bad, and that if he neglects to do so, he becomes responsible as an insurer for the debt. In ordinary cases, mere negligence in giving information to the principal, it is agreed, renders the agent liable only to the extent of the actual loss incurred; *Elliott* v. *Walker*, 1 Rawle, 126; but in *Arrott* v. *Brown*, 6 Wharton, 9, 23, the case of *Harvey* v. *Turner & Co.*, is defended, as rest-

ing on the principle, that where the information transmitted is such as may induce the principal, in the adaptation of his operations to his means, to rely on an outstanding debt as a fund on which he may confidently draw, the agent makes the debt his own. If the principle, for the first time, declared in *Harvey* v. *Turner & Co.*, be correct, the agent is liable for the whole debt, even though the debtor prove totally insolvent, so that nothing could have been obtained from him by the principal, if he had received the earliest notice: a position quite unreasonable, and contradicted by authorities.

Thus, in *Dwight* v. *Whitney*, 15 Pickering, 179, the plaintiffs had sold goods as factors for the defendant, to a person in good credit, upon a credit of six months, which expired on June 9, 1824. The buyer continued in good credit until his death on August 17, 1824, but died insolvent. The plaintiffs, on November 12, 1824, before they knew that the estate was insolvent, rendered an account current in which they gave credit to the defendant for the net proceeds of the goods. They charged back the amount in July, 1825, and in a letter to the defendant, dated November 4, 1825, they stated that they had delayed notifying the defendant of the situation of the debt, because they had hoped, until very recently, that the whole or a portion of the debt would have been paid by the executors of the purchaser. This suit was brought to recover back the amount of the debt as money paid by mistake. The court decided, that evidence of a usage to sell at such credit, and to give credit in account to the principal immediately, was admissible; and if proved, such credit did not render the plaintiffs liable, but gave them a right to charge back the amount, in case the debt proved bad. "Nor," continued the court, "does the omission of the factor to give notice to his principal, that the debt has become due and is unpaid, in point of law, render the factor liable, if no specific damage can be shown to have arisen from it. Before the death of the purchaser, the plaintiffs had no reason to apprehend an insolvency, and after the death nothing could have been done to secure the debt; and even if there had been a subsisting attachment, it would have been dissolved by the death:" and in the residue of the opinion of the court, the case is put upon the ground, that there was not negligence, injurious to the defendant. *Rogers* v. *White*, 6 Greenleaf, 193, is still stronger. In this case, factors had sold goods for their principal, on July 12, 1825, and taken a note, for the amount payable to themselves, at the usual credit of three months: and upon this sale they credited the net proceeds to the principal, in an account settled with him on August 31, 1825, and carried the balance to a new account. Two or three weeks before the purchaser's note fell due he failed. On November 30, 1825, another account was settled between the factors and their principal, no notice being taken of the note in this account, and a large balance due the principals was carried to a new account: and on June 27, 1826, another account was settled between them in which the amount of the note was charged to the principal: and there was no evidence of notice to the plaintiff of the failure of the purchaser, except what arose from the settlement of the account of June, 1826. The agents had used all due diligence to obtain payment of the note, and had been unable to do so. The court decided, that as the loss was not attributable to the fault of the agent, and it did not appear, that the want of earlier notice had been, or could have been, productive of injury or inconvenience to any one, the agents had a right to make this charge, in the account of June, 1826, and that the principal was bound to pay it. In *Forrestier* v. *Bordman*, 1 Story, 44, 56, it was decided, that the measure of damages for negligence in giving notice of the insolvency of a debtor, was the actual damage or

loss which it was proved that the principal had suffered.

Notwithstanding the distinction suggested in *Arrott* v. *Brown*, 6 Wharton, 9, for the support of *Harvey* v. *Turner*, the latter seems to be effectively overruled by *Arrott* v. *Brown*; for the distinction between a customary annual account current, in the one, and a special account of sales, in the other, is not a substantial one. The rule, at all events, is to be considered as modified, so as merely to place the burden of proof upon the agent, and make him *prima facie* liable for the whole debt, unless he proves, that the principal sustained no loss by not having received notice; see *Brown* v. *Arrott*, 6 Watts & Sergeant, 402, 422; and even that seems to be too rigorous.

Except where the agent really intended to assume outstanding debts, or his conduct has been such, that the principal might suppose, that such was his intention, the cases must be very few, indeed, in which he ought to be charged, for any fault, with the whole nominal amount of a debt, without regard to the actual loss occasioned by his fault. See the question of the measure of damages for negligence, discussed *infra*.

The contract created by a *del credere* commission, is an independent contract between the principal and agent, separate from the sale, and not affecting the relations between the principal and the buyer, or those between the agent and the buyer. It is an absolute engagement by the factor, private between himself and the principal, and distinct from the sale which he makes, that the debts to which it refers, shall be paid at the time they are due, or in other words, that they shall be cash in the principal's account, at the time they are due. See *Mackenzie* v. *Scott*, 6 Tomlins' Brown's Cases, 280. Being an original and absolute engagement, it is not within the Statute of Frauds, and need not be in writing; *Swan* v. *Nesmith*, 7 Pickering, 220, 224; *Wolff* v. *Koppel*, 5 Hill's N. Y. 458; S. C. on error, 2 Denio, 368: and being an independent contract between the principal and agent, and in its legal effect a direct responsibility for the money due upon the sales, there need be no previous proceedings or recourse by the principal against the buyer before he can charge the factor; *Grove* v. *Dubois*, 1 Term, 112, 115; *Leverick* v. *Meigs*, 2 Cowen, 645, 664; (though some doubts to the contrary are thrown out by Lord Ellenborough in *Morris* v. *Cleasby*, 4 Maule & Selwyn, 566, 575): but the principal, if he sues the factor upon it, ought regularly to declare specially upon the contract *del credere*, which is a contract *sui generis*, that when the goods are sold, the price shall be paid; *Gall* v. *Comber*, 7 Taunton, 558: though there is some variety and perhaps laxity of practice on this subject; see *Swan* v. *Nesmith*; *Wolff* v. *Koppel*, and *Morris* v. *Cleasby*, 575. Being an arrangement between the principal and factor, only, intended as a cumulative security to the former, to which the purchaser is not privy, it does not affect the relations between the purchaser and either the principal or factor upon the contract of sale; *Leverick* v. *Meigs*: the rights of set-off between the purchaser and factor, are the same as where the contract *del credere*, does not exist; see *Cumming* v. *Forester*, 1 Maule & Selwyn, 494; *Koster* v. *Eason*, 2 Id. 112; *Morris* v. *Cleasby*, 4 Id. 566; *Baker* v. *Langhorn*, 6 Taunton, 519; *Peele* v. *Northcote*, 7 Id. 478: the principal's direct right of action against the buyer on the sale remains unaltered; *Hornby* v. *Lacy*, 6 Maule & Selwyn, 166; the notes taken by the factor from the buyer, belong to the principal, and in case of the factor's insolvency, the principal may follow them and the proceeds of them, into the hands of the assignee, as if the *del credere*, contract did not exist; *Thompson* v. *Perkins et al.*, 3 Mason, 232; and the debt created by a sale under such commission cannot be attached as a debt due

to the factor, for it is a debt to the principal, and the factor has no interest in it beyond the lien for his commissions; *Titcomb et al.* v. *Seaver & Trustee*, 4 Greenleaf, 542. The contract *del credere*, relates only to the payment of the debts due for sales, and does not extend to a remittance of the funds after payment is made; in respect to which a factor receiving a *del credere* commission is not bound to greater diligence than one who does not receive such commission; *Leverick* v. *Meigs*, 1 Cowen, 645, 665; *Sharp* v. *Emmet*, 5 Wharton, 288, 299; *Muller* v. *Bohlens*, 2 Washington, C. C. 378. The dicta thrown out, in some of the later cases, chiefly by Lord Ellenborough, have tended to perplex the subject of the liability created by a *del credere* commission: but if the points adjudged are attended to, it will be seen that the principles declared in *Grove* v. *Dubois*, have not only not been overthrown, but have been sustained and strengthened.

A factor cannot pledge the goods of his principal.

LAUSSATT *v.* LIPPINCOTT AND ANOTHER.

In the Supreme Court of Pennsylvania.

MARCH TERM, 1821.

[REPORTED, 6 SERGEANT AND RAWLE, 386–394.]

A factor cannot pledge the goods of his principal for his own debt; but if a merchandise-broker, to whom goods are delivered by his principal with power to sell, deliver, and receive payment, deposit them, in the usual course of business, with a commission merchant, connected in business with a licensed auctioneer, who advances his notes thereon, the deposit binds the principal, who cannot recover the value of the goods in an action of trover.

UPON the trial of this cause before DUNCAN, J. at Nisi Prius, in April, 1820, it appeared to be an action of trover for a quantity of coffee, which it was agreed was the property of the plaintiff, who, in the month of March, 1816, employed William Harlan, a *merchandise-broker*, to sell it. The coffee was placed in stores, the keys of which were in the power of Harlan. The plaintiff's orders were not to sell at less than 27 cents a pound. This was the only restriction. The authority of Harlan was to sell, deliver, and receive payment. The defendants were *commission merchants*, connected in business with John Humes, a

licensed auctioneer. On the 15th of April, 1816, Harlan delivered 45 bags of the plaintiff's coffee to the defendants to be sold at auction, without limitation of price, and at the same time received from them their note for 1300 dollars, payable in 60 days. On the 17th of April, he delivered to them more of the same coffee, on the same terms, and received their note for 1300 dollars, at sixty days. On the 20th April, he delivered to them 45 bags more on the same terms, and took their note at sixty days, for 1700 dollars; and on the 18th May, he delivered to them another parcel of the same coffee, on the same terms, and received their note at sixty days for 1300 dollars. Harlan did not inform the defendants to whom the coffee belonged, nor did they ask him. He had been accustomed to deal with them in this way for four or five years to a very considerable amount. The plaintiff understood from Harlan that he had sold his coffee; he paid him seven or eight hundred dollars, and made excuses for not paying more. Part of the coffee delivered to the defendants was sold by them for less than 27 cents a pound; part remained unsold, and was demanded by the plaintiff after it was discovered that it was in the possession of the defendants, and that Harlan had failed. The defendants refused to deliver it, saying that they knew no other owner than Harlan.

On the trial of the cause, evidence was given by the defendants, tending to prove a usage for merchandise-brokers to sell the goods of their principals at public auction, and to receive part of the price in advance in cash or notes at the time of depositing the goods. The plaintiff gave evidence in contradiction of this usage, and the Judge gave it in charge to the jury, that if they should be of opinion that the usage existed, and that in this case the coffee was not *pledged*, but *sold*, the verdict should be for the defendants.

The jury found for the defendants, and the case now came before the Court on a motion by the plaintiff for a new trial.

Kittera and *C. J. Ingersoll*, in support of the motion for a new trial.

This is the case of a factor who has pledged the goods of his principal, which, by law, he cannot do. Harlan was a merchandise-broker, and the only authority he received was, to *sell, deliver, and receive payment.* In this character, alone, he was known as well to the defendants as to the plaintiff, which is proved by the whole course of the transaction. The limited and qualified possession which he had of the goods, was in his capacity of broker. They were not in his store, and though he had access to that in which they were deposited, and had a right to remove them when sold, he did not even keep the key of it. The weighmaster's charge was against the plaintiff, and was paid by him. There was not a single circumstance to make Harlan the apparent owner of the

property. The defendants knew that he was a broker, and that the coffee did not belong to him. Whether, therefore, the transaction between them was a sale or a pledge, is of no consequence, because they had no right to purchase goods which they knew did not belong to the seller, or with respect to which, there was at least enough to put them on inquiry. But, in fact, the coffee was not *sold* to the defendants; it was *pledged* to them, and they made advances on the deposit. A pledge is the delivery of goods in security for money lent. 1 Bac. Ab. 369. This is exactly what took place with respect to the goods in question. There was no contract for sale; no price stipulated. The receipts given by Harlan to the defendants speak of goods *deposited* for sale, and there cannot be a doubt that Harlan would have had a right to redeem them on paying the amount of the notes and the defendants' commissions. What is the law in relation to this subject? It is clear, that a factor cannot *pledge* the goods of his principal. In D'Aubigny v. Duval, 5 D. & E. 604, a factor deposited the goods of his principal with A., as a security for his own debt. It was held that the principal might recover the value of them in trover against the pawnee; and BULLER, J. stated the general rule to be, that a factor cannot pawn the goods of his principal at all. And in Newsom v. Thornton, 6 East, 17, Lord ELLENBOROUGH holds similar language. This established principle forms the basis of a great multitude of decisions. Skinner v. Dodge, 4 Hen. & Mun. 432. Martini v. Coles, 1 Maule & Selw. 140. Solby v. Rathbone, in note to Cochran v. Irlan, 2 Maule & Selw. 301. Van Amridge v. Peabody, 1 Mason, 440. De Bouchet v. Goldsmith, 5 Ves. jr., 211. Bearing & Correy, 2 Barn. & Ald. 137, 15 East, 407. Whitaker on Liens, 136, 7. Per Ld. Mansfield, in Wright v. Campbell, 4 Burr. 2050.

But whether the act of Harlan was a pledge or not, it was a breach of instructions, and, therefore, vested no property in the defendants. An authority to sell, and delivery of possession by the principal to the factor, confer no right on the factor to act as owner of the goods. To the defendants he did not appear in the light of owner, for he had no *indicium* of property about him. He was an agent for a special purpose, and a special agency like this does not admit of substitution. Harlan, therefore, could not delegate to the defendants his power to sell the goods, nor were they placed with them for that purpose. A sale at auction could not have taken place without the agency of Humes, and his name does not appear in any part of the transaction.

The defendants, however, rely on an alleged usage for merchandise-brokers to dispose of the goods intrusted to them in the manner adopted in the present instance, and the Court admitted evidence of it. This supposed usage it is difficult to comprehend. It is neither a common

law, nor a commercial usage, but a course of dealing limited to a few individuals, which it is said may govern the contract and render that valid, which otherwise would be invalid. If a usage contravenes the law, as this certainly does, it connot prevail. In some instances, indeed, a usage is permitted to explain a contract, but never to control the law. Frith v. Barker, 2 Johns. 327. Durham v. Gould, 16 Johns. 367. Preston v. De Forest, Id. 159. Sterritt v. Bull, 1 Binn. 237. A usage, to have any force, must be general, honest, fair, and not injurious to the public; it must be clearly proved, too, and not depend on the opinions of witnesses. Trott. v. Wood, 1 Gall. 443. Winthrop v. Union Insurance Company, 2 Marsh, 707, note. (The counsel went into a minute examination of the evidence, through which it is unnecessary to follow them, to show that no legal usage had been proved.)

Chauncey and *Binney* against the motion.

The main ground of the opposite argument is, the application of the rule of law, that a factor cannot pledge the goods of his principal, to the act of the broker in the present instance, which, it is insisted, constituted a pledge. This principle was first ruled at Nisi Prius, by LEE, C. J., in the case of Patterson v. Tash, 2 Str. 1178, in which the goods were pledged for the debt of the factor. The next case in which it occurred was that of D'Aubigny v. Duval, 5 D. & E. 604, where, without much examination, it was taken for granted. In later cases, and on more mature consideration, the soundness of the principle has been doubted, at least in the unqualified sense in which it has been laid down. The cases, however, by which the principle is attempted to be supported in reference to this case, do not apply. In Van Amridge v. Peabody, the factor pledged the goods for a debt of his own, and it was known that they were consigned to him for sale by the plaintiff. In Skinner v. Dodge, the goods were expressly pawned by the factor. In Baring v. Correy, the question was, whether the defendant could set off a debt of the broker against the owner of the goods; besides which, there was negligence in the purchaser, and the case turned upon the point that the defendant ought to have known he was dealing with a factor, from the manner in which the business was done. None of the cases prove that a factor may not pledge in the usual course of business. This is all it is necessary to contend for, and this he certainly may do. Evans v. Pollon, 2 Gall. 13. Usage of trade always governs. Cochran v. Irlan, 2 Maule & Selw. 302, note. Martini v. Poles, 1 Maule & Selw. 147. Floyer v. Edwards, Cowp. 112. Scott v. Sermon, Willes, 406. M'Kinstry v. Pearsall, 3 Johns. 319. Halsey v. Brown, 3 Day, 346. 2 Sm. 157. A general usage, such as enters by implication into a contract, is not contended for, but a course of business only, from which

the extent of the authority committed to the agent may be inferred. The reason why a factor is not permitted to pledge is stated by BAILEY, J., in Shipley v. Hyman, 1 Maule & Selw. 493, to be, because a power to pledge is not within a power to sell. That reason does not apply to this case. An authority to sell involves a power to sell in such a manner, and on such terms as are usual, though not universal. What the broker did in this case was within his power, though he abused it. When an agent acts within the apparent power given to him, his principal is bound, and any private instructions he may have received will not affect a purchaser who trusts to the general ostensible power. Thus, if his instructions are to sell at a limited price, and he sells below it, the sale is good. This is strongly laid down in Pickering v. Burk, 15 East, 38, where A. purchased hemp through a broker, and suffered a transfer to be made in the books of the wharfinger in the name of the broker, which gave an implied power to the broker to sell the hemp. If, therefore, Harlan did pledge the coffee, in the usual course of business, and in prosecution of his power to sell, the pledge was valid. But the coffee was not pledged. The transaction was totally of a different character, and much will depend on understanding its true character. Harlan's occupation did not resemble that of an English broker. He was a commission merchant, whose mode of doing business differs essentially from that of a broker in England. There the broker cannot pledge, because that forms no part of the exercise of the power to sell, with which he is entrusted. Here the deposit with the defendants was connected with the broker's power of sale, and was made in the course of the exercise of that power. It is said, that the goods were pledged, because Harlan had a right to redeem them. This we deny. He had a right to stop the sale on payment of the amount of the notes and commissions, but not a right of redemption, according to the proper signification of the term. The coffee was not pledged, but deposited in the usual course of business for sale. It was not a sale to the defendants, but a sale in which they were employed, and gained a lien on the goods to the amount of their advances. This arrangement was assented to and sanctioned by the plaintiff. He gave Harlan the possession of, and control over the coffee. He knew that it had been weighed and part of it sold, to which he made no objection, but, on the contrary, received 300 dollars on account of the sales, and permitted him to retain possession of the remainder. More coffee was afterwards sent to the defendants, and the plaintiff received 500 dollars more on account of the price, without making any objection to the manner in which it had been disposed of. In conclusion, the transaction was without fraud on the part of the defendants, and in the usual course of business. The verdict was founded on these grounds, and ought not to be disturbed.

TILGHMAN, C. J., delivered the opinion of the Court.

That a factor cannot pledge the goods of his principal for his own debt, seems to be too well settled to admit of a dispute. It was so decided by C. J. LEE, in Patterson v. Tash, 2 Str. 1178, at Nisi Prius, and that decision has been adhered to, though not without some reluctance. Indeed, it is no wonder it has been said by some modern Judges, that perhaps it would have been as well if the law had been originally decided otherwise; for certainly it bears extremely hard upon persons who deal with a factor, without a possibility of knowing that the goods do not belong to him. It would seem reasonable that the loss should fall on him who puts it in the power of the factor to deceive innocent persons who deal with him, bona fide, and on valuable consideration. And there certainly is some inconsistency in the law which declares, that a factor cannot *pledge* the goods of his principal, and yet permits a *purchaser*, who buys the goods supposing them to be the property of the factor, to *set off* a debt due from the factor to himself; for the principal of *caveat emptor*, which avoids the pledge, would forbid the set off. But I am not for disturbing the law which has been settled, especially as it advances the commercial credit of the country, to afford strong protection to the property of foreigners sent here upon consignment. The reason why the factor is not permitted to pledge is, that his authority is only to sell. Anything not inconsistent with a general power to sell, he may do; he may sell for cash or on credit; he may receive in payment notes, or any kind of property. And in the case of Wright v. Campbell, 4 Burr. 2046, Lord MANSFIELD was of opinion that a *bona fide* transfer by the factor, in satisfaction of a debt due from himself, would have been good. After the verdict of the jury in the case before us, we must not consider the coffee of the plaintiff as having been *pledged* by the broker. We must take it to have been delivered to the defendants for the purpose of being sold, part of the proceeds of sale having been paid in advance by the defendants. It is one of those new kinds of business which commerce, in its endless varieties, is constantly producing. The counsel for the plaintiff objected to the evidence of the usage; and if its admission was improper, the verdict ought not to stand. But on what ground could the evidence have been refused? There was no attempt to set up a custom in opposition to any principle of law. For, surely, a man violates no law, when he authorizes his broker to deposit his goods with an auctioneer, and on receiving part of their value in advance, to give to the auctioneer an irrevocable power of sale. Nor does the broker violate any law when he acts in pursuance of such authority, whether express or implied; and this is the amount of the usage. This, though not an absolute sale, is very different from a simple pledge, and partakes more of the

nature of a sale than of a pledge. Business to an immense amount has been transacted in this manner, and the usage being established, it follows, that when the plaintiff authorized his broker to sell, he authorized him to sell according to the usage, and when the defendants dealt with the broker, even if they had known that the coffee was not his own, they had a right to consider him as invested with power to deal according to the usage. If the plaintiff desired to keep any control over his property, he should have retained the possession of it, and not have suffered it to go into the hands of the broker, thus enabling him to exhibit to the world all the emblems of full power. Any collusion between the broker and the auctioneer would vitiate their transactions. But it was not incumbent on the auctioneer to make any inquiry about the owner, unless there were some suspicious circumstances; because persons who raise money by sending their goods to auction, often wish that their names should be concealed. The verdict, however, negatives all idea of fraud. No case exactly like the present, is to be found in the books: but the reasoning of the Court in Pickering v. Burk, 15 East, 43, is not inapplicable. In that case A., who had made a purchase of hemp, through B., his broker, suffered a transfer to be made in the books of the wharfinger, in the name of B. It was held, that this gave B. an implied power to sell. "Strangers," says Lord ELLENBOROUGH, "can only look to the *acts* of the parties, and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker, and if a person authorizes another to assume the apparent right of disposing of the property, *in the ordinary course of trade, it must be presumed that the apparent authority is the real authority.*" Now the jury have found that, in the ordinary course of business in this city, merchandise-brokers make sale of the goods of their principals in the manner in which this coffee was sold. Therefore, when the plaintiff trusted a known merchandise-broker with the possession of his goods for the purpose of sale, he impliedly gave him power to sell in the manner in which he *sold*, or to speak with more strict propriety (though the jury call it a sale) the manner in which he *deposited for the purpose of sale.* No ill consequences can result from this implication of power. The owners of goods may always protect themselves by retaining the possession until they receive payment; while it will be out of their power to injure the auctioneers by investing brokers with the appearance, without the reality, of authority. I am of opinion, that a new trial should not be granted.

New trial refused.

The rule that a factor cannot pledge the goods of his principal has been strictly adhered to, since it was first established in *Paterson* v. *Tash*, 2 Strange, 1178; and is the settled law of all the States of the Union, in which the legislature has not interfered to make a change. See *Van Amringe* v. *Peabody et al.*, 1 Mason, 440; *Newbold* v. *Wright & Shelton*, 4 Rawle, 195, 211; *Hewes* v. *Doddridge, &c.*, 1 Robinson's Virginia, 143, 146; *Odiorne et al.* v. *Maxcy et al.*, 13 Massachusetts, 178, 181; *Warner et al.* v. *Martin*, 11 Howard's S. Ct. 209, 224. This results from the plain principle, that a factor is an agent to sell and account; and an authority to sell and account, is not an authority to pledge. "A factor," said Parsons, C. J., in *Kinder et al.* v. *Shaw et al.*, 2 Id. 398, 400, "has no authority to pawn goods which have been intrusted to him for sale: the rights of the principal and factor depend on the law merchant, which has been adopted by the common law. By this law, a factor is but the attorney of his principal, and he is bound to pursue the powers delegated to him." The *dictum* in *Evans* v. *Potter*, 2 Gallison, 13, that a factor may pledge for duties, or other purposes sanctioned by the usage of trade, has no application or authority. A factor, also, cannot barter his principal's goods, nor deliver them in exchange for his own note, or in satisfaction of his own debt; *Holton* v. *Smith*, 7 New Hampshire, 446; *Warner et al.* v. *Martin*, 11 Howard's S. Ct. 209, 226. If a factor pledge for his own debt, it is a conversion, and trover will lie against him; *Kennedy* v. *Strong*, 14 Johnson, 128, 132; and if the pledgee sell, or refuse to deliver on demand, trover will lie against him; *Van Amringe* v. *Peabody et al.*, for, the pledge is wholly void, and the property is not devested from the owner; *Hoffman & another* v. *Noble and another*, 6 Metcalf, 68, 74.

But though a factor has not authority to pledge, a distinction has been taken, as in the principal case, between a pledge, and a deposit for sale in the usual course of mercantile dealing and an advance in anticipation of sale: such a transaction, being a usual mode of effecting a sale, has been considered as partaking so much more of the character of a sale than of a pledge, as to fall within the range of the factor's authority. The principle appears to be, that if a factor, in possession of goods as his own, deliver them to be sold, to a broker, auctioneer, or commission merchant connected in business with an auctioneer, and such person advance money in anticipation of a sale, in the way in which, in the ordinary course of disposing of goods, his profession are accustomed to advance it, and according to the usage of commerce, the transaction is valid, and the principal is bound by it; *dictum* of Lord Ellenborough, C. J., in *Martini* v. *Coles and others*, 1 Maule & Selwyn, 140, 147; *Pultney* v. *Keymer et al.*, 3 Espinasse, 182; *Bowie & Sons* v. *Napier & Co.*, 1 McCord, 1; in which last case, as in the principal case, evidence of the usage was given. In *Bowie & Sons* v. *Napier & Co.*, where money was advanced to a factor by a vendue master in the usual course of business, and for the purposes of effecting a sale, the court said that "there is such a marked difference between a pledge and a deposit for sale, that it would seem astonishing they should ever be confounded. By a pledge, we understand not only a thing that may be redeemed, but generally one that is intended to be redeemed. Now, when goods are deposited with orders to sell, such an idea as that of redemption can never enter the mind; for the agent with whom they are deposited, may, in the shortest space of time, alienate the right." But this exception, it seems, is to be strictly construed, even if it can be considered to be well or generally established: it must be a *bonâ fide* advance in anticipation of sale by a person who is a usual agent

through whom sales are effected in that manner; for if it be in fact a pledge, it will not be sustained; *Shipley* v. *Kymer*, 1 Manle & Selwyn, 484; *Martini* v. *Coles & others*, Id. 140; *Newbold* v. *Wright & Shelton*, 4 Rawle, 195, 212. See, also, *Buckley* v. *Packard*, 20 Johnson, 421; *Martin* v. *Moulton*, 8 New Hampshire, 504.

In Great Britain, and some of the states in this country, the law, on this subject, is now altered by statutes.

In July, 1823, was passed the act of 4 Geo. 4, c. 83, which recites that the law relating to goods shipped in the names of persons not the owners of them, and to the pledge of goods, was productive of fraud and litigation, and of injury to commerce; and in July, 1825, was passed the act of 6 Geo. 4, c. 94, to alter and amend the former. The latter, which supersedes the former, is commonly called the Factor's Act.

Section 1, of 6 Geo. 4, c. 94, enacts that where any person intrusted with goods for the purpose of consignment or sale, shall ship them in his own name (and one in whose name goods are shipped shall be taken to have been thus intrusted, unless the contrary appear,) or where goods shall be shipped in any person's name by another, the consignee, who shall not have notice by the bill of lading or otherwise, that the nominal consignor is not the owner, shall have the same lien on the goods, for advances to him, or for money and negotiable securities received by him for the consignee, as if he were in fact the owner.

Sect. 2, enacts, that any person, intrusted with and in possession of, a document of title to goods, as, the bill of lading, dock warrant, &c., shall be deemed the true owner so far as to have power to contract for the sale or disposition of the goods, or to pledge them for money or negotiable instruments, advanced, upon the faith of such document, by any person not having notice, by the document or otherwise, that he is not the owner of the goods.

Sect. 3, provides that if the pledge in such case be for an antecedent debt of the person so intrusted and in possession, the pledgee shall acquire such rights as the person himself possessed and might have enforced, but no more.

Sect. 4, gives validity to contracts of purchase, made with an agent intrusted with goods or to whom goods are consigned, and to payments therefor to him, if made in the usual course of business, though the person have notice that he is an agent, provided he has not notice that the agent was not authorized to sell or receive payment.

Sect. 5, provides that a person accepting such goods or documents in pledge with notice that the pledgor is an agent, shall acquire such rights in relation thereto as the pledgor had at the time, but no more.

Sect. 6, preserves the rights of the owner to recover his property before valid sale or pledge, in case of the factor's insolveney; and to recover the price of goods sold, subject to the right of set-off against the factor; and to redeem goods pledged by the factor.

Sect. 7, enacts that any agent pledging such goods intrusted or consigned to his care, or such documents possessed or intrusted as aforestated, for advances to himself, and applying or disposing thereof to his own use, in violation of good faith and with intent to defraud the owner, shall be punishable as for a misdemeanour; and sections 8, 9 and 10, contain further provisions in relation thereto.

The policy of this statute appears to have been viewed with disfavour by the courts, who have, in general, put the narrowest construction upon its provisions of which they were capable.

Under the 2d section, it has been decided, that a disposing means not a pledge, but something in the nature of a sale; and that no pledge will be valid but for money or negotiable in-

struments, that is, such instruments as bills and notes which pass by endorsement, and not East India warrants which pass by delivery merely; and that the advances must be made at the time of the pledge and on the faith of the document, and therefore that a delivery of dock warrants in exchange for other dock warrants of other persons, on the security of which money had been previously advanced to the factor, is not a valid pledge under that section; *Taylor and another* v. *Trueman and others*, 1 Moody & Malkin, 453; *Taylor* v. *Kymer*, 3 Barnewall & Adolphus, 320, 337; *Bonzi* v. *Stewart*, 4 Manning & Granger, 295, 326. Under the same section, also, it has been decided, in the Court of Exchequer, the Exchequer Chamber and the House of Lords, that the rule of the common law was thereby relaxed, only in cases where the agent was not merely in possession of, but was *intrusted* with, the symbol of property, and not in cases where his possession of the document was not in accordance with the intention of the prineipal, and therefore that the section was inapplicable, not only where the possession had been obtained feloniously or fraudulently, but where the agent, without the principal's assent, had, by being intrusted with the bill of lading for the purpose of sale, been enabled to take out the dock warrant in his own name, a mere de facto *enabling* of the agent to obtain the document not being an *intrusting*, when that ability was exercised in such a way as that the principal, if informed, would have said that he had not intended it; *Phillips* v. *Huth*, 6 Meeson & Welsby, 572; *Hatfield* v. *Phillips*, 9 Id. 647; S. C. 14 Id. 665; *Bonzi* v. *Stewart*, p. 328.

With regard to the 3d and 5th sections, Best, Ch. J. at nisi prius, was of opinion, in a case under the former, that as it gives the pledgee only the lien which the factor had and *could enforee*, that it applies only to a lien for debts, and not to a lien for liabilities, such as acceptances, which he may not have to pay, since in such a case, though the agent has a right to retain as a security till he is released from liability, yet he has no right which he can then enforce, as he has no elaim for the payment of money from his prineipal until he has paid money on his liability; *Blandy* v. *Allen*, Danson & Lloyd, 22, 27; but however this may be, it has been decided under the 5th section, that when the owner discharges the agent's liability, by taking up the notes or bills, all lien is gone, and he may immediately recover the property from the pledgee, without paying off his claim; *Fletcher* v. *Heath*, 7 Barnewall & Cresswell, 517. The 5th seetion, also, has been decided to apply, only to a pledge, distinctly so intended, and not to such a transfer as is in law a sale: *Thompson* v. *Farmer*, 1 Moody & Malkin, 48.

These decisions led to the passing of 5 & 6 Vict. c. 39: but before giving an aceount of its provisions, it may be proper to speak of the Factor's acts of New York and Pennsylvania, which are founded upon 6 Geo. 4, c. 94; the former passed on 16th April, 1830, (1 Rev. St. 774,) and the latter on April 14, 1834.

Sections 1st and 2d of the New York statute, in effect, re-enact the 1st section of 6 Geo. 4, c. 94; but instead of giving a lien in terms to the consignee of goods, which have been intrusted, &c., it gives it in general words, in the case of "every person in whose name any merchandise shall be shipped:" but the meaning is probably the same. Indeed, in the late ease of *Covill* v. *Hill*, 4 Denio, 324, 330, Bronson, C. J., remarked that the New York act was framed upon the St. 6 Geo. 4, c. 94, and that the latter might be looked, to aid in the construction of the other. "Although the words of the section of the New York act," he observed, "are very broad, it must, I think, be confined to cases where the goods have been

shipped by the owner, and under his authority, in the name of another. It could not have been the intention of the legislature, that one who had taken the property as a trespasser or a thief, and shipped it in his own name, should be deemed the true owner, so as to give the consignee a lien for advances. The leading object of the statute was to protect the consignee, when he had, in good faith, paid, or become liable to pay money on the credit of appearances created by the owner of the property."

Sect. 3d, enacts that an agent intrusted with the possession of any document of title to goods, or not having such document, but intrusted with the possession of goods for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed the true owner, so far as to have power to contract for the sale or disposition of the goods for any money advanced, or negotiable instrument or other obligation in writing given upon the faith of it. This is in several respects more comprehensive than the 2d section of 6 Geo. 4, c, 94; yet is very defective in precision. It has been decided under this section, that the consideration need not be given at the time, provided it is given on the faith of the sale, and therefore that a transfer, by an agent intrusted with goods for the purpose of sale, as a security for endorsements to be subsequently made, is valid if the endorsements are afterwards made; *Jennings* v. *Merrill*, 20 Wendell, 9. It has been decided also, that this section does not apply where the party dealing with the agent has notice that he is not the owner, though that is not expressly provided in the statute; *Stevens* v. *Wilson*, 6 Hill, 512; where Bronson, J., declared that the statute was not made to legalize fraud, but to protect those who honestly trusted to appearances, and supposed that they were dealing with the true owner, and that this statute, though framed in a different manner from the English one, was evidently designed to produce the same result.

Sect. 4, gives the pledgee, in case of a deposit of such goods as a security for any antecedent debt, merely, the rights therein which the agent at the time possessed, or might have enforced.

Sect. 5, preserves the owner's right to redeem property, thus pledged, and recover the proceeds of deposits sold, upon discharging the pledgee's lawful claims upon it.

Sect. 6, provides that the act shall not be taken to authorize a common carrier, warehousekeeper, or other person to whom goods may be intrusted for transportation or storage only, to sell or hypothecate them.

Sect. 7, declares the pledge or sale by an agent of goods intrusted or consigned to him, and the applying or disposing of the proceeds, to his own use, in bad faith, and with intent to defraud, to be a misdemeanour in him, and in all aiding and assisting in the fraud.

Sect. 8, preserves the power of the court of chancery to entertain a bill of discovery in cases of such fraud.

It will be observed, as a consequence of the decision in *Stevens* v. *Wilson*, that the New York statute does not contain any provision similar to the 5th sect. of the British act, enabling a known agent to pledge to the extent of his interest. This circumstance, together with the extension, in the 7th sect., of the penalties of a misdemeanour, to those who aid the factor in effecting a sale or pledge fraudulently, for his own benefit, would indicate that the omission, from the 3d section, of the clause relating to notice, was intentional, and that the Supreme Court in *Stevens* v. *Wilson*, had misapprehended the design of the legislature, which, probably, was to enact what is provided by sects. 1 & 3 of 5 & 6 Vict. c. 39. But the decision in *Stevens* v. *Wilson* has been confirmed by the Court of Errors; 3 Denio, 472; and approved in *Zachris-*

son v. *Ahman*, 2 Sandford's S. Ct., 68, 75.

Of the Pennsylvania statute of April 14, 1834, the 1st and 2d sections give to a consignee, without notice by the bill of lading or otherwise, a lien for advances to, or receipts by, the person in whose name merchandise is shipped or otherwise transmitted, "whenever any person intrusted with merchandise, and having authority to sell or consign the same, shall ship or otherwise transmit the same to any other person."

Section 3, enacts, that if any consignee or factor, having possession of any goods, or of a document of title thereto, with authority to sell, shall pledge the goods to one not having notice, by such document or otherwise, that the holder is not the owner, the pledgee shall acquire the same rights as if the holder were the owner.

Section 4, provides, that where a person accepts such goods or document in pledge for an antecedent debt due by the factor, and without notice, that he is not the owner, or shall accept them in pledge, with notice or knowledge that the pledgor is only an agent, the pledgee shall take such right and interest as the factor possessed, or could have inforced, and no more.

Section 5, provides, that the act shall not affect the lien at law of consignees or factors for expenses or charges attending consignments; nor the owner's right to recover his property from a factor before pledge, or from his assignees, in case of insolvency; or to redeem goods pledged by the factor upon discharge of the pledgee's rightful claims.

Section 6, enacts, that if a factor shall pledge, and apply or dispose of the proceeds to his own use, with intent to defraud, or shall, with such intent, apply or dispose of, to his own use, the proceeds of any sale or other disposition of the goods of his principal, he shall be punishable as for a misdemeanour.

This act of Pennsylvania is drawn with great precision and neatness. Perhaps the only particular in which it differs substantially from the act of 6 Geo. 4, c. 94, is in giving, in its 3d section, to the possessor of goods, the same power of pledging which it gives to the possessor of a document of title, and in giving that power to one having possession, with authority to sell, instead of to one intrusted and in possession.

In June, 1842, to obviate the effects of the decisions before mentioned under the act of 6 Geo. 4, c. 94, and further to extend the provisions of that statute, was passed the act of 5 & 6 Vict. c. 39, "to amend the law relating to advances *bona fide* made to agents intrusted with goods."

The first section enacts, that wherever an agent is intrusted with the possession of goods, or documents of title to goods, he shall be deemed the owner so far as to give validity to any contract by way of pledge, lien, or security thereon, whether for an original or a continuing advance, made *bona fide* by any person, even if that person have notice that the party is an agent.

Section 2, enacts, that where such contract of pledge, lien, or security, is in consideration of the delivery up of other property on which the pledgee has a valid and available lien or security for a previous advance under some contract with the agent, the pledgee, acting *bona fide* shall acquire, upon the property deposited in exchange, a lien to the extent of the value of the property given up.

Section 3, provides, that though the act shall extend to protect *bona fide* contracts of loan, advance, or exchange, made with notice that the agent is not the true owner, it shall not protect such contracts as are not made *bona fide*, and without notice that the agent has not authority to make such contracts, or is acting *mala fide* in respect to the owner, or to protect any pledge for an antecedent debt of the agent, or to authorize the agent to deviate

from the express orders of his principal.

Section 4, enacts, that an agent intrusted with, and possessed of any document of title to goods, (and the meaning of a document of title is defined,) whether derived immediately from the owner, or obtained by reason of the agent's having been intrusted with the goods, or with some other document of title, shall be deemed to have been intrusted with the possession of the goods, and a pledge of the document shall be a pledge of the goods; and such agent shall be deemed possessed of such goods, whether they are in his actual custody, or held by another subject to his control, or for him or on his behalf: and any advance made *bona fide* to any agent intrusted with and in possession of any such goods or documents, on the faith of a contract in writing to consign, deposit, transfer, or deliver them, and they shall be actually received by the person making the advance, without notice that the agent had not authority to give such pledge or security, such advance shall be deemed to be on the security of the goods or documents under this act, though they are not received by the person making the advance till subsequently thereto; and any contract made with a clerk or other person, on behalf of the agent, shall be deemed made with the agent; and any payment made, whether by money or negotiable security, shall be deemed an advance under this act; and an agent in possession of such goods or documents, shall be taken to have been intrusted therewith, unless the contrary can be shown.

Section 5, provides, that the civil responsibility of agents shall not be diminished; Section 6, that agents pledging or receiving advances in bad faith, and for their own benefit, shall be punishable as for a misdemeanour; Section 7, reserves to the owners the right to recover or redeem in cases under this act, as under the 6th sect. of the former one.

Of the principal's ownership of property in the hands of his factor.

VEIL & PETRAY *v.* THE ADMINISTRATORS OF A. MITCHELL.

In the Circuit Court of the United States for the District of Pennsylvania.

APRIL TERM, 1821.

[REPORTED, 4 WASHINGTON, 105–106.]

When the principal can trace his property into the hands of an agent or factor, whether it be the identical article which first came to his hands, or other property purchased for the principal, by the factor, with the proceeds; he may follow it, either into the hands of the factor, or of his legal representatives, or his assignees, if he should become insolvent; unless such representatives or assignees should pay away the same before notice *of the claim of the principal.*

THE special verdict stated, that in the lifetime of Abner Mitchell, the intestate, the plaintiffs sent to him for sale, two bills of exchange on France, with instructions to remit them the proceeds. The intestate sold the bills, and remitted to the plaintiffs the proceeds of one of them, except $60, which he had in bank notes of the South Carolina banks. For the other bill he took the check of the purchaser, payable some days after the sale. Before the check came to maturity, Mitchell died, leaving in his possession the check, and the South Carolina notes amounting to $60; all of which came to the hands of the defendants, who received payment of the check when the same became due. On another account, the plaintiffs were indebted to the intestate, in a balance of $344 82 cts. The intestate died insolvent, and the question reserved for the opinion of the court is, whether the plaintiffs are entitled to recover the amount of the check, and the notes for $60, after deducting what is due to the intestate.

Chauncey, for the plaintiff. A factor can acquire no property in the goods of his principal, or the goods purchased with the proceeds for the principal, so long as they remain unchanged, and can be traced. Hourquibe vs. Girard, 2 Wash. C. C. Rep. 164, 212, and Mac Millan vs.

Ewing, decided in this court. See 1 Salk. 160. 2 Vern. 638. 2 Atk. 232. 5 T. Rep. 215, 494. 1 East, 544. Giles vs. Perkins, 9 East. Willis's Rep. 400. 3 P. Williams, 186, note.

C. J. Ingersoll, for the defendant, admitted the law to be as stated. But he denied that the verdict traced the property into the hands of the defendant; neither does it state that the proceeds of the check, and the $60, remain in the hands of the defendants distinct from their money; or that it was not mingled, before notice of the plaintiff's claim to it. He cited 5 Binn. 298. 2 Madd. Ch. 494, 510. 12 Ves. 119.

The court, after hearing the defendant's counsel, stopped the reply.

WASHINGTON, J., delivered the opinion.

The cases upon this subject are uniform, in laying down the rule, that where the principal can trace his property into the hands of his agent or factor, whether it be the identical article which first came to the hands of the factor, or other property purchased for the principal by the factor with the proceeds; he may follow it, either into the hands of the factor, or of his legal representatives, or of his assigns if he should become insolvent or a bankrupt.

The factor is trustee for the principal, so long as he retains the property, or its representative in his hands; and his assignees, or legal representatives take it subject to the same trust, which they cannot defeat by turning it into money; unless, indeed, they should pay it away in their representative character, *before notice* of the claim. It is in this point of view only, that notice is necessary.

Judgment for plaintiffs.

This case illustrates a principle of great importance in the law of agency; and it has often been confirmed. In case of the insolvency of an agent or factor, and a general assignment by him for the benefit of his creditors, and in case of his bankruptcy, property consigned to him to sell, and the proceeds of it, whether in notes or bonds payable to the factor, or invested in effects for the principal's use, or in money, so long as the same can be distinguished from the mass of the agent's or factor's property, are the property of the principal, and do not pass to the assignees, and if received by them, may be recovered by the principal at law; *Denston* v. *Perkins et al.*, 2 Pickering, 86; *Chesterfield Man. Co.* v. *Dehon et al.*, 5 Id. 7; *Price* v. *Ralston*, 2 Dallas, 60; *Messier* v. *Amery*, 1 Yeates, 533, 540; *Yates & McIntire* v. *Curtis*, 5 Mason, 80; and this applies to a factor selling on a *del*

credere commission, and taking notes in his own name; *Thompson* v. *Perkins et al.*, 3 Id. 232; *Titcomb et al.* v. *Seaver and Trustee*, 4 Greenleaf, 543. "In such cases," said the court in *Overseers of the Poor* v. *Bank of Va. et al.*, 2 Grattan, 544, 548, "it is wholly immaterial whether the property be in its original state, or has been converted into money, securities, negotiable instruments or other property; if it be distinguishable, and separable from the other property or assets, and has an earmark or other appropriate identity. The product, or substitute of the original thing, has the nature of the original thing itself imparted to it, as long as it can be ascertained to be such product, or substitute; and the right of the principal thereto ceases only when the means of ascertainment fail; and this is the case when the subject is turned into money, and is mixed and confounded in a general mass of the same description, and becomes incapable of being distinguished from the mass of the money of the agent." A principal, also, may follow property or securities of his, misappropriated by his agent, in whosesoever hands they may come; *Merrill* v. *Bank of Norfolk*, 19 Pickering, 32; and in case of an agent's death, as the agency is wholly terminated, his administrators have no right to receive money due on sales, or to retain notes taken on sales, and the principal may recover from them; nor to dispose of property remaining in the agent's hands: *Merrick's Estate*, 8 Watts & Sergeant, 402; *City Council* v. *Duncan*, 3 Brevard, 386; *Gage* v. *Allison & Clark*, 1 Id. 495; money, however, if paid or lent to a bona fide holder, cannot be recovered by the principal; *Lime Rock Bank* v. *Plimpton*, 17 Pickering, 159.

In the case of *Foley* v. *Hill*, in the House of Lords, Lord Cottenham (the Chancellor), in distinguishing the relation of Banker and Customer, from that of Principal and Agent, in respect to original equitable jurisdiction, said: "As between principal and factor, there is no question whatever that that description of case which alone has been referred to in the argument in support of the jurisdiction, has always been held to be within the jurisdiction of a Court of Equity, because the party partakes of the character of a trustee. Partaking of the character of a trustee, the factor—as the trustee for the particular matter in which he is employed as factor—sells the principal's goods, and accounts to him for the money. The goods, however, remain the goods of the owner or principal until the sale takes place, and the moment the money is received the money remains the property of the principal. So it is with regard to an agent dealing with any property; he obtains no interest himself in the subject-matter beyond his remuneration; he is dealing throughout for another, and though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction for which he is engaged; and, therefore, in these cases the Courts of Equity have assumed jurisdiction." *Foley* v. *Hill*, 2 H. of L. cases, 28, 35. But the principal is not merely a *cestui que trust:* he is regarded as such, for the purpose of giving a court of equity, jurisdiction. But he is also the owner in law.

A sale by a factor, creates a contract between the principal and the purchaser; the principal may sue in his own name on the contract of sale, and he may control the election of notes taken by the factor in his own name, except where the factor is in advance to him; he may forbid payment to the factor, and payment to the latter after such notice will not be good, except in the case just mentioned; *Kelly* v. *Munson*, 7 Massachusetts, 319, 324; *West Boylston Man. Co.* v. *Searle*, 15 Pickering, 225; *Pitts* v. *Mower*, 18 Maine, 361. Where one acknowledged in writing that he had bought of J. F., agent of A. H., and agreed to pay him a cer-

tain sum, and J. F. sued upon it, it was held to be a good defence that the interest is in A. H., and that A. H. has ordered the defendant not to pay J. F., as it amounts to a revocation of J. F.'s agency; *Fox* v. *Pray*, 2 Miles, 333. But payment to an agent, bona fide, while his agency continues, and without notice to the contrary, is in law, payment to the principal, and is good against him; *Cropper et al.* v. *Adams et al.*, 8 Pickering, 40, 44; *Taber* v. *Perrot et al.*, 2 Gallison, 565, 569; *Cross & Co.* v. *Haskins*, 13 Vermont, 536, 540; but after notice not to pay, it is a mispayment; *Frazier* v. *The Erie Bank*, 8 Watts & Sergeant, 18.

But the rights of the principal, as above stated, are to be understood in all cases as subject to the factor's lien for advances, commissions, and expenses, as all the cases above cited, admit, and also to those rights of set-off which have been acquired by persons who have dealt with the factor in the belief that he was the principal. See also *Walter et al.* v. *Ross et al.*, 2 Washington, C. C. 283, 287; *Toland* v. *Murray*, 18 Johnson, 24.

Of the duty and liability of an agent to his principal.

EBENEZER BURRILL versus JAMES PHILLIPS.*

In the Circuit Court of the United States, for the District of Rhode Island.

NOVEMBER TERM, 1812.

[REPORTED, 1 GALLISON, 360–363.]

A factor, in making sales of goods on consignment, is bound not only to good faith, but to reasonable diligence.

Advances by a consignee are considered by the general law, as made on the joint credit of the fund and the person of the principal; and the factor may relinquish his lien on the fund without at all affecting his personal remedy.

STORY, J. As to the law applicable to the facts before the jury, I take it to be well settled, that a factor, in making sales of goods on

* This was an action of assumpsit brought by a factor against his principal, to recover advances made on account of cotton consigned for sale. The defences were, that the factor sold the cotton on credit to persons not in good credit at the time, and who afterwards failed, and that the advances were made on the credit of the cotton exclusively, and not on the personal responsibility of the principal. The reporter's statement is omitted.

consignment, is bound not only to good faith, but to reasonable diligence. It is not sufficient, that he has been guilty of no fraud, or of no gross negligence, which would carry with it the *insignia* of fraud. He is required to act with reasonable care and prudence in his employment, and exercise his judgment after proper inquiries and precautions. If he shut his eyes against the light, or sell to a person, without inquiry, when ordinary diligence would have enabled him to learn the discredit or insolvency of the party, I cannot admit that he is discharged from responsibility to his principal. So also he shall not be permitted to sell his own goods to the party, and take security, and at the same time to sell the goods of his principal to the same party without security. For he is bound to exercise at least as much diligence and care, as to his factorage, as his own private concerns. And in the supposed case, it may well afford ground of presumption, that the factor had knowledge of some latent defect of credit, although in the commercial world in general the purchaser stood with a fair character. I do not, however, think, that the same presumption would ordinarily arise from the mere fact of the factor's taking security for advances made to the purchaser *in money*, or even receiving a premium for such advances. He may well refuse to lend his own money without security or a premium, upon grounds altogether distinct from a doubt of the solvency of the party. And in the present case it is shown not to be an uncommon course in trade.

In order to affect the factor with the imputation of negligence, it is not necessary that he should absolutely know, that the party was discredited. It is sufficient if he have notice of facts, which ought to put a person of ordinary prudence on his guard. For, as in equity causes, the factor will be held affected with notice, if the facts be such as ought to have put him upon farther inquiry. A sale, therefore, if made under circumstances of real or constructive notice, will be considered as made at the risk and on the account of the factor, and the principal may well, in a suit like the present, avail himself of the claim.

As to the point, that the advances were made exclusively on the credit of the fund without recourse to the principal, it is a mere question of evidence. There may be an agreement between the parties, which shall have this effect; and it cannot be doubted, that such an agreement would, in point of law, be valid. It amounts to no more than the common case of selling with a *del credere* commission. But such an agreement is not legally to be inferred from the mere relation of principal and factor. Advances between them are considered by the general law, as made on the joint credit of the fund and the party; and the factor may relinquish his lien on the fund without at all affecting his personal remedy. When therefore, a party sets up such an agreement, as it is

in derogation of the general law, he is bound to make out in proof the agreement, and no presumptions of law arise in his favour.

On the whole, if the jury are of opinion that the facts of the case prove such an agreement to consider the cotton as the exclusive fund of payment; or if they believe that the plaintiff had knowledge of facts, which ought to have put him on inquiry, or which afford a fair presumption of impending insolvency, then the verdict ought to be for the defendant; otherwise for the plaintiff.

The jury found a verdict for the plaintiff.

Burrill and *Goddard* for the plaintiff.

Robbins and *Dexter* for the defendant.

COURCIER *v.* RITTER.

In the Circuit Court of the United States for the District of Pennsylvania.

OCTOBER TERM, 1825.

[REPORTED, 4 WASHINGTON, 549–554.]

General rule as to the duty of an agent in obeying the orders of his principal.

A merchant of Philadelphia sends a cargo of coffee to his correspondents at Bordeaux, and writes as follows: "Make sale of the coffee immediately on arrival, *and forward the returns in the articles mentioned below, by the same vessel." It was the duty of the agent to sell immediately on arrival, no matter at what loss, if he could; or as soon as he could. He had no right to exercise any discretion.*

If the agent disobeys his orders, and makes a full and candid statement of all the facts on which his judgment was exercised to his principal, and the latter makes no objection to his conduct, or is silent respecting it, this amounts to a recognition of it, and will excuse the agent.

In the same case, the other part of the order was complied with; the agent sending the return cargo ordered, by the same vessel. The

acceptance of that cargo by the principal, is no ratification of the agent's conduct, in not selling as soon as he could.

In October, 1812, the defendant, a merchant of Philadelphia, consigned to the plaintiff, a merchant of Bordeaux, forty bags of coffee, weighing between five and six thousand pounds, which were accompanied by a letter of advice, apprising him of the consignment, and containing the following order, viz., "you will please to make sale of the coffee *immediately on arrival*, and forward the returns in the articles undermentioned, by the same schooner." The vessel was compelled to put in at Bayonne, where she arrived in December of that year, but was not permitted to land her cargo until the 24th of March, 1813, when the coffee was placed in entrepot. On the 9th of February, 1813, the plaintiff wrote to the defendant, announcing the arrival of the vessel at Bayonne, and stating that the times were very dull; that the cargo could not then be landed, but that he should ship him by the vessel, a return cargo as ordered; and concluding with assurances that he should use his best endeavours to obtain an advantageous sale of his coffee. On the 28th of April, 1813, he again wrote to the defendant as follows: "I have not been able yet to procure a sale for your coffee, but no exertions will be wanted to avail myself of the first favourable change in the market. Circumstances are not favourable at the present moment, and nothing but very dry and white Havana sugars can command any sales." The plaintiff did not again address the defendant, until the 21st of May, 1815, when he wrote to him and enclosed an account of sales, by which it appeared that the coffee had brought only one franc, seventeen centimes a pound, which made a considerable balance against the defendant, for which this action was brought.

For the plaintiff, it was contended:

1. That the operations of the hostile army to the north, and in the peninsula, during the year 1813, and down to the restoration of the Bourbons, produced a state of things which could not be known to, or anticipated by the defendant in October, 1812, and so reduced the price of all colonial produce in France, that had the plaintiff obeyed literally the order contained in the defendant's letter of October, 1812, he would have subjected his correspondent to a very considerable loss. That this was therefore a case where a consignee is justified in departing from the strictness of his instructions, and in exercising a discretion with an honest intention to promote the interest of his employer; and if he should be mistaken in his judgment, whereby a loss happens, it ought not to fall on the agent. 4 Binn. 361.

2. That if the law be otherwise, still, by accepting the return cargo

which was procured by an advance made by the plaintiff, and was not purchased with the proceeds of the outward cargo, and by not promptly objecting to the plaintiff's alleged violation of his orders, of which the letter of the 28th of April informed him, the defendant ratified what was done. 1 Ves. 509. 2 T. Rep. 188. 1 Emer. 144, 145. 12 Johns. 300. 3 Cow. 281. 1 Yeates, 487.

The counsel for the defendant contended, 1. That the order being positive, nothing could excuse a violation of it but an inability to sell; the contrary of which is proved by the evidence. 2. The letter of the 28th April, stating an inability to sell, disclosed no violation of the order: and consequently the silence of the defendant could not be a tacit ratification of an act of disobedience not stated by the plaintiff.

The parol evidence given in the cause will be noticed in the charge.

WASHINGTON, J. There are two questions for the consideration of the jury. 1. Were the defendant's orders disobeyed; and if they were, does the plaintiff stand excused by the circumstances which his counsel have urged in his favour? 2. If this point be against him, has the defendant, by his conduct, discharged him from the legal consequence of his disobedience?

1. The order contained in the letter of instruction which accompanied the coffee consisted of two parts: 1. To sell the coffee *immediately on arrival:* and 2. With the proceeds to purchase a return cargo, to be forwarded by the same vessel. It will be necessary to keep in mind these parts of the order, when we come to the examination of the second question. The obvious meaning of the first part is: sell immediately on arrival, *if you can*, or *as soon as you can*. This results from the consideration that no person can be supposed to be so absurd as to require another to do what is impossible, nor can the other be supposed to contract to do it. The law contemplates no such case, and consequently makes no provision for it, otherwise than to excuse the party for the breach of a contract, the performance of which, circumstances have rendered impossible. Questions between principal and agent frequently occur in courts of justice, as to the *construction* of the orders which are alleged to have been violated, whether they are positive and unqualified, or leave a discretion, with the agent. If they are so ambiguous that two constructions may fairly be given to them, every principle of justice demands that the want of precision in the writer should fix the loss, if any, upon him, rather than upon his correspondent. If the order leaves him a discretion, the law requires of him nothing further than the exercise of a sound, honest judgment. But if the order be free from ambiguity; is positive, and unqualified; it must be

rigidly obeyed if it be practicable; and no motive connected with interest of the principal, however honestly entertained, or however wisely adopted, can excuse a breach of it. This is a general and well-established principle of law, to which I am aware of no exception.

It has been argued for the plaintiff, that no man can be supposed to act so absurdly as to mean that his property should be sacrificed, or even sold at a loss by his agents; and, therefore, that the most positive order should be so construed as to give a direction where such a consequence, resulting from circumstances not known or contemplated by the principal, would attend a strict performance of the order. But were this argument to receive the sanction of the court, it would be highly mischievous, by confounding all distinction between positive and discretionary powers, and thus unsettling well-known and established principles of law. It would be particularly so to commerce, which cannot well be transacted but by the instrumentality of agents. Risk of profit, or loss in foreign markets, is the inseparable attendant of the trade which is carried on with them; and yet no merchant in the possession of his reason ever did anticipate the incurring of the latter, much less the sacrifice of the articles consigned to his agent for sale there. But he knows, that war, political occurrences, and unexpected glut of the foreign market with the articles on which he calculates to make a profit, as well as other causes, equally unexpected, may intervene to frustrate all his calculations. He may, from those considerations, deem it prudent to confer on his agent an unlimited or a qualified discretion. But if he determine to rely solely on his own judgment, and to exclude all discretion in his agent; to sanction a latitude of action in the latter, beyond the rigid commands of his orders, would be to declare, what no person will attempt to maintain, that there is no intelligible difference between limited and unlimited powers. The principal could never be certain when he had given a positive order; and the agent could never know when he might, with safety to himself, exercise a discretion, and to what extent; since the circumstances of the different cases on which his judgment is to be employed, to find out when he may, and when he may not depart from his orders, will generally be various, and therefore always embarrassing. But so long as he is held to a strict compliance with an order plainly expressed, the principal can never complain, nor can the agent suffer; be the consequences to the former what they may.

It has been observed that a strict compliance with the order in this case could not be observed, as the vessel arrived at Bayonne instead of Bordeaux, and no sale could be made before the cargo was landed. The answer to the first part of the argument is, that the consignment was accepted by the plaintiff, after he knew of her arrival at the former

port; and as to the second, the order was not disobeyed, if no sale could be made until the coffee was landed.

The case of Dusar vs. Perit, 4 Binn., which the plaintiff's counsel supposed afforded an instance of an exception from the general rule which we have laid down, seems to us rather to illustrate and confirm it. In that case, the supercargo was authorized to sell the vessel and cargo at the Havanna, at a certain price for each. He was compelled by misfortune experienced on the voyage to put in there and to unload, for the purpose of having the vessel hove down. Whilst in this situation, the limited price for the vessel was offered and accepted; and the market for the flour promised to equal that at which his instructions restricted him, and at which he actually sold a part; but before the sales of the whole cargo were completed, the market fell, and he was compelled to take, for the residue of the cargo, less than the limited price. As to that part of the cargo, the sale was a matter of uncontrollable necessity; since having, *in compliance with his order*, sold the vessel, and having no authority to purchase, or to hire another vessel, it was impossible to comply with his orders, in case the prescribed price could not be obtained, to proceed to another market. A strict compliance with the orders, therefore, became impracticable.

The only question for the jury to decide on this point is, whether the order to sell immediately on arrival, was practicable? It is clear that it was not so until the coffee was landed. Was it then practicable? This is a question for you to decide upon the evidence. Two of the witnesses examined by the plaintiff, have deposed that the state of the market for all colonial produce, during the year 1813, was bad, and that the plan of holding up these articles was generally adopted by the merchants of Bordeaux. One of them states, that during that year, sales were impossible. The other deposes, that till July, 1813, sales were made in Bordeaux, but that after that month the price was nominal, there being no purchasers. The clerk of the plaintiff swears, that sales of the coffee could not be made at Bayonne in that year; for which reason the plaintiff was unable to dispose of that consigned to him by the defendant. A fourth witness has sworn nearly to the same effect; and all of them agree, that the plaintiff adopted the same conduct in relation to his brother's coffee, as he did in the instance now under consideration; and that other merchants observed a similar policy, from a view to the interest of their employers. Upon this latter part of the evidence, it may be proper to observe, that it might have been of material importance, if discretionary powers had been confided to the plaintiff; but it can have no weight in a case like the present, where the order to sell immediately was imperative.

On the other side, the captain of the vessel has deposed, that he had

about the same quantity on board with that shipped by the defendant, which he sold at Bayonne, whilst it lay in entrepot, in two parcels, one for four francs twenty-five centimes per pound, and the other for four francs fifteen centimes per pound. But his officers were unable to dispose of the quantity which they took out. Two other witnesses, merchants of Bayonne, have deposed, that this article sold there from March to May, 1813, at from four francs twenty centimes to four francs forty centimes, and in June, at from four francs ten centimes to four francs twenty centimes; and that sales at those prices were easily effected, both publicly and privately, during those months.

If, upon this evidence, and the principle of law which has been stated, the jury should be of opinion that the plaintiff is chargeable with a breach of orders; the remaining question is, has the defendant by his conduct discharged him from the legal consequences of his disobedience.

The plaintiff's counsel have very properly insisted, that, if the principal, being informed by his agent of his deviation from his orders, make no objection to his conduct, the law construes his silence into a tacit recognition of the act or omission, against which he will not be permitted afterwards to complain. The reason is obvious. He shall not, by his silence, place his agent in the predicament of losing all the gain which may result from his well-intended disobedience, and yet be exposed to sustain the loss which a mistaken judgment, or unforseen circumstances, may produce. But to entitle the agent to the benefit of this principle of law, it is incumbent upon him to act with the utmost good faith, by making to his employer a candid disclosure of his conduct, and of the causes which influenced it, in order that the latter may have the means of judging in respect to the course which it becomes him to adopt. The question then is, has such a disclosure been made by the plaintiff in this case? His counsel endeavour to excuse him upon the ground that political events, unknown to and unexpected by the defendant, had so depressed the price of all colonial produce in France, that sales could not be made of the coffee in question, after its arrival and being landed, without subjecting their principal to a heavy loss, and on that account he was justified in disregarding the strict injunctions of the order to sell immediately. But did their client make such a statement in his letter to the defendant of the 28th of April, 1813? This is its language—"I have not been able yet *to procure a sale for your coffee*, but no exertions will be wanted to avail myself of the first favourable change in the market. Circumstances are not favourable at the present moment, and nothing but very dry and white Havanna sugars will command any sales." He does not say that he has declined selling on account of the low price of coffee, which would subject his correspondent to a loss—but, that the sale of it is *impracticable*,—and that no colonial produce

will command *any* sales except a particular kind of sugars. He discloses no breach of orders whatever, if the fact was that no sales could be made; and consequently, the defendant's silence had no known violation of duty to recognise or to ratify. He had a right to conclude that if no sales could then be made, yet, that regarding the original order, the plaintiff would sell as soon as it should be in his power to do so. No further communication was made to the defendant till March, 1815, when the letter, covering the account of sales was written.

If then the jury should be of opinion, upon the evidence, that sales could have been effected at the time the letter of April was written, the silence of the defendant does not amount to a ratification of the plaintiff's conduct in not selling.

But it has been further insisted for the plaintiff, that the defendant, by his acceptance of the return cargo, although it was not purchased with the proceeds of the coffee, amounted to a dispensation from a strict compliance with the defendant's order. The court is of a different opinion. I have before observed, that that order consisted of two parts. One of them I have just disposed of; the other was, to purchase a return cargo with the proceeds of the coffee. This was not done, and consequently the defendant might have refused to take that cargo to himself, or he might have received and sold it for his own security, but as the plaintiff's agent. But having chosen to pursue a different course, he cannot now, nor does he complain of a breach of that part of his order which pointed out no fund with which his cargo was to be purchased. But this has nothing to do with that part of his order which directed the plaintiff to sell the coffee immediately on his arrival. The whole cause then turns upon the question of fact, whether it was practicable to sell the coffee at all, at or after the time it was landed, in 1813? If it was, the loss must be borne by the plaintiff.

The jury found for the plaintiff $443 damages, being about the balance claimed by the counsel in the event of his being considered as having broken his orders.

Chauncey and *Binney*, for plaintiff.
Bradford and *J. Sergeant*, for defendant.

ELIJAH CLARK versus MOSES P. MOODY AND OTHERS.

In the Supreme Judicial Court of Massachusetts.

MARCH TERM, 1821.

[REPORTED, 17 MASSACHUSETTS, 145–153.]

Of a factor's duty to account to his principal, and of his liability to an action without previous demand.

[In this case, which was assumpsit on a promise to account for goods sent by the plaintiff, in Boston, to the defendants, commission merchants at Philadelphia, to be sold on account, arbitrators had found a balance due to the plaintiff for the proceeds of the goods; but referred the costs to the Court to depend on the question whether the action could be lawfully commenced under the circumstances, without an order drawn for the balance, or a demand, before suit, or special instructions to remit, or other circumstances.]

Parker, C. J., delivered the opinion of the Court. We must understand that the merchandise was sent on to be sold, without any special instructions from the plaintiff, as to the disposition of the proceeds; and must gather the understanding and intention of the parties, as well as we can, from their acts and doings, relative to the subject-matter of the contract between them.

The general rule laid down in the books is, that when goods are delivered to a factor, to be sold and disposed of for his principal, the law implies a promise on the part of the factor, that he will render an account of them, whenever called upon by the principal: and if he refuses to account, he is liable to an action of *assumpsit* for the breach of his implied promise. It seems to have been formerly doubted, whether any action but account would lie against a factor: and afterwards it was thought, that an express promise to account was necessary to maintain *assumpsit*. But the doctrine now settled is, that the undertaking to act as bailiff is an undertaking to account: and Lord Holt, in the case of Wilkin vs. Wilkin, 1 Salk. 9, referred to by the plaintiff's counsel, says, wherever one acts as bailiff, he promises to render an account. Although in Comyns on Contracts, 261, the inference from

this case is made to be, that the factor is liable only on demand, or on refusal to pay money; yet if the general principle adopted by Holt is right, that the mere acting as bailiff is promising to account, it would not seem that a demand was, in all cases, necessary, to enable the principal to maintain his action. Indeed such a limitation of the liability of a factor would be exceedingly inconvenient, and tend to the embarrassment of trade. For if a merchant, who sends his goods to a foreign country to be sold, can have no right to call for his money, the proceeds of his goods, until he has sent abroad to make a demand, the risk of loss from the failure of factors would be considerably increased, and the disposition to trust them proportionably impaired.

Generally the consignor of goods accompanies his consignment with directions how to apply the proceeds; either to pay them over to a third person; or to remit in bills, or in merchandise, or in specie; or to hold them, to answer his future orders; and in these cases, there can be no difficulty. For the factor cannot be liable, until he has actually or impliedly broken his orders. I say impliedly, for if the factor should become bankrupt or insolvent, with the goods of his principal or their proceeds in his hands, so that he is disabled from remitting them, or otherwise appropriating them according to the instructions of the principal, there seems to be no reason, why an action would not immediately lie against him; by analogy to the common law principle, that when a duty is to arise upon a demand, and the party liable has disabled himself from performing, the necessity of a demand ceases. And if this were not so, creditors here, who could not for a long time cause a demand to be made, would have no opportunity of securing themselves out of the effects of the factor in this country; while creditors of a different description, but not more meritorious, would meet with no impediment in securing their debts.

The practice here has conformed to this principle: for many instances are known to have occurred, of actions brought and sustained against factors in foreign countries, although no demand had been previously made upon them, to render an account. And it is probably upon this ground, if at all, that a principal may prove his claim against his factor, under a commission of bankruptcy in England, although no demand had been made upon him; so that the debt was contingent according to the general liability of factors. 3 D. & E. 549.

It is also the duty of factors to account to their principals in a reasonable time, without any demand, in cases where a demand would be impracticable or highly inconvenient: so that a factor abroad, who should receive goods to sell, without special directions as to the mode of remittance, would be held, according to the course of business, to give his principal information of his progress in the transaction; and if he

should neglect unreasonably to forward his account to his employer, this negligence would be a breach of his contract, and subject him to an action.

So if he should render an untrue account, even without any intention of fraud, claiming greater credit than he was entitled to, so that the balance shown was not true, we conceive the principal would have a right of action, without a demand. For he would not be obliged to submit to such charges as the factor should choose to make, or to wait, perhaps at the risk of his debt until his agent should voluntarily correct his account, and acknowledge a just balance.

But if the factor should receive and sell the goods, without any special orders as to remittance, upon an understanding express or implied, that he is to hold the proceeds to the order of his principal; and he does nothing in violation of those orders, or to disable himself from complying with them when they shall be received; and transmits a true account of sales, in a reasonable time, according to the course of business; and is ready to remit or answer drafts upon him; we think that no action will lie against him for the balance in his hands. For his contract is to sell and render an account, and he ought not to be held to remit at his own risk; and he cannot remit at the risk of his principal, unless in compliance with instructions.

It was urged in argument, that as the defendants had stated an account and acknowledged a balance, they were indebted for that balance, and that a right of action immediately accrued without demand, as in other cases of admitted debt.

It may be so, where there is nothing in the case to control the legal presumption. But if the course of business between the parties, or any evidence accompanying the account, shows a contrary implication, the presumption would fail.

In the case before us, the referees state that, when the account was sent on, which acknowledges the balance, it was accompanied by a letter from the defendants, in which they state that they hold the balance for the order of the plaintiff. This declaration is repeated in the following month; and it appears by the account stated by the referees, that all the proceeds, except the balance acknowledged, had been paid by drafts from the plaintiffs. These facts, with nothing of a contrary complexion, go far to show, that the consignments were accepted with an understanding that the proceeds were not to be remitted, without orders from the consignor.

The case in this view seems to be at least as strong as that cited from 10 Johns. 285, in which it was decided that the consignee was not liable in the action, because he had committed no breach of trust or duty. It appeared in that case to be the usage, for the consignor to direct the

mode of remittance; and it probably is the general practice everywhere. Such practice, together with the conduct of the defendants in the case before us, may justify the conclusion, that this consignment was made and accepted conformably to this practice.

But this is a fact to be stated by the referees, and not by the Court. If they determine, from the evidence in the case, that the understanding of the parties was, that the consignor was to direct the remittance, to draw for the proceeds, or otherwise appropriate them, then the defendants were not liable to the suit: and of course not to the costs, unless they were negligent in transmitting their account, or upon another ground they rendered themselves liable.

It has been stated, as one of the grounds of the liability of a factor, that he should have transmitted a false account, or one misrepresenting the balance in his hands. In the account, transmitted by the defendants, the balance stated is little more than half the amount found by the referees to be due. *Prima facie* this shows a wrong statement of account, by which the plaintiff was not bound to abide. If he had drawn for a larger sum, his bill might have been protested: if he had drawn for the balance as stated, it might have been an admission that the balance was true. He had therefore a right to sue, if it should turn out there was a misstatement of the account. On the other hand, if it shall appear that the account was correct, and that the referees had increased the balance against the defendants improperly, or from considerations of supposed equity, contrary to their legal rights, the eventual balance found would not affect their liability, when the suit was brought.

A large debt of one Lethbridge was lost, in consequence of his failure. The referees determined that the loss should fall upon the plaintiff, the defendants having been guilty of no negligence. But they had charged commissions on the amount of the sales to Lethbridge, which the referees disallowed. Was it right for the defendants to charge commissions on this sale, the fruits of which were lost? This must depend upon the usage among merchants. If such commissions are not usually charged, it was improper for the defendants to charge them, and the balance represented by them was not the true balance. If, on the other hand, it is considered proper among merchants, and is usual to charge a commission in such cases, the account is right in that particular.

It appears also that another sum, debited to the defendants, was not credited in the account rendered by them. If an account of this was rendered before the suit was commenced, and in a reasonable time after the money was received, the defendants are in no fault on account of this sum. But at present it appears that the sum remained in their

hands unacknowledged, when the suit was commenced. This matter may also admit of explanation.

As then the question of costs is seen to depend upon facts, which are not ascertained by the report of the referees, we conclude to recommit the report to them, with directions to consider and determine. 1. Whether from the correspondence between the parties, the course of business between them, or from any other evidence in the case, it appears that the consignments were made and received, under an expectation or understanding that the plaintiff was to draw for the proceeds, or otherwise to direct the remittance. 2. Whether the account rendered of the sales, and of the balance were true, according to the defendants' right as factors, agreeably to the usage of commission merchants. 3. Whether the defendants, within a reasonable time after the receipt of the proceeds, rendered an account thereof to the plaintiff. And if they find all these points in the affirmative, they will not charge the defendants with costs: otherwise they will.

The principal duties assumed by an agent, are—1. To employ adequate skill, and exert reasonable diligence, for the accomplishment of the objects of the agency. 2. To obey the instructions of his principal. 3. To keep his principal properly informed of the events of the agency. 4. To account at reasonable times, or on demand.

The first of these general duties, is illustrated in the case of *Burrill* v. *Phillips*. An agent is bound to employ adequate skill and due diligence in performing the duty assumed by him; and he is responsible for defect of either; *Redfield* v. *Davis*, 6 Connecticut, 439, 442. Whether left to his discretion, or limited by positive orders, his liability still is for negligence; if he has not been negligent, he will not be responsible; *Lawler* v. *Keaquick*, 1 Johnson's Cases, 174; and when the facts are not disputed, the question of negligence is for the court; *Porter* v. *Blood*, 5 Pickering, 54, 57. A factor is bound to use diligence in ascertaining the solvency of those to whom he sells on credit, or whose bills he purchases for remittance, or whom he employs. If he acts with that caution and prudence which he would have observed in his own case, and confides in those who are in good credit at the time, he is not answerable, though the result be disastrous; *Walker et al.* v. *Robert Smith*, 1 Washington, C. C. 152, 154; *Ford* v. *Stewart, &c.*, 4 B. Monroe, 326; *Hammon & Daniel* v. *Cottle*, 6 Sergeant & Rawle, 290; but if he has been negligent or imprudent, he is responsible: and, as is held in the case of *Burrill* v. *Phillips*, he is chargeable for the failure of those to whom he gives credit, if he has notice of such facts as ought to put a man of ordinary prudence on his guard; and to the same effect is *Leverick* v. *Meigs*, 1 Cowen, 645. The usage of his profession, or of his profession in the place in which he resides, is the general measure of the diligence required of an agent; and, in the absence of a special engagement, if he acts in ac-

cordance with the usage, he will not be liable for negligence; *Carter* v. *Cunningham & another*, 7 Metcalf, 491; *Parke* v. *Lowrie*, 6 Watts & Sergeant, 507. A factor is, as we have seen, a bailee to sell; and it is, therefore, ordinarily the duty of a general consignee to sell goods that are consigned to him, and not to consign them elsewhere: but if it be proved to be the established and legal usage and custom of commission merchants where he resides, when they have made advances on consignments from another state, to ship them to another market for sale, he will be justified in doing so; for if such a custom be established and known at a particular place, it is to be presumed that persons consigning goods there, unaccompanied with special directions, agree to that usage; *Wallace & Co.* v. *Bradshaw & Co.*, 6 Dana, 382. In all cases, the liability of an agent is for negligence to the prejudice of his principal; and if he be found to have been guilty of no negligence that has occasioned loss to the principal, he will not be answerable; *Folsom* v. *Mussey*, 1 Fairfield, 297.

With regard to the liability of a bank, receiving a note or bill for collection, there is some diversity in the law of the different states. According to the decisions of some of the courts, a bank receiving a note or bill for collection, is bound merely to make, or cause to be made, due presentment and demand of payment when the instrument has become payable, and in case of default to give immediate notice to the holder, but not to give notice to other parties liable on the bill, unless there have been an undertaking to that effect, in the particular case, either express, or to be implied from usage; *The Bank of Mobile* v. *Huggins, Adm'r, &c.*, 3 Alabama, 207; but if there be evidence, from usage or special circumstances, that the agent or notary did undertake to give notice, he will be liable for neglect in doing so; *The Bank of Mobile* v. *Marston*, 7 Id. 108; in like manner it is decided in *Bellemire* v. *Bank United States*, 4 Wharton, 105, and in *Tiernan et al.* v. *Commercial Bank of Natchez*, 7 Howard's Mississippi, 648, and *Agricultural Bank* v. *Commercial Bank*, 7 Smedes & Marshall, 592, that a bank, receiving a note or bill for collection and placing it in the hands of a notary or other suitable agent, is not liable for his neglects, and in the first of these cases it is said, that the official character of a notary extends only to the protest, and not to the hunting up of the parties: See, also, *Hamilton, Donaldson & Co.* v. *Cunningham*, 2 Brockenbrough, 351, 365, 376: but the duty may be altered or enlarged by proof of usage; see *Parke* v. *Lowrie*, 6 Watts & Sergeant, 507. In other states, it is settled, upon the ground of general and established usage and understanding, that a bank receiving a note or bill for collection, is bound, not only to make due presentment to the maker or acceptor, but, in case of default, to take the necessary measures to charge the drawer and endorsers by due notice, and is liable in case or assumpsit for negligence in these respects, on its own part, or on the part of its notary; *Smedes* v. *Utica Bank*, 20 Johnson, 372; S. C. affirmed on error, 3 Cowen, 663; *M'Kinster* v. *Bank of Utica*, 9 Wendell, 46; S. C. affirmed on error, 11 Id. 473; *Fabens* v. *Mercantile Bank*, 23 Pickering, 330; *Mechanics' Bank at Baltimore* v. *Merchants' Bank at Boston*, 6 Metcalf, 13, 26; *Tyson* v. *The State Bank*, 6 Blackford, 225; *Thomson* v. *The Bank of the State*, Riley, 81; S. C. 3 Hill's So. Car. 78. See *Bank of Washington* v. *Triplett & Neale*, 1 Peters, 25. But whether this shall apply to a case where the receiving bank is to employ another agent in a distant place to make the collection, is again a subject of difference. The general and most prevailing doctrine is, that where the note or bill is, on its face, payable in another place, and also, where the acceptor or

maker resides in another place, than that in which the receiving bank is, so that the employment by that bank of another agent to make the collection must have been contemplated by the parties, it will be understood, in the absence of a special agreement to the contrary, that such receiving bank is an agent only for transmission, and will be liable only for reasonable diligence in selecting and instructing an agent for collection in the place where the payment is to be made, and not for the negligence of such agent; *The East Haddam Bank* v. *Scovil*, 12 Connecticut, 304; *Fabens* v. *Mercantile Bank*, 23 Pickering, 330, 332; *Mechanics' Bank* v. *Earp*, 4 Rawle, 385; *Jackson* v. *Union Bank*, 6 Harris & Johnson, 146; *Dorchester & Milton Bank* v. *New England Bank*, 1 Cushing, 178, 186: and such subagent is liable to the holder for negligence; *Wilson & Co.* v. *Smith*, 3 Howard's Supreme Court, 763: but in New York, the rule established by the Court of Errors, is, that a bank or money dealer, receiving, upon a good consideration, a note or bill for collection, either in the same place, or in a distant place, is liable for the neglect, omission, or other misconduct of the bank or agent to whom the note or bill is sent, unless there be some agreement to the contrary express or implied; *Allen* v. *Merchants' Bank of New York*, 22 Wendell, 216, 244: but this does not exempt the collecting agent from liability directly to the holder of the note or bill, both the receiving and collecting agent being regarded as agents liable to the holder; *The Bank of Orleans* v. *Smith*, 3 Hill's N. Y. 561; and in Pennsylvania, it has been held that if there be on the part of the receiving bank, an agreement to collect, it will be liable for neglecting to give notice of non-payment, and to return the note; *Wingate* v. *Mechanics' Bank*, 10 Barr, 105.

2. The duty of a factor, in regard to instructions from his principal, is very clearly stated in *Courcier* v. *Ritter*. A factor, accepting a consignment, or any other agent undertaking to act, if he receives no special orders, is bound to use his best discretion, according to the usage of trade; and is liable for nothing more; *Geyer* v. *Decker*, 1 Yeates, 486; *Evans* v. *Potter*, 2 Gallison, 13; but if he receives positive orders, his discretion is suspended, so far as those orders extend; he is bound to obey his orders if practicable, and is answerable for any injury consequent on his departing from them, however fair his motives may have been; and this is declared to be a rule of universal application in the law of agency, and one, which, in commercial agencies, it is of great consequence, should be rigidly enforced; *Manella, Pujals & Co.* v. *Barry*, 3 Cranch, 415, 439; *Walker et al.* v. *Robert Smith*, 1 Washington C. C. 152; *Holmes* v. *Misroon*, 1 Constitutional, 21; S. C., 3 Brevard, 209; *Rundle* v. *Moore*, 3 Johnson's Cases, 36; *Hays* v. *Stone*, 7 Hill, 128, 134, 136. "An agent, if a discretion be given him," said Judge Washington, in another case, "is bound to act to the best of his judgment, for the benefit of his employer. If the orders he receives be positive, he must either refuse to act, or he is bound to a strict observance of them. He is not to exercise his own judgment, but as to the best mode of executing the orders, according to the terms of them:" *Kingston* v. *Kincaid et al.*, 1 Washington C. C. 454, 457. Thus, if a consignee receive no directions as to the price for which he is to sell, he may sell at a fair market price; if he be limited to a certain price, he is answerable if he sell below that price, though from good motives; *Guy* v. *Oakley*, 13 Johnson, 332: See *Loraine* v. *Cartwright*, 3 Washington, 151. A reasonable, practicable compliance with orders, is sufficient; *Parkhill* v. *Imlay*, 15 Wendell, 431. And, in the interpretation of a usual commercial order, and in the mode of exe-

cuting it, an agent is to be guided by the usage of trade. Thus, if an order is given to sell for cash, evidence is admissible of an established and known usage among merchants in executing such an order, not to demand the cash on the delivery of the goods, though there is an immediate right to do so, but to deliver the goods, if the purchaser be in good credit, and to send the bill for payment the next day, or in a few days, and that this, in the understanding of merchants, is a sale for cash; and if the purchaser be of solvent character, and the transaction were not a giving of credit, this will be a sufficient compliance with an order to sell for cash, to exonerate the agent; *Clark* v. *Van Northwick et al.*, 1 Pickering, 343; but if the indulgence really amount to a giving credit to the purchaser, such a usage would be repugnant and void, and the agent would be answerable for the consequences; *Barksdale* v. *Brown & Tunis*, 1 Nott & McCord, 517. See *Leland* v. *Douglass*, 1 Wendell, 490, where evidence of such a usage was rejected.

In *Bell* v. *Palmer*, 6 Cowen, 128, 135, it was held, that the circumstance of a consignee being in advance, even beyond the value of the goods consigned to him, gives him no license to disobey the injunctions of his consignor, which in this case related to the time of sale: an immediate sale had been directed, but the consignee declined the first offer, on the ground that it would not cover the anticipations, charges, &c., and afterwards sold for less; and it was held that the consignee's lien for advances does not alter the rights of the parties in any respect, so far as relates to the duty of the factor in making sale of the goods; and, therefore, that in this case the consignee was liable for the difference. See, also, *Loraine* v. *Cartwright*, 3 Washington, 151, 154. However, this general principle is practically subject to some limitation; for though a factor's lien for advances will not warrant him in disobeying an order to sell, it may give him a right to sell under certain qualifications, which may override an order in restraint of sale. And the principle appears to be established, that a commission merchant, having received goods to sell at a certain limited price, and having made advances upon such goods, has a right to reimburse himself by selling them at a fair market price, though below the limit, if the consignor refuse, upon application, and after a reasonable time, to repay the advances; *Parker* v. *Brancker*, 22 Pickering, 40, 45; but without notice, and demand, he cannot sell below the limit; *Frothingham* v. *Everton*, 12 New Hampshire, 239, 242; *Blot* v. *Boiceau*, 3 Comstock, 78.

In regard to orders relating to the time of sale, a rule was laid down in the following manner, in a late case in the Supreme Court: That the consignor has a general right to control the time of sale, where the factor is not in advance or under liabilities, and the factor must obey the orders given to him; but if the factor is in advance, or under liabilities, he may sell so much as may be necessary to reimburse him, or put him in funds, unless there is some agreement between himself and the consignor, which controls or varies the right: thus, if at the time of the consignment and the advances or liabilities, orders are given by the consignor, and assented to by the factor, that the goods shall not be sold until a specified time, the consignment is presumed to be received subject to such orders, and the factor cannot sell till the time has elapsed; but where the consignment is general, without orders as to the time or mode of sale, and advances are made, or liabilities incurred on the footing of such consignment, the legal presumption is that the factor is intended to be clothed with the ordinary rights of factors to sell, in the exercise of a sound discretion, at such time, and in such mode, as the usage of trade and his general duty require, and to reimburse himself; and the consignor has no right, by any

subsequent orders, given after advances have been made, or liabilities incurred, to suspend or control this right of sale, except as respects the surplus after reimbursement, and this right of the factor is stronger where the consignor is insolvent; but the factor cannot, in any case, sell contrary to orders, if the consignor stands ready, and offers to reimburse the advances or liabilities; *Brown & Company* v. *M'Gran*, 14 Peters, 480, 495. But this appears to be an inaccurate conception of the principles applicable in such cases, which are more correctly explained in *Marfield* v. *Goodhue*, 3 Comstock, 62, where *Brown* v. *McGran* is disapproved. It was there held, that a factor at all times holds his authority for the exclusive benefit of the principal; and if he receives a general consignment, though he thereby acquires authority to sell according to his discretion for the interest of his principal, yet as his authority and discretion are always subject to be controlled by his principal, if he makes advances, and the principal afterwards becomes satisfied that his interest would be promoted by delaying a sale, and gives orders accordingly, the factor is as much bound as before to consult the interest of the principal and obey his orders. As factor, therefore, he must obey orders. But a revocation of the general discretionary power to sell, which he had, will not destroy the right which by making advances he acquires as pledgee; and in that character he may sell after giving reasonable notice; *Marfield* v. *Goodhue*. In all cases, therefore, there should be a previous demand of reimbursement, unless the consignor is notoriously insolvent, which would excuse a demand. And the notion expressed in *Brown* v. *McGran*, that a factor, under advances, may sell in violation of orders, is again condemned and rejected in *Porter* v. *Patterson*, 3 Harris, 229, 234; and it is there declared, that "a consignee making advances on goods of his consignor, even beyond their value, is bound to obey instructions as to time of sale, and also as to prices." The right of a factor, under advances, to sell at all in violation of his principal's orders, is also rejected by the English courts; and in a late case, where *Brown* v. *M'Graw* was cited and relied upon, it was decided that a factor who has received goods on consignment for sale generally, and who has afterwards made advances on their credit, has no right to sell the goods contrary to orders, even if the latter, on request, neglects to repay the advances; *Smart* v. *Sandars*, 5 Common Bench, 805. If a factor having a lien on goods, is ordered to part with the possession, on consignment, or otherwise, he may retain such parts of the goods as would be sufficient to secure him, or may consign the whole with directions to the consignee to deliver them up on being paid; but he would not be justified in retaining goods to a large amount, in order to satisfy an inconsiderable debt; *Jolly* v. *Blanchard*, 1 Washington, C. C. 252, 255.

In limitation of this liability for breach of orders, there are two things principally to be attended to; 1, the occurrence of an event not contemplated at the time of the orders; and 2, the distinction between advice, suggestion or general direction, and positive and absolute orders. As to the first, it is commonly held that a departure from instructions may be excused by the occurrence of circumstances not provided for by the instructions; and *Dusar* v. *Perit*, 4 Binney, 361, is usually cited in illustration of this point. But Judge Washington shows, in *Courcier* v. *Ritter*, that according to the true bearing of that case, the contingency which excuses a breach of positive orders, must be in the nature of an *impracticability;* and that under all circumstances, positive orders must be executed, if it is reasonably practicable to do so, in reference to the general object which it is the agent's duty to accomplish. If express orders are given, the execution of which is a

primary purpose of the agency, they must be obeyed, if obedience to them is possible; but if the accomplishment of some particular end is the effective purpose of the appointment of the agent, and the orders are secondary and tributary to that end, only, and the principal end becomes impracticable, or the execution of the orders would defeat it, the obligation to obey the orders is suspended. In all cases the obligation of instructions depends upon the intention of the principal, to be inferred from his language, the purpose of the agency, and the circumstances of the case. In *Day* v. *Noble*, 2 Pickering, 615, it was held, that if a consignee cannot sell without a great sacrifice of the property, he is not obliged to sell, such a circumstance being considered as an unexpected contingency; and that in the event of such an impracticability, he will be justified in doing, what at the time appears to be the most advantageous and prudent thing to do. "I take it to be clear," said Mr. Justice Story, in *Forrestier* v. *Bordman*, 1 Story, 44, 51, "that if, by some sudden emergency, or supervening necessity, or other unexpected event, it becomes impossible for the supercargo to comply with the exact terms of his instructions, or a literal compliance therewith, would frustrate the objects of the owner, and amount to a total sacrifice of his interests, it becomes the duty of the supercargo, under such circumstances, to do the best he can, in the exercise of a sound discretion, to prevent a total loss to his owner; and if he acts *bonâ fide*, and exercises a reasonable discretion, his acts will bind the owner." So also in *Holmes* v. *Misroon*, 1 Constitutional, 21, the rule laid down is, that a factor is always bound to follow instructions, if practicable. 2. The distinction between the expression of an expectation or the suggestion of a general course which it may be proper to follow, and the giving of positive orders, depends upon the construction of the letter of advice in reference to the circumstances of the case: but it is a reasonable principle of interpretation, as well as a requirement of justice, that instructions should not be construed as intended to be obligatory, unless they are distinct, positive, and express, and that an agent should not be made liable for a departure from the will of his principal, where his orders are ambiguous, doubtful, or unexplicit; *Vianna* v. *Barclay*, 3 Cowen, 281; *De Tastett & Co.* v. *Crousillat*, 2 Washington, C. C. 132, 137; *Kingston* v. *Kincaid et al.*, 1 Id. 454, 457; *Courcier* v. *Ritter*. In *Pickett* v. *Pearsons*, 17 Vermont, 471, 477, it was said that the obligation of the agent must be according to the contract of agency, as he understood it; and that he is bound by the contract only according to his own understanding, unless there was fraud, or some fault, on his part, in not comprehending the principal's instructions, and that ought to be shown.

As to the cases in which a merchant in one country is bound to insure for his correspondent in another, see *Smith* v. *Lascelles*, 2 Term, 187. One who assumes the responsibility of an agent, is bound to insure, if he receives an order to that effect from his principal; and one acting as a general agent, and shipping goods as such, is bound to insure without particular instructions, if in the course of such transactions, it is the custom to insure; but one acting under a special order to ship goods, without instructions as to insurance, is not bound to insure unless there be a usage of trade to that effect: *Shirtliff & Austin* v. *Whitfield & Brown*, 2 Brevard, 71; see *Collings & Co.* v. *Hope*, 3 Washington, 149; *Thorne* v. *Deas*, 4 Johnson, 84; *French* v. *Reed et al.*, 6 Binney, 308; *Sanches et al.* v. *Davenport et al.*, 6 Massachusetts, 258.

Courcier v. *Ritter* also recognises the principle, that there may be such a ratification, express or implied, of the acts done or omitted by the agent

in violation of instructions, as will discharge the agent from responsibility to his principal. The maxim, *omnis ratihabitio mandato equiparatur*, is as applicable between the principal and agent, to protect the latter, as it is between the principal and third persons to bind the former; and the adoption by the principal, after full knowledge, of an act done for him by his agent, though it were wholly unauthorized, and even wrongful and injurious, will discharge all liability of the agent, and operate to give legality to the act as if it had been strictly authorized in the first instance; and an adoption of part, it is said, will confirm the whole, because it ratifies the assumed agency; *Corning* v. *Southland*, 3 Hill's N. Y., 553, 556. This ratification may take place, not only directly, but by collateral acts; as in the case of a sale contrary to orders, if the principal, knowing all circumstances, sue for, accept, or even demand the payment of the purchase-money, or draw on the factor for the proceeds, or otherwise claim an interest under the act done by his agent; *Loraine* v. *Cartwright*, 3 Washington, 151, 154; *Codwise* v. *Hacker*, 1 Caines, 526; *Towle & Jackson* v. *Stevenson*, 1 Johnson's Cases, 110; *Woodward* v. *Suydam & Blydenburg*, 11 Ohio, 360, 363: but this is only where the demand or other act proceeds upon the basis of affirming the rightfulness of the agent's conduct; and a demand of money which has been misapplied, or of the proceeds of property converted, is not a ratification of the *tortious* act of the agent, but on the contrary, is rather a direct disaffirmance of it: *Blevins* v. *Pope & Son*, 7 Alabama, 371, 377. It is a salutary rule, also, as stated in *Courcier* v. *Ritter*, that the principal when informed of the transaction, if it is one that may be for his benefit, must elect promptly to affirm or reject, that the agent may take immediate steps to secure himself; and therefore, it is held, that if the principal, after full knowledge of the disregard of instructions, and of the unauthorized acts of his agent, does not dissent and give notice within a reasonable time, his assent will, at least in many cases, be presumed; but he is entitled to a reasonable time; there can be no implied ratification without full knowledge; *Cairnes & Lord* v. *Bleecker*, 12 Johnson, 300, 305; *Vianna* v. *Barclay*, 3 Cowen, 281, 283; *Hays* v. *Stone*, 7 Hill, 128, 132; *Geyer* v. *Decker*, 1 Yeates, 486; *Porter* v. *Patterson*, 3 Harris, 229, 235, 236; *Johnson* v. *Wingate*, 29 Maine, 404, 408. It seems to be clear that where the act is completely *tortious*, there is no ratification by silence; see *Blevins* v. *Pope & Son*. In fact, the doctrine of *ratification*, as a discharge of damages, can apply only to acts professing to be done as agent, for a principal, and therefore not to mere torts; remission from a liability for torts can be grounded only on a *release* or *discharge*, which is a distinct question of intention. There are some cases, in which the correspondence of the parties may leave it a matter of doubt whether the principal was to be understood as disaffirming the acts of his agent, or acquiescing in them; in these cases, it must be left to the jury whether there was or was not an implied acquiescence in, and ratification of, the unauthorized acts, and a waiver of the principal's claim for damages; *Cunningham et al.* v. *Bell et al.*, 5 Mason, 161, 171; S. C. *Bell et al.* v. *Cunningham*, 3 Peters, 69, 81.

3. It is the duty of an agent to keep his principal apprised of his doings, and to inform him in a reasonable time, of sales made, and to give him timely notice of all facts and circumstances, which may render it necessary for him to take measures for his security; and in case of a neglect to do so, he will be answerable for the loss occasioned by his negligence; *Devall* v. *Burbridge*, 4 Watts & Sergeant, 305; S. C. 6 Id. 529; *Brown* v. *Arrott*, 6 Id. 402, 416; *Forrestier* v. *Boardman*, 1 Story, 44, 56; *Austill & Marshall* v.

Crawford, 7 Alabama, 336, 341; *Johnson* v. *Wingate*, 29 Maine, 404, 408.

4. The duty of a factor to account to his principal is very ably illustrated in *Clark* v. *Moody et al.* There is a distinction, which appears to be recognised in that case, as it also is in *Cooley* v. *Betts*, 24 Wendell, 203, 205, 206, between the duty of a factor to render an account, and his duty to pay over money in his hands. It is his duty, without instructions, to render an account at reasonable times, and in case of neglect or refusal to do so, he is probably liable to an action, without a demand, as soon as he is in default for not accounting: see *Torrey* v. *Bryant*, 16 Pickering, 528; and *Schee* v. *Hassinger*, 2 Binney, 325, 330: but where he has rendered accounts duly, and is in no default of any kind, he is not liable to an action for money received by him until a demand has been made upon him, or instructions given to remit; *Ferris* v. *Paris*, 10 Johnson, 285; *Cooley* v. *Betts*, 24 Wendell, 203: and this is chiefly because the money is received by him to await the instructions of his principal, and it is not his duty to remit without instructions, and partly, it is said, because when the money is to be paid, he is not to seek the principal and pay him wherever he may be, but it is due and payable at the factor's residence; *Hall & Chase* v. *Peck & Co.*, 10 Vermont, 474, 479; (see *Grant et al.* v. *Healey*, 3 Sumner, 523, 526;) but nothing more seems to be necessary than a request, or instructions, to pay over, and a reasonable delay to give an opportunity for doing so; and in *Hall & Chase* v. *Peck & Co.*, it was held that a demand after the issuing of the writ, but before service, and before any costs were incurred, would be sufficient. But it seems that a factor is not entitled to this privilege, unless he has performed all his duty as a factor; and therefore he is liable to a suit, without a demand, where he denies his liability as agent; *Tillotson* v. *McCrillis*, 11 Vermont, 477, 480; or has neglected to render account at reasonable times, and to keep his principal properly advised of the state of the agency, or is otherwise chargeable with some default, neglect, or breach of duty; the case will be the same where he has received general instructions, to remit at certain times and has neglected to do so; *Hemenway* v. *Hemenway*, 5 Pickering, 389; *Dodge* v. *Perkins*, 9 Id. 369; *Jellison* v. *Lafonta*, 19 Id. 244; *Brown* v. *Arrott*, 6 Watts & Sergeant, 402, 418.

With regard to the question of the liability, generally, of an agent, or receiver, to an action for money in his hands, without a demand, there is a considerable diversity of opinion: but the true distinction appears to turn upon the question whether or not, by the nature of the agency, it is his duty to pay over immediately on the receipt of the money. If money be in the hands of one as trustee, and he has done nothing amounting to an abuse of the trust, he is not liable to an action without a demand; *Sears* v. *Patrick*, 23 Wendell, 528, 530; *Walrath* v. *Thompson*, 6 Hill, 541; and the law is the same in the case of a simple deposit, to be kept for the depositor, or paid according to his directions; *Downes* v. *The Phœnix Bank of Charleston*, 6 Hill, 297; *Watson* v. *Phœnix Bank*, 8 Metcalf, 217; *Johnson* v. *Farmers' Bank*, 1 Harrington, 117; and in the case of a steward or bailiff receiving money to hold subject to the orders of his principal; *Lever* v. *Lever*, 1 Hill's Chancery, 62, 67; S. C. 2 Id. 158, 164; *Rowland* v. *Martindale*, 1 Bailey's Equity, 226; *Williams* v. *Storrs*, 6 Johnson's Chancery, 353, 358. On the other hand, a mere collecting agent, whose duty is to receive money and pay it over in a reasonable time, or to give notice of its collection, is liable to suit without a demand, if he neglects to pay over, or to give notice; *Lillie* v. *Hoyt*, 5 Hill, 396; *Hawkins* v. *Walker*, 4 Yerger, 188; *Estes* v. *Stokes*, 2 Richardson, 133; *State* v. *McIntosh*, 9 Iredell, 307, 311. And according to the

better opinion, the rule is the same with regard to an attorney at law; *Smith* v. *Whiteside*, 4 Yerger, 192; *Nisbet* v. *Lawson*, 1 Kelly, 275, 281; though the contrary was decided in *Taylor* v. *Bates*, 5 Cowen, 376, 379; *Rathbun* v. *Ingalls*, 7 Wendell, 320; *Krause* v. *Dorrance*, 10 Barr, 462; *Cummins* v. *McLain & Badgett*, 2 Pike, 402; *Palmer & Southmayd* v. *Ashley & Ringo*, 3 Id. 75, and perhaps in *Williams* v. *Storrs*, 6 Johnson's Chancery, 353. In *Walradt* v. *Maynard*, 3 Barbour's Supreme Court, 584, it was decided, that, although money collected by an attorney for his client, must be demanded, or a direction to remit given and neglected, before a suit can be brought, yet there may be a waver of demand on the part of the attorney, and that his denial of liability to pay, and his setting up a claim exceeding the amount collected, is a waver of legal demand. A sheriff also, who has collected money, and not paid it to the parties, nor paid it into court, is liable to suit without a demand; *Dale* v. *Birch*, 3 Campbell, 347; (see *Jefferies* v. *Sheppard*, 3 Barnewall & Alderson, 696;) *Dygert* v. *Crane*, 1 Wendell, 534, 539; though there is a *dictum* to the contrary in *Estes* v. *Stokes*, 2 Richardson, 133. However, in some of the states, it is held to be a general rule, in relation to all agents who collect or receive money under a lawful authority, that until a demand or request made, or something equivalent thereto, they are not liable to a suit; *McBroom et al.* v. *The Governor, &c.*, 6 Porter, 33, 47; *Sally's Administrators* v. *Capps*, 1 Alabama, 121; *Kidd* v. *King*, 5 Id. 84; *Houston* v. *Frazier*, 8 Id. 82, 86; *Armstrong* v. *Smith*, 3 Blackford, 251; *Judah* v. *Dyott*, Id. 324; *Taylor* v. *Spears*, 1 English, 382; *Warner* v. *Bridges*, Id. 386; *Cockrill* v. *Kirkpatrick*, 9 Missouri, 697, 704. See also *Wardlaw et al.* v. *Administrators of Gray*, Dudley's Equity, 85, 112, and *Potter* v. *Sturges*, 1 Devereux, 79, that generally a suit will not lie against an agent by his principal for money received, without a demand: and see *Hays* v. *Stone*, 7 Hill, 128, 131. The ground of this opinion that an agent is not liable to suit without a demand, probably is, that the relation of principal and agent is not that of debtor and creditor, but that of bailor and bailee, or of trustee and cestui que trust, as is laid down in *McDonogh* v. *Delassus and another*, 10 Robinson's Louisiana, 481, 487, 488; and it has been supposed important to adhere to this doctrine in order to maintain the rule that the principal owns the property in the hands of the agent, and may follow it, in case of his death, insolvency, or tortious transfer; for if the agent upon the receipt of money became personally a debtor, and liable at once to an action, that might be thought to imply that the ownership of the money vested in the agent. But it should be remembered that the right of action in a case of this kind arises from the breach of a trust; and that the breach of a trust is not a discharge of the trust, which continues notwithstanding the agent has made himself a debtor in law. In the case where a demand has been made, the agent still continues to be a trustee, and the principal to own the property in his hands: so that the liability to suit appears not to depend upon whether the agent is a trustee or not, but upon whether it was his duty under the trust to pay the money over at once, or to hold it subject to orders.—The principle applicable to the subject is stated very satisfactorily in *Bedell* v. *Janney et al.*, 4 Gilman, 194, 201. "A person," said the court, "is entitled to money collected for him by another so soon as received by the latter, and good faith on the part of the collector demands its immediate payment by him; but, nevertheless, he is ordinarily not subjected to suit for his failure or omission to make such payment, until after demand therefor has been made of him. As a general rule in such cases, it may be presumed that payment has been delayed by reason of the want of safe and convenient means of transmission,

or of some other good and sufficient cause, and that the recipient of the money, still considering himself as entitled to no more than enough reasonably to compensate him for his services in collecting it, will pay it over on demand. But, where so long a time has elapsed since the collection of the money, so as to rebut any such presumption in favour of the collector, he may well be considered as having appropriated it to his own use, and then, neither law nor reason requires that before he can be sued for his non-feasance, he should be requested to do what his conduct sufficiently indicates his determination not to do."

In an action against an agent, for neglect or breach of duty, whether consisting in the violation of orders, or in negligence, the legal measure of damages, is the loss actually occasioned thereby to the principal; *Hamilton, Donaldson & Co.* v. *Cunningham*, 2 Brockenbrough, 351, 366; *Frothingham* v. *Everton*, 12 New Hampshire, 239, 243; *Blot* v. *Boiceau*, 3 Comstock, 78; *Gould* v. *Rich, Administrator*, 7 Metcalf, 539, 546; *The Bank of Mobile* v. *Huggins, Adm'r, &c.*, 3 Alabama, 207; which will include profits, but not speculative, nor vindictive, damages; *Cunningham et al.* v. *Bell et al.*, 5 Mason, 161, 172; S. C. *Bell et al.* v. *Cunningham*, 3 Peters, 69, 85; *Short* v. *Skipwith*, 1 Brockenbrough, 104, 109; *Walker et al.* v. *Smith*, 1 Washington C. C. 152, 154; *Greene & others* v. *Goddard*, 9 Metcalf, 223, 231, 232: see *Le Guen* v. *Gouverneur & Kemble*, 1 Johnson's Cases, 437, *note*. Where a factor was directed not to sell below a certain price, and yet, in violation of orders, did sell below the limit, it was decided in *Austill & Marshall* v. *Crawford*, 3 Alabama, 336, 342, that the actual loss, which was the measure of damages, was not the difference between the limit and the price obtained, but the difference between that price and the selling price of such articles during the season: and the same principle is reaffirmed in *Ainsworth* v. *Partillo*, 13 Alabama, 460. In *Brown & Company* v. *M'Gran*, 14 Peters, 480, 496, it was held, that where a consignee had sold cotton tortiously and contrary to orders on a certain day, and on a subsequent day, authority to sell had been received, the consignor had an election either to claim damages for the value of the cotton on the day of the sale, as a case of tortious conversion, or for the value of the cotton on the day when the authority to sell was received.

Since an agent, guilty of negligence, is liable only for the loss caused thereby, the case of *Burrill* v. *Phillips* appears to be incorrect in the position that a sale made under circumstances of real or constructive notice of want of solvency in the buyer, is to be considered as made at the risk and on the account of the factor, and that in a suit brought by the factor to recover back advances, the principal may avail himself of the claim. In *Winchester* v. *Hackley*, 2 Cranch, 342, which was an action to recover back advances, the plaintiff, after having rendered an account, charged back to the defendant several sums on account of the alleged insolvency of some of the purchasers, and the defendant offered to prove that these sums were lost by the mismanagement and misconduct of the plaintiff, in having made the sales to persons known by him to be unworthy of credit; but the court below (Marshall, C. J.) refused to permit such proof to be made to the jury in this action, being of opinion, that such misconduct was properly to be inquired into in a suit for that purpose; and, on error, this was affirmed by the Supreme Court. It is true, that in some courts, the defendant, principal in an action by the factor to recover his advances, is allowed to show by way of defence the damages occasioned by breach of orders, to prevent circuity of action, yet still the measure of damage is the actual loss; *Frothingham* v. *Everton*, 12 New Hampshire, 239, 242, 243: and the practice of allowing evidence

of negligence or fault in an action to recover advances, is not regular, except under statutes of set-off; see remarks of Gibson, J., in *Harper* v. *Kean*, 11 Sergeant & Rawle, 280, 294.

With respect to the burden of proof in regard to the amount of damages, in case of neglect of duty or violation of orders, the general rule certainly is, that the party charging the neglect must prove the amount of damages. Yet there are some cases, in which, a right being lost by the fault of the agent, he is prima facie liable for the amount, and it lies upon him to show that the actual loss was less. Thus, Judge Washington laid it down as a clear rule of law, that if a foreign merchant, who is in the habit of insuring for his correspondent here, receives an order for making an insurance, and neglects to do so, or does so differently from his orders, or in an insufficient manner, he is answerable, not for damages merely, but as if he were himself the underwriter; *De Tastett & Co.* v. *Crousillat*, 2 Washington C. C. 132, 136; *Morris* v. *Summerl*, Id. 203: yet it seems to be clear, that this is only *prima facie* the measure of damages; *Allen* v. *Suydam*, 20 Wendell, 321, 335; for, if the circumstances are such that the insurance, if effected according to orders, would have been void, the agent is discharged from liability; *Alsop* v. *Coit*, 12 Massachusetts, 40; and the remedy against the agent, in cases of this kind, appears generally to have been by action on the case; see 2 Term, 187, 188, and note. In like manner, it was decided in *Allen* v. *Suydam*, 20 Wendell, 321, that where an agent employed to collect a bill, by his negligence in making demand, discharges the parties, he is *prima facie* liable for the whole amount of the bill, and it lies upon him to show that the actual loss is less. The principle, in all cases, is the same, that the actual loss is the measure of liability, but this distinction arises in the application of it; that if, by his negligence or misconduct, the factor has discharged a legal right which the principal had, or has failed to secure one for him which it was his duty to have obtained, he is, prima facie, liable to the whole nominal extent of the right, and it lies upon him to reduce the damages by proving that the right, if acquired or kept, would have been less productive; but where the principal's rights are, through the fault of the agent, of less value, though undefective in law, the agent is to be charged only with the actual loss proved by the principal. In Pennsylvania, however, the disposition of the courts has been to adopt the general rule, that where in an action by the principal against the agent, proof is given of a breach of duty committed on the part of the defendant, tending to produce loss, it lies on him to show that it was less than the whole amount of the debt or property, by showing what the amount of the actual loss was; *Brown* v. *Arrott*, 6 Watts & Sergeant, 402, 422. But as negligence or disobedience is not actionable unless it produce loss, the effect of adopting such a rule where a debt, though not discharged, is simply less productive, in consequence of the agent's neglect, would be to require the defendant to make a defence, before the plaintiff had shown a cause of action.

The most usual actions by a principal against his factor, are assumpsit and case, and, if the factor has been guilty of a conversion by refusing to deliver goods on demand when they were in his possession, or by disposing of them in a manner inconsistent with the character of agent, trover; *M'Morris* v. *Simpson*, 21 Wendell, 610, 614. If goods have been sold by the factor, and no account is given by him of the proceeds, it has been held that it may be presumed by the jury, that he was paid, and that an action for money had and received will lie; *Schee* v. *Hassinger*, 2 Binney, 325, 331; *Tuttle* v. *Mayo*, 7 Johnson, 132; but not an action for goods sold and delivered; *Selden et al.* v. *Beale*, 3 Greenleaf, 178; *Ayres and another* v. *Sleeper*, 7 Metcalf, 45.

Of the rights of an agent against his principal.

D'ARCY AGAINST LYLE.

In the Supreme Court of Pennsylvania.

MARCH 29, 1813.

[REPORTED, 5 BINNEY, 441–455.]

Damages incurred by an agent, without his own fault, in the management of the principal's affairs, or in consequence of such management, must be borne by the principal.

THIS was an action of indebitatus assumpsit, in which the plaintiff declared for money paid, laid out and expended, money lent and advanced, money had and received, and work, labour, and services. It was tried before YEATES, J., at a Nisi Prius in December last, when a verdict was found for the plaintiff, damages 3500 dollars; and upon a motion by the defendant for a new trial, his honour reported the facts to be as follows:

On the 4th of August, 1804, the plaintiff, who was then about to proceed to Cape Francois upon commercial business, received from the defendant a power of attorney to demand from Suckley and Co., at the Cape, who had been the defendant's agents, all his goods remaining unsold in their hands, and to settle by compromise or in any manner the plaintiff thought most beneficial, all accounts of the defendant with that house. On the voyage, the plaintiff, in consequence of being chased by a French privateer, threw overboard, among other papers, the power of attorney. He stated this fact to Suckley and Co., upon his arrival, who consented to deliver up the goods upon his promising to pay a balance which they alleged to be due from the defendant; and this being assented to by the plaintiff, they proceeded to deliver the goods. Before the delivery was complete, one Thomas Richardson attached them with other goods of Suckley and Co., to secure a debt due by them to the house of Knipping and Steinmetz of Charleston, for whom he was agent. The plaintiff interposed a claim on behalf of the defendant; and on the 26th of November, 1804, the Chamber of Justice decreed that he should retain possession of the merchandise, on his

entering into a recognisance in the sum of 2089 dollars, conditioned to produce within four months an authentic letter of attorney from the defendant, or on default to pay Richardson as the agent of the Charleston house, the said amount, which was the invoice value of the merchandise. The recognisance was given on the 30th of November, and on the 6th of December following, the plaintiff personally appeared in the clerk's office of the Civil Tribunal where it was entered, and caused an act to be made, setting forth, that his recognisance or submission in November should be null, as he had received the power of attorney, and notified it to Richardson. In November, 1805, the plaintiff having sold the goods, forwarded an account-current to the defendant, making the net balance 2509 dollars 60 cents. On the first of December, 1805, he by letter directed the defendant to pay over to a friend all his funds, after deducting the balance due to himself; and on the 19th of April, 1806, having had some misunderstanding with the defendant, he wrote his final letter, closing his correspondence, and declining any further concern with him. Up to this time Dessalines was emperor, and favoured the plaintiff.

In March, 1808, the powers of government at the Cape being in Christophe, who was the friend of Richardson, and the plaintiff continuing to reside as a merchant at the Cape, Richardson instituted a suit against the plaintiff in the Tribunal of Commerce, to recover from him the value of the goods, which by the decision of the Chamber of Justice had been decreed to him as the defendant's agent in 1804. The amount of the claim was 3000 dollars, which by a memorial presented by the plaintiff to the tribunal (no part of the record of this court being produced), appeared to be founded on an alleged promise of the plaintiff to pay so much for Suckley; but in the memorial the plaintiff denied the promise, asserted that this was no other than the transaction about the security to produce a power of attorney, that he was no longer an agent for Lyle, and had settled the matter with him, and that Richardson was endeavouring to make them change the just and wise decision made more than three years before. On the 14th of May, the Tribunal of Commerce gave judgment for D'Arcy. Richardson appealed to the Civil Tribunal of the first district of the province of the North, sitting at the Cape. That Court on the 1st of June confirmed the sentence of the lower court. Richardson had previously applied to the president Christophe, who interfered in the proceedings, and on the 31st of May, sent an order for the imprisonment of D'Arcy's lawyer, who was tied and sent to the fort. To this another order succeeded, that D'Arcy and Richardson should fight each other, and that the issue of the combat should be fatal to one or the other. A friend of D'Arcy waited upon Christophe, remonstrated against the order, and procured

the commander of a British vessel of war then in the harbour, to do the same; but the president insisted upon the combat, unless D'Arcy would pay to Richardson the sum claimed as the value of the goods. D'Arcy having determined not to pay the money, the parties met, but neither of them was injured. On the same day another order came from Christophe, that D'Arcy and Richardson should again fight at six o'clock on the following morning, and that he, Christophe, would be there himself to see the affair settled. The friends of D'Arcy, deeming it dangerous for him to remain longer at the Cape, prevailed upon him to attempt his escape; but he was intercepted by the president's order. The same friends then advised him to pay the money, and preserve his own life, that of his lawyer and the judges, all of whom were in danger from the parts they had taken. The plaintiff still refused. About dusk of the same evening, Christophe sent for D'Arcy, and had a conversation with him, the purport of which was not in evidence; but on the next day, after the judgment of the lower court had been confirmed, D'Arcy in open court retracted his defence, consented that both judgments should be reversed, and that his memorial should be burnt by the public agent, and that he should be condemned to pay Richardson the 3000 dollars he claimed, and the costs. He retracted his oath also, that he owed Richardson nothing, because as the record of the court set forth, Richardson had since made him remember some facts his memory did not furnish him when he took the oath. The court accordingly reversed the judgments, condemned D'Arcy to pay Richardson the 3000 dollars, "for so much he had engaged to pay him for Suckley and Co., for merchandise which the latter had delivered to him as belonging to Mr. James Lyle, whom the said D'Arcy represented, for which the tribunal, do reserve to Mr. D'Arcy his rights, that he may prosecute on the same if he thinks proper against Lyle or Suckley." On the 22d of June, D'Arcy paid the 3000 dollars and the costs.

Judge YEATES charged the jury, that if they were satisfied the plaintiff individually promised to pay Richardson the 3000 dollars, he could not recover. But the record showed, that there was a review of the suit in 1804, respecting the goods of the defendant received from Suckley and Co., as the judgment referred the plaintiff to the defendant for compensation. The plaintiff was in no fault; he stood out until the safety of all concerned in the business was endangered. He did not pay voluntarily. The jury must decide whether the loss arose from his private engagement, or from his having received the goods as agent of the defendant. If they were satisfied that the money was extorted from the plaintiff as the defendant's agent, he might recover under the count for money paid to the defendant's use.

A loss of money incurred by the agent without fault, ought to be compensated by the principal.

The motion for a new trial was argued at December term last.

Tod and *Rawle* for the defendant, argued, that there should be a new trial, because, 1. The defendant was in no manner bound to answer for the loss incurred by the plaintiff. 2. There was no count upon which, if a recovery was just, the plaintiff could recover what the jury had given him. 3. The verdict was excessive.

1. The agency of the plaintiff for the defendant ceased in the year 1805. He remained in St. Domingo after that time, for his own business; voluntarily exposing himself to the tyranny and outrages of the black government, and finding an indemnity for this exposure in his own emoluments. The loss which accrued in 1808, was therefore not incurred in the course of the agency, but was the effect of an outrage committed upon his property intentionally detained within the reach of the wrongdoer, to which the defendant was in no respect accessory. Take it first upon the ground of a promise actually made by the plaintiff when he received our goods, to pay Richardson 3000 dollars on account of the debt due by Suckley and Co. It was a promise never communicated to or sanctioned by the defendant, and which most obviously transcended the agent's powers; for the amount to be paid, was greater than the value of the goods, and not a shadow of authority was given to make any contract with Richardson on behalf of the Charleston house. Nixon v. Hyserott, 5 Johns. 58. But this promise was a fiction. The transaction with Suckley and Richardson closed with the production of the power of attorney. The suit in 1808 was instituted under the patronage of Christophe, not as an appeal from or review of the prior suit, for in none of the proceedings in 1808 is the decree or judgment of 1804 either reversed or questioned, but as a new action, depending for its success upon despotic authority, regardless alike of law and morality. Take the case then upon the ground not of promise, but of an outrage committed under the coercion of despotism, it is a qualified robbery of the plaintiff's own property, for which he can have no recourse to us, without destroying commercial security, and putting every merchant in this country who has ever employed as his agent a resident in St. Domingo, at the mercy of the despots who rule that island. The consequences of such a doctrine may be terrible. An agency has closed or expired. The agent is no longer in the confidence or employ of his former principal. His former principal is dead, and his property is distributed. A suit is commenced against the agent in Algiers, in Turkey, or at the Cape, and under the threat, or the asserted threat of death, he is made falsely to acknowledge a promise, upon a

matter said to be connected with his former agency, and to confess a judgment to an extent beyond all that his principal was worth. Is it possible to say that such an agent can recover his loss from the principal, without destroying hereafter that relation among men? It is not our property that has been taken; it is not in the course of an agency for us, that his own property has been taken; it is the case of an extorted promise under at most a mere colour of continuing agency, the whole from the foundation, a tissue of falsehood and outrage, and the judicial proceedings the mere machinery of robbery. All writers upon the subject of mandatory contracts, agree that in such a case there is no recourse to the principal. The mandant is obliged to replace to the mandatary, all reasonable expenses disbursed bona fide, and the damage sustained by him *in the execution* of the mandate. 2 Ersk. Inst. Bk. 3, sec. 38, p. 334. The agent ought to be repaid whatever charges he has been at in the execution of the commission; and the same holds good of any loss that happens *by reason of the trust*, but not of such a loss as is occasioned *obliquely* by it, as if he had been plundered or shipwrecked. Puff. lib. 5, cap. 4, sec. 4, p. 482. When an agent undertakes a hazardous business, as every business in St. Domingo is to an American merchant, he takes the risks on himself. Ibid. If he suffers damage on account of the affair which he has taken in hand, we must judge by the circumstances, on whom the loss must fall. It will depend on the quality of the order to be executed, the danger, the nature of the event which occasioned the loss, *the connexion between the event and the order that was executed*, the relation which the thing lost or the damage sustained, had to the affair which was the occasion of it. 1 Domat. Bk. 1, Tit. 15, sec. 2, art. 6. If a person undertake to go for another to a place where his own business obliges him to take money with him, and he is robbed of it, the person who engaged him to make the journey is not liable for the loss. Ibid. note to art. 6. The agent may be a sufferer in his own person or property by the business he undertakes, as where one goes a journey and lames his horse, or is hurt himself by a fall on the road; but he cannot recover unless by express stipulation. 1 Paley's Mor. Ph. 175, Bk. 3, ch. 12. He may demand reparation for such losses only as are the *natural* consequence of his agency. Burl. pt. 3, ch. 12, sec. 2. 1 Hub. 367. *Non omnia quæ impensurus non fuit, mandator imputabit, veluti quod spoliatus sit à latronibus, aut naufragio res amiserit, vel languore suo, suorumque adprehensus, quædam erogaverit; nam hæc magis casibus, quàm mandato imputari oportet.* Dig. lib. 17, Tit. 1, sec. 26, art 6. The distinction is then between those losses which grow naturally out of the agency, and such as are casual, or as Puffendorf terms them, *oblique*, not flowing directly from the execution of the mandate. For the latter,

which is the character of the plaintiff's loss, the defendant is not liable. There is also a strong equitable reason why in the present case, he should not be; for although he may recover from Richardson, we cannot either from Richardson or Suckley.

2. The only count on which he can recover, is the equitable count for money had and received; but we have never received with interest more than 2000 dollars; the net proceeds of the goods, deducting the balance paid to Suckley and Co., and the outstanding debts, being but 1627 dollars.

3. Upon the same ground the damages are excessive.

Hare and *Tilghman* contra. The authorities cited for the defendant on the important question in this cause, will not be controverted. They prove by the clearest implication, that a loss growing out of the agency, without the fault of the agent, is to be borne by the principal. The rule is distinctly stated and illustrated by Heineccius. The person giving a commission, is obliged to restore useful and necessary charges, and bound to repair all damages that may have been incurred for his sake, or on account of managing his affairs without the fault of the agent. 1 Turnb. Heineccius, 269, lib. 1, cap. 13, sec. 349. The same principle runs through a variety of cases, in which the relation of the parties is analogous to that of principal and factor. If a trustee is robbed of the trust-money, he is entitled to an allowance. 2 Fonbl. 177. If a partner who is travelling on business of the concern, is wounded or robbed, the common stock must make it good. 1 Domat. 159, lib. 1, tit. 8, sec. 4, art. 12, 2 Ersk. Inst. 528. Puff. 279, bk. 5, ch. 8, note by Barbeyrac. Partners are agents for each other; and they derive their indemnity under such circumstances, from their acting at the time as agents for their house. It is the plainest equity, and the merest justice, that the agent should be indemnified; and if ruin must follow, it is better that it should fall upon him who was to reap the profit, without being personally exposed to the injury.

Consider this case, then, either as a regular judicial proceeding, founded on a real promise, or as an act of force springing from despotic power; in either point of view, the defendant is answerable. If a real promise, the plaintiff had authority to make it, for he was empowered to settle the accounts with Suckley and Co. by compromise, or in any other way, and of course to promise, as a means of obtaining undisturbed possession of the goods, to pay their debt to Richardson's friends at Charleston. Setting aside the idea of a promise, then it is most clear, that the final act of force was applied in a suit growing out of, and connected with, the original proceeding. The jury have negatived all individual liability by the plaintiff to Richardson, and therefore we must

take the asserted liability to have been as agent. This is the first step. The next feature in the case, is Richardson's intention by the suit to defeat, if not reverse, the judgment in 1804. The records are imperfect. The situation of the country prevents perfect copies from being obtained. But enough appears in the plaintiff's memorial or defence, to show the connexion, because he says it was Richardson's endeavour to make the judges "change their already wise and just decision," and "who could suppose that the repose of so honourable a decision should be disturbed after the lapse of more than three years." If the money had not been paid over by the plaintiff to the defendant, it would have been impossible for the latter to recover, against the proceeding at Hayti; and where is the difference between the inability to recover, and the obligation to refund? Where would be the difference between Christophe's seizing the goods in the hands of the plaintiff, and compelling him to pay money on account of those goods after they were sold? If an agent advances money to the principal, and the goods are burnt:—or after the agent has sold and accounted for the goods, a suit is brought against him by third persons claiming the property, and obtaining a judgment:—or while the goods are in his hands, a suit against him for them is decided in his favour, he then sell and remits, and upon appeal the first judgment is reversed, and judgment rendered against the defendant;—what difference is there between any of these cases, and the present, in which the first judgment was in fact reversed, in a proceeding which was intended to have that effect? In one and all the agent is entitled to an indemnity. It is true the act of Christophe was an outrage of the grossest kind. But we are not to criticise such acts by the rules of our own code; it is enough that the plaintiff did not yield a voluntary assent to it, that he resisted until resistance was fruitless, and certain death the consequence of continuing it; and that it was a consequence flowing from the agency, and which could not have existed but for the agency. It is said the plaintiff was not agent at the time. This is begging the question. He was agent *quoad hoc*, if the second proceeding grew out of the first; and it is of no importance whether actual agent or not, if the loss was the consequence of the agency. The material fact is, that Richardson's claim did not originate in a transaction subsequent to the agency. It is also objected that the plaintiff continued to reside at the Cape, after the agency ceased, and that it was his own property that was exposed. To make this of any consequence, it must have been a *fault* in him to remain there; he was under no obligation to remove. It is said, too, that this loss was the result of one of the risks attending the agency, which he knew and took upon himself. In no respect does it deserve the name of a casualty. It was a consequence of the agency, produced by the will of those among

whom the commission was to be executed. Finally, it is objected that we can recover against Richardson, and the defendant cannot. This also begs the main question. If we paid as agent, and paid for the defendant, he may recover, and not we. But it is no reason for turning us round, be the law as it may.

2. The action may be supported upon either of the counts. We have recovered no more than the principal, interest, and expenses, and this was the least we were entitled to. 2 Com. on Contr. 1, 138, 159.

3. For the same reason the damages are not excessive.

Cur. adv. vult.

TILGHMAN, C. J., after stating the facts, and remarking that although the records were very imperfect, he thought it sufficiently appeared that the proceedings in 1808, were connected with those of 1804, either as an appeal from the judgment in 1804, or a revival of the suit in a new form, proceeded as follows:

This is one of those extraordinary cases arising out of the extraordinary situation into which the world has been thrown by the French revolution.

If the confession of judgment by the plaintiff had been *voluntary*, it would have lain on him to show that the 3000 dollars were justly due from the defendant to Richardson, or the persons for whom he acted, or they had a lien on the goods of the defendant to that amount. But the confession of judgment was *beyond all doubt* extorted from the plaintiff by duress, and he did not yield to fears of which a man of reasonable firmness need be ashamed. The material fact on which this case turns is, whether the transactions between the plaintiff and Richardson, were on any *private* account of the plaintiff, or solely on account of the defendant. That was submitted to the jury, and we must now take for granted that the proceedings at the Cape against the plaintiff, were in consequence of his having received possession of the defendant's goods from Suckley & Co. I take the law to be as laid down by Heineccius, Turnbull's Heinec. c. 13, p. 269, 270, and by Erskine in his Institutes, 2 Ersk. Inst. 534, that damages incurred by the agent in the course of the management of the principal's affairs, or in consequence of such management, are to be borne by the principal. It is objected that at the time when judgment was rendered against the plaintiff, he was no longer an agent, having long before made up his accounts, and transmitted the balance to the defendant. But this objection has no weight, if the judgment was but the consummation of the proceedings which were commenced during the agency. As such I view them, and I make no doubt but they were so considered by the jury. It is objected again, that no man is safe if he is to be responsible to an unknown amount, for any

sums which his agent may consent to pay, in consequence of threats of unprincipled tyrants in foreign countries. Extreme cases may be supposed, which it will be time enough to decide when they occur. I beg it be understood, that I give no opinion on a case where an agent should consent to pay a sum, far exceeding the amount of the property in his hands. This is not the present case, for the property of the defendant, in the hands of the plaintiff in 1804, was estimated at 3000 dollars. The cases cited by the defendant show, that if the agent on a journey on business of his principal, is robbed of *his own money*, the principal is not answerable. I agree to it, because the carrying of his own money was not necessarily connected with the business of his principal. So if he receives a wound, the principal is not bound to pay the expenses of his cure, because it is a personal risk which the agent takes upon himself. One of the defendant's cases was, that where the agent's horse was taken lame, the principal was not answerable. That I think would depend upon the *agreement of the parties*. If A. undertakes, for a certain sum, to carry a letter for B. to a certain place, A. must find his own horse, and B. is not answerable for any injury which may befall the horse in the course of the journey. But if B. is to find the horse, he is responsible for the damage. In the case before us, the plaintiff has suffered damage without his own fault, *on account of his agency*, and the jury have indemnified him to an amount, very little if at all exceeding the property in his hands, with interest and costs. I am of opinion, that the verdict should not be set aside.

YEATES, J. Several legal exceptions against the plaintiff's recovery in this suit, were taken by the defendant's counsel in the course of the trial, which have been relinquished upon the argument on the motion for a new trial. It is now contended that the payment made by D'Arcy to Thomas Richardson, was voluntary, and unconnected with the agency under Mr. Lyle, and that were it otherwise, the defendant as principal, is not responsible to the plaintiff for injuries done by a despot to him as a special agent, after the determination of his authority.

The cause was put to the jury to decide whether the conduct of the plaintiff as agent of the defendant was correct, and whether the payment of the 3000 dollars under the sentence of the Court of Hayti, was extorted under colour of law from him for acts done by him during his agency. The jurors by their verdict, have established the affirmative of both questions, and I was far from being dissatisfied therewith: I feel no disposition to disturb their decision.

I see no reason whatever for retracting the opinion I had formed on the trial, that where an agent has acted faithfully and prudently within

the scope of his authority, he is entitled to protection from his constituent, and compensation for compulsory payments exacted against him under the form of law, for the transactions of his agency. The flagitious conduct of Christophe, President of Hayti, compelled the litigant parties under his savage power into a trial by battle, in order to decide their civil rights. He influenced the civil tribunal of the first district of the province of the North, sitting at the Cape, "to set aside a former judgment rendered by the tribunal of commerce and of their own Court, and to condemn D'Arcy," according to the language of the sentence, "to pay to Thomas Richardson 3000 dollars, for so much he had engaged to him to pay for Suckley & Co. *for merchandise, which the latter had delivered to him as belonging to James Lyle*, whom the said D'Arcy represented, for which the tribunal *do reserve to D'Arcy his rights*, that he may prosecute the same, if he think proper *against the said Lyle* or *Suckley*," &c.

The defendant appointed the plaintiff his attorney, to settle and collect a debt in a barbarous foreign country. The plaintiff has transacted that business with fidelity and care, and remitted the proceeds to his principal. He risked his life in defence of the interests of his constituent, under the imperious mandate of a capricious tyrant, holding the reins of government. He has since been compelled by a mockery of justice, to pay his own moneys for acts lawfully done in the faithful discharge of his duties as an agent; and I have no difficulty in saying, that of two innocent persons, the principal and not the agent should sustain the loss.

In Leate v. Turkey Company Merchants, Toth. 105, it was decreed, that if a consul beyond sea hath power, and do levy goods upon a private merchant, the company must bear the loss, *if the factor could not prevent the act of the consul.* The decree is founded in the highest justice, and its reason peculiarly applies to the present case. D'Arcy was doomed by the cruel order of an inexorable tyrant, either to pay the 3000 dollars, or in his hated presence to fight his antagonist until one of them should fall.

Upon the whole, I am of opinion that the motion for the new trial be denied.

BRACKENRIDGE, J. Whatever conditional stipulation it might have been necessary for D'Arcy, the agent of Lyle, to have made, provided that stipulation was not so much against the interest of Lyle as to come under the denomination of an unreasonable stipulation, and to constitute a mal-agency respecting the subject of the agency, Lyle the principal, must have been bound by it. The giving bond to produce the power of attorney, in order to receive the goods of Lyle, out of the hands of

Suckley, which would seem to have been detained under the claim of Richardson, might be deemed prudent; and had the power of attorney not have been produced, owing to no fault of D'Arcy, but to accident, or the impossibility of getting it in time, Lyle might be considered as bound to pay the bond, as the goods had been disposed of for his benefit. But the power of attorney was received, and the bond satisfied; and we hear no more of this. It is on an entire new ground, that a claim was advanced by Richardson against D'Arcy as the agent of Lyle. It is that of an agreement or stipulation by him (D'Arcy), that in consideration of having obtained a delivery of the goods of Lyle, he would pay the debt due by Suckley, and in whose possession the goods of Lyle were, a debt due and owing from Suckley to him (Richardson) as agent for a house in Charleston. Had he made such agreement, and it should turn out that this debt was beyond the value of the goods received for the use of Lyle, it would be an unfaithful, being an improvident, agency; and he would not be considered as entitled to recover from Lyle, more than the value of the goods which he had received, and the money arising from the sale of which had come to the hands of Lyle. But D'Arcy admits that he had made no such agreement, or stipulation whatever, on behalf of Lyle, in order to receive his goods, or to have them delivered to him. How then can he claim against Lyle?

It is alleged to be on the ground, that Richardson had compelled him from a fear of life to acknowledge such agreement. It was on the allegation of Richardson, that Christophe, the master of the gang, interfered, and compelled D'Arcy to acknowledge such agreement. He compelled him to come into a court of his, who had given judgment to the contrary, and confess such agreement; in other words to retract a denial of such agreement, and give his court colour for reversing the judgment before given. This cannot be distinguished from a compulsion *without colour*, to retract a denial, and confess an agreement. It is the same thing as if Richardson and Christophe, out of doors had compelled through a fear of life D'Arcy, not only to pay money, but to acknowledge that he had agreed to pay it. A. a common carrier has carried the money of B., to pay C. He is met by a gentlemanly footpad, who says that the money is his so carrying to C. It is denied by A., who is suffered to go on. But on his return he is again accosted by the same footpad, who alleges that he agreed to pay him that sum or a greater, on condition that he should be suffered to go on and carry to C. It is denied, but the master of the gang interposes, and says he shall acknowledge the agreement. The acknowledging the agreement never made, is but the *sub modo* of the robbery. It is but the robbery of the carrier, under a pretence of having carried the money of B., which he

the footpad alleges, belonged to him, and which he the carrier had agreed on his first journey to be the fact, and now on his return should pay him, and even a greater sum. In this case, it would appear to be as perfectly a pretence, as that of the wolf in the fable, accusing the lamb of disturbing the stream. Why is it that a carrier must be answerable for goods notwithstanding a robbery? It is the policy of the law, founded on the possibility of a carrier procuring himself to be robbed. Will not the same policy be in the way of an agent recovering for an alleged robbery; robbed more especially not of the goods in his possession, but of other goods, on account of having had these? Setting such a principle, would render it unsafe to have an agent at all. There are two things or circumstances which take this case entirely out of all reason and justice; the remaining in the country after the agency as to the principal had been closed, and it being the act of the agent himself that gave colour to the compulsion. He was put in fear, fear of his life; fear that would excuse or justify a constant and resolute man; that is clear. But it is his misfortune, and I can consider Lyle under no obligation to indemnify him for the loss. His redress, if he shall ever be able to obtain any, must be against the spoiler, or those for whom he may have acted, or who may have obtained the advantage of his wrong. There is a third circumstance in this verdict, which would justify a new trial; the sum given being beyond the value of the goods or money, even with interest, which D'Arcy the agent, alleges to have been paid, on account of obtaining possession of the property of Lyle. But on the two first grounds, I do not think him entitled to recover. I see nothing of an appeal from a proceeding under a claim made or interposed against the goods of Lyle. Nor am I able to see anything like a growing out of the claim: it may be said to be engrafted on it, or adscititious to it, or springing up with it. But the act of D'Arcy himself, confessing an agreement, is the only thing that can connect; and this he admits did not exist. His agency for Lyle, might be said to be the occasion, but could not be considered the cause of his loss. But it was rather the occasion of the pretence that was set up, and to which D'Arcy himself gave sanction, and if he has saved his life by that, he must keep his life as that for which he sustained the loss. It is not more nor less, than if an agent, having resisted a claim, set up against his *quondam* principal, and to avoid a challenge, should come into one of our courts, and move to have the judgment in his favour set aside, and to confess a judgment against his principal, which if allowed, might be to any amount. It is a question with moralists, whether it is lawful for the sake of life or property to depart from truth.

Propter vitam, vivendi perdere causas.

Where a person had a right to expect the truth, it is not *lawful*, however under circumstances it may be *excusable*. But for one to evade a risk by departing from the truth, and to attempt to throw the loss upon another person, is totally inadmissible; it cannot be done. If any argument could be drawn from the circumstance of the master of the gang, Christophe, being a principal as to the force, it must be evident that it might be owing to the indiscreet expressions respecting Christophe, and his influence upon the administration of justice in his courts, that induced him to interpose. This was the act of Richardson. I am therefore of opinion for the defendant.

New trial refused.

BRADFORD AGAINST KIMBERLY AND BRACE.

In the Court of Chancery of New York.

JUNE 18th and 19th, and SEPTEMBER 28th, 1818.

[REPORTED, 3 JOHNSON'S CHANCERY, 431–435.]

Where the several joint owners of a cargo appoint one of the part-owners their agent, to receive and sell the cargo, and distribute the proceeds, he is entitled, under such special agency, to a commission, or compensation, for his services, as a factor, or agent, in the same manner as a stranger: and as such factor, or agent, he may retain the goods or their proceeds, as security, not only for his advances, disbursements, or responsibilities, in regard to the particular property, but for the balance of his general account.

IN August, 1813, the defendants, Abijah Weston, Benjamin Merritt, and others, were joint owners of a vessel and cargo fitted out from New Haven, Connecticut, to Porto Rico, where the cargo was sold, and the proceeds invested in a cargo of coffee, &c., shipped on board the brig Edwardo, consigned to P. Harmony, of Newport, where it arrived. P. Weston owned three-*eighths* of the return cargo, and previous to its arrival at Newport, sold and assigned his interest to Ralph Bulkley, who, after the arrival of the cargo, to wit, on the 21st of March, 1814, assigned the three-eighths thereof, so purchased by him of W., to the

plaintiff, to whom he was largely indebted, as a security for the debt, and in trust to pay John Clapp 1,500 dollars, and to pay the defendants 1,220 dollars, and the residue to the plaintiff. The defendants paid to the plaintiff 1,450 dollars, which he paid over to Clapp. On the 22d of March, 1814, the said return cargo came into the possession of the defendants, who, on the 25th of March, 1814, received notice of the assignment of Weston's share, by R. Bulkley, to the plaintiff, but refused to deliver it. The share of W., so assigned to Bulkley, and by him to the plaintiff, amounted to 5,800 dollars. The accounts between the defendant and the other owners were adjusted and paid by the defendants, who have in hand 3,000 dollars of the proceeds of W.'s share, which the plaintiff claimed under the assignment to him. The bill prayed that the defendants might account for the property so received by them, and assigned to the plaintiff, and may be decreed to pay over the balance to him, &c.

The answers of the defendants admitted the joint shipment and joint concern in the return cargo of the Edwardo, and that W.'s share was 600 parts of 1,634, and was so finally adjusted. That the cargo was consigned to S., the master of the brig, who, on his arrival placed it in the hands of Harmony. That the cargo arrived at Newport, in December, 1813, and the owners, in January, 1814, agreed to make the defendants their factors, agents, or commission merchants, for the disposal thereof, in New York; and S. and H. were directed to deliver the same to the defendants accordingly. That a greater part of the cargo came into the hands of the defendants, on the 19th of March, 1814, not on the 22d of March, as the plaintiff had alleged; and another part came to New York, to the defendants, on the 9th of May following. That, on the 25th of March, 1814, notice was received by the defendants of the assignment by Bulkley to the plaintiff. That the net amount of the share so assigned is 3,946 dollars and 60 cents. That, previous to any knowledge of the assignment, Bulkley was indebted to the defendants; and after the cargo was received by them, they lent him their notes, which they afterwards paid, &c.; that, on the 29th March, 1816, they paid to the plaintiff 1,736 dollars and 55 cents. That R. Bulkley is indebted to the defendants, for a balance of accounts, in the sum of 2,000 dollars; and that he failed on the 21st of March, 1814, and became insolvent, which was known to the plaintiff before the assignment to him. The defendants insisted, that their advances and responsibilities for Bulkley having been made after the cargo came into their hands, they had a *lien* on the proceeds, for their security, for the balance due them from B., and which could not be defeated or impaired by the assignment to the plaintiff.

Several witnesses were examined in the cause, which came on to be heard in June last.

Wells, for the plaintiff. He cited 7 East, 229. 9 East, 426. 3 Bos. & Pull. 494, 126. Abbott on Ship., 96. 1 Vesey, 497. Watson on Partn. 139. Weston v. Barker, 12 Johns. Rep. 276.

Boyd, for the defendants. He cited Comyn's Dig. tit. Factor. Cowp. Rep. 251. 2 East, 227. 1 Burr. 489.

The cause stood over for consideration until this day.

THE CHANCELLOR. It appears in proof that the owners of the cargo of the Edwardo, in January, 1814, appointed the defendants their agents to receive and sell the cargo, and distribute the proceeds. The defendants were at the same time part owners; but this special agency was altogether distinct from their ordinary powers as part owners, and they were to be considered, for this purpose, as agents for the company; and in that character they were entitled to their commissions or compensation, in the same manner as any other persons, being strangers in interest, would have been entitled under such an agency. In the case of joint partners, the general rule is, that one is not entitled to charge against another a compensation for his more valuable or unequal services bestowed on the common concern, without any special agreement; for it is deemed a case of voluntary management. This is the doctrine in the cases on this point. (Thornton v. Proctor, 1 Anst. 94. Burden v. Burden, 1 Vesey and Bea. 170. Franklin v. Robinson, 1 Johns. Ch. Rep. 157.) But where the several owners meet, and constitute one of the concern an agent, to do the whole business, a compensation is, necessarily and equitably, implied in such special agreement, and they are to be considered as dealing with a stranger. The defendants are, consequently, to be viewed as commission merchants to receive and sell the return cargo, and they are entitled to the rights belonging to that character.

If this conclusion be correct, there is then no doubt that the claim on the part of the defendant must be admitted. It is well settled, that a factor may retain the goods or the proceeds of them, not only for the charges incident to that particular cargo, but for the balance of his general account; and this allowance is made out not only while the goods remain in *specie*, but after they are converted into money. This was the doctrine declared in Kruger v. Wilcox, (Amb. 252,) and afterwards, by Lord Mansfield, in Godin v. London Assurance Company, (1 Burr. 494,) and by Mr. J. Buller, in Lickbarrow v. Mason, (6 East,

23, *in notis.*) And it is further settled, that this lien applies not only for the amount of the money actually disbursed for the necessary use of the property in hand, and for acceptances actually paid, but for the amount of outstanding acceptances not then due. The factor may retain the goods, or the money into which they have been converted, until he is indemnified against the liability to which he had subjected himself. (Hammonds v. Barclay, 2 East, 227. Drinkwater v. Goodwin, Cowp. 251.) This is very equitable doctrine, especially when the acceptances and responsibilities were assumed, or necessarily presumed to have been assumed, upon the credit of the property in his possession.

In this case the accounts annexed to the answers are admitted to be correct; and it appears by them that at the date of the assignment from Bulkley to the plaintiff, he was indebted to the defendants for moneys advanced, or responsibilities assumed, and afterwards discharged by the defendants, to more than his share of the net proceeds of the goods committed to the disposal of the defendants, after crediting the plaintiff with what he has since received under the assignment. There was nothing due to the plaintiff when he filed his bill. It will be readily admitted, that the plaintiff took no other or greater right under his assignment, than what Bulkley possessed when he made it. It was made subject to all existing equities.

Bill dismissed, with costs.

The rights of an agent in relation to his principal, are 1. To Indemnity; 2. To Compensation, which includes Commissions; 3. And for the security of the general balance of a factor, and of some other kinds of agents, the law gives a *general lien.*

1. Indemnity. *D'Arcy* v. *Lyle* is a celebrated case on the point, that a principal is under an implied obligation to indemnify his agent for all damages incurred by him, without his fault, in the course of the agency, and in consequence of it; and it has often been confirmed. In *Elliott* v. *Walker*, 1 Rawle, 126, a foreign factor having sold, on credit, goods consigned by two principals, procured, from a commercial house in the foreign port, advances on an assignment of the debts due by the purchasers, which advances he remitted to his principals; subsequently, in consequence of a destructive fire, several of the purchasers failed, and the house which made the advances, having demanded repayment from the principals, without success, attached the property of the factor after his death, and recovered the amount of their claims with costs. Suits were brought by the factor's administrators, against both principals, to recover the amount so paid, or the portion due by each of the consignors, with interest, and a proportion of the expenses of the attachment suit: which it was decided they were entitled to do. "There is no doubt," said Rogers, J., in pronouncing judgment, "an obligation on the principal (which the civilians

call *obligatio mandato contraria*) to repay his agent such sums of money, as the latter has necessarily expended in the execution of his commission: and to indemnify him for losses sustained by reason of his employment. To give rise to this obligation, it is necessary that the agent should have sustained some loss, on account of the agency, *ex causa mandati*, and that the loss should not have been caused by the agent's fault. These principles are recognised to the fullest extent in *D'Arcy* v. *Lyle*, 5 Binn. 441." In *Ramsay* v. *Gardner*, 11 Johnson, 439, the defendant had applied to the plaintiff to inform him how he should draw £100 from Scotland, and the plaintiff advised him to draw a bill for the amount in favour of the plaintiff, which he would negotiate, and on advice being received of its payment, would pay the amount to the defendant. This was accordingly done, but the bill was returned protested for non-payment, and the plaintiff as endorser had to pay 20 per cent. damages, with the charges of protest: and in an action brought, he was held entitled to recover this 20 per cent. damages with interest, and the expenses on the protest (including postages); on the ground that the plaintiff, in the negotiation of the bill, acted as the agent of the defendant without any expected benefit to himself, and that the responsibility which he had incurred as endorser was solely for the accommodation of the defendant. In *Stocking* v. *Sage*, 1 Connecticut, 519, the plaintiff, as master of a schooner of the defendants, and their agent, with orders to make as good a voyage as he could for the owners, entered into a contract in a foreign port with K. & Co. for the employment of the vessel, under which they advanced to him a sum of money for the purchase of a cargo to be at their risk; afterwards the plaintiff was attached by K. & Co. on the said contract, but obtained final judgment in his favour against them, but in defending the suit, expended about $500 for fees of counsel, interpreter, and notaries, and $300 in obtaining testimony, &c.; and he brought this suit to recover the amount of the costs, charges, and damages sustained by him on account of that contract, alleging a promise to indemnify; Swift, Ch. J., with whom a large majority of the judges agreed, was of opinion that the plaintiff was entitled to recover on an implied promise; and he said, that "where an agent, acting faithfully, without fault, in the proper service of his principal, is subjected to expense, he ought to be reimbursed. If sued on a contract made in the course of his agency pursuant to his authority, though the suit be without cause, and he eventually succeeds, the law implies that the principal will indemnify him, and refund the expense. For this, he can maintain an action of indebitatus assumpsit; and the proof of such facts will be sufficient to warrant the jury to find the promise." *Powell* v. *Trustees of Newburgh*, 19 Johnson, 284, is similar to this case, excepting that here the action by which the agent had been put to expense, was an action of tort. The plaintiffs had been trustees of the village of Newburgh, being compelled by law to take that office upon them; and after they were out of office, an action had been brought against them by one G. for special damage arising from their having discontinued a highway and a sluiceway in the village, in which judgment was given in their favour, but in their defence they had expended a large sum of money over and above the taxable costs, for counsel fees, expenses of witnesses, &c., and to recover this, the present suit was brought against their successors in office, who had notice of the suit and of the amount expended by the plaintiffs, in defence of it. It was decided that the plaintiffs, having been sued for an act done by them as the agents and trustees of the corporation, in the course of their agency, and pursuant to authority, and having acted faithfully and without fault, were entitled to re-

cover for everything reasonably and necessarily disbursed about their defence, and which could not be included in the taxation of costs in the judgment recovered against G.: and Spencer, Ch. J., remarked, that the distinction was between those cases which arise naturally out of the agency, and such as are casual, or *oblique*, not proceeding directly from the execution of the mandate; and that it is upon this principle, that the doctrine of contribution towards a general average stands; where the owner of a vessel cuts away a mast to avoid impending ruin, and the owners of goods are personally liable for the amount of contribution, on the ground that the act was done, by the general agent, for the safety of the property. In this case, it will be observed, the action against the agent, though in tort, had been unsuccessful; but the right of indemnity is the same where damages have been recovered against the agent in an action of tort for something done by direction of the principal, if the act of the agent was required by his duty, and was without knowledge or intention of wrong; and on this ground rests the implied obligation of a party to a suit to indemnify an officer acting by his directions, for damages recovered against him in trespass; *Gower* v. *Emery*, 18 Maine, 79, 83. The recent case of *Green and others* v. *Goddard*, 9 Metcalf, 212, illustrates the principal of indemnity arising out of the relation of agent and principal, in a very interesting manner; and this decision, reported with faultless and elegant distinctness, from the ability with which the most delicate principles of mercantile law are dealt with and applied, in a case of some intricacy, is eminently creditable to the commercial jurisprudence of this country. In this case, Messrs. W. & Co. of London, having given the defendant a letter of credit, authorizing the plaintiffs to draw at Canton on them, for account of the defendant, who engaged to remit funds to London, in time to provide for the bills, the defendant sent the letter to the plaintiffs' house at Canton, and the plaintiffs, as agents of the defendant, drew accordingly in their own names, and disposed of the bills, and invested the proceeds for the benefit of the defendant. W. & Co. accepted the bills, but, before their maturity, had stopped payment. B. & Co., of London, then took up the bills, supra protest, for the honour of the plaintiffs as drawers, under an arrangement with the plaintiffs' house at Boston, by which certain credits of the plaintiffs with B. &. Co., against which the plaintiffs might have drawn, were appropriated to the purpose, covering the liability in part, and to cover the residue, funds, purchased at a high premium of exchange, were remitted by the plaintiffs from Boston. Afterwards, W. & Co., with funds remitted by the defendant, paid B. & Co. the amount of the bills with interest, notarial expenses, and banker's commissions, and took them up, and thus all liability on the bills was discharged; but the plaintiffs brought this suit, upon the relation of principal and agent, for indemnity for damage occasioned by the failure of the defendant to provide funds for the bills at maturity, according to his engagement; which damage was alleged to consist in, 1. The high premium of exchange paid by them in seuding funds to London to take up the bills supra protest, and 2, the loss of the profits of exchange which they might have made in drawing on their credits with B. & Co. As to the latter, it was decided to be speculative damage, which the plaintiffs were not entitled to recover for; but they were decided to be entitled to recover for the former, because, as drawers, they had a right to make provision for taking up the bills after dishonour, to sustain their commercial credit, and prevent the heavy damage consequent on a return of the bills, which would have exceeded the premium of exchange now demanded; and therefore, that the relation of the

parties was that of an agent seeking to recover an indemnity from his principal, for a loss sustained by him in the faithful discharge of his agency. The Court observed, that the expense in question, incurred by the plaintiffs, arose from drawing the bills in their own names, which they were obliged to do in executing, as agents of the defendant, the authority given by W. & Co.; and that, "Where an agent, in pursuing the instructions of his principal, and acting within the scope of his authority, becomes personally liable for the performance of the contract he makes for his principal, and without which personal liability, the orders of the principal cannot be executed at all, or not so well executed, and this is known by the principal at the time of giving his instructions and creating the agency, if a loss occur to the agent, it is most clear that he can look to the principal for indemnity for the damage sustained by him. And this," it was added, "rests upon those sound principles of common sense and mutual justice in the transaction of business, upon which the law merchant, in its various branches, is founded; and which law, as it regulates and prescribes the rights and duties of principal and agent, alike furnishes protection to the agent, when he suffers loss through fidelity to his employer, and gives redress to the principal who sustains an injury from the breach of orders or neglect of duty by the agent."

2. Compensation. Every agent, employed by another, is ordinarily entitled to a reasonable compensation for his services: see *Bradford* v. *Kimberly; Walker et al.* v. *Robert Smith*, 1 Washington C. C., 152, 154; *Gregory* v. *Mack*, 3 Hill's N. Y. 380, 384; *Tevebaugh* v. *Reed*, 5 Monroe, 179; *Welsh* v. *Dusar*, 3 Binney, 329; but negligence and breach of orders will abate or bar the claim; *Dodge* v. *Tileston*, 12 Pickering, 328; *White* v. *Chapman*, 1 Starkie, 91. The compensation of a factor or other commercial agent, consists by the usage of trade in commissions, which are defined to mean "an allowance or compensation made upon the sale or purchase of goods;" *Miller* v. *Livingston*, 1 Caines, 349, 357: see *Stevenson* v. *Maxwell*, 2 Sandford's Chancery, 274, 284; and they accrue immediately upon effecting the sale; *Solly* v. *Weiss*, 8 Taunton, 371: these are due to such commercial agents by the usage of trade; *Poag, Ex'or*, v. *Poag*, 1 Hill's Chancery, 285, 287; *Lever* v. *Lever*, 2 Id. 158, 166; and the right to them is chiefly regulated by usage; *Clark* v. *Moody et al.*, 17 Massachusetts, 145, 152; but usage cannot entitle a factor to commissions on the payment of his own debt; *Pavret et al.* v. *Perot et al.*, 2 Yeates, 185.

3. For the security of his claims as agent upon the principal, a factor has a general lien on the principal's goods which are in his possession as factor. There are three kinds of lien mentioned in the books; 1. A lien at common law, which is, a right to retain a specific article, until its price, or a charge respecting it, is paid, and the true character of this lien at common law, as stated by Serjt. Manning, in a note to *Barnett* v. *Brandao*, 6 Manning & Granger, 658, is, that as the title of one party to demand possession, and of the other to demand payment, are contemporaneous, the owner has no right to possession until he has tendered payment; see *Brooks* v. *Bryce*, 21 Wendell, 14, 17, and *Steinman* v. *Wilkins*, 7 Watts & Sergeant, 466: 2. A lien by special contract, express or implied: 3. The commercial lien of factors, bankers, and insurance brokers, which is a general lien, and which, though originally established by custom and usage of merchants, is now settled as a part of the law merchant, and the general law of the land; see *Barnett* v. *Brandao*, 6 Manning & Granger, 630, 665; *Moody* v. *Webster*, 3 Pickering, 424, 426; *Neponset Bank* v. *Leland*, 5 Metcalf, 259; *McKenzie* v. *Nevius*, 22 Maine, 138;

Bank of the Metropolis v. *New England Bank*, 1 Howard's Supreme Court, 234; *Kollock and others* v. *Jackson*, 5 Georgia, 153, 159; *Russell* v. *Hadduck*, 3 Gilman, 233, 238. Such a lien exists also, in favour of wharfingers, but not of warehousemen; see *Brooks* v. *Bryce*, and *Steinman* v. *Wilkins:* an attorney or solicitor, it has been held in Mississippi, has a particular lien on the fund recovered, and a general lien on papers in his hands; *Pope* v. *Armstrong*, 3 Smedes & Marshall, 214; *Cage* v. *Wilkinson and Miles*, Id. 223. But it is only the factor's lien which it is proposed to consider at present.

This general lien is defined to be "a right of the factor to hold all the goods of his principal which come into and remain in his hands as such factor, until the general balance, that is to say, all debts which his principal owes him, and which have arisen and become payable in the course of his business as factor, have been paid;" "whereas a particular lien is confined to the debt due for the specific article;" per Cowen, J., in *Brooks* v. *Bryce*, 21 Wendell, 14, 16, 17: but it does not apply to debts incurred on other than the agency account; *McKenzie* v. *Nevius*, 22 Maine, 138, 150. This lien exists by law in favour of factors and purchasing agents; *Stevens* v. *Robins*, 12 Massachusetts, 180; *Brooks* v. *Bryce;* but not in favour of a mere collecting agent, such as a bank collecting a note, which has not a lien for the general balance of account; *Lawrence* v. *Stonington Bank*, 6 Connecticut, 521, 527; nor in favour of a mere servant or clerk who transacts the business of his principal exclusively; *Gray* v. *Wilson*, 9 Watts, 512. It extends to goods and the proceeds of them, and securities and debts, belonging and due to the principal, and is for advances, commissions, and responsibilities incurred when there is a reasonable apprehension of danger; *Bradford* v. *Kimberly; Hodgson* v. *Paxson & Lorman*, 3 Harris & Johnson, 339; *Matthews & Hopkins* v. *Menedger*, 2 McLean, 145, 153; *Murray* v. *Toland*, 3 Johnson's Chancery, 569, 573; *Toland* v. *Murray*, 18 Johnson, 24; *Bard & Co.* v. *Stewart*, 3 Monroe, 72; *Jordan et al.* v. *James*, 5 Hammond, 88, 99; *Newhall* v. *Dunlap*, 12 Maine, 180, 183; *Stevens* v. *Robins:* see *Le Guen* v. *Gouverneur & Kemble*, 1 Johnson's Cases, 436, 459, 462: and it is general, embracing those goods which have been paid for, as well as those which have not been; *Stevens* v. *Robins; Brooks* v. *Bryce;* see *Le Guen* v. *Gouverneur & Kemble.* But to give this lien, there must be a debt to the factor, or a present liability on his part; for if, by agreement, express or implied, goods ordered through a purchasing agent, are purchased on an extended credit, and to be delivered at once, the retention of the goods till payment, would be in violation of the agreement of the parties; *Williams* v. *Littlefield*, 12 Wendell, 362, 370: *Brooks* v. *Bryce.* "In order to constitute a lien, there must be some possession, custody, control, or disposing power, in the person claiming the lien, or his agent, in and over the subject-matter in which such lien is claimed:—the factor, indeed, sells the goods and thereby parts with the lien on the goods; but at the same moment he takes the proceeds, whether the money, or security, which he may take in his own name, and thus as between him and his principal, the lien is immediately transferred to the proceeds;" *Hall* v. *Jackson & Tr.* 20 Pickering, 195, 197; the possession of the factor's carrier or agent, however, is the factor's possession; *Holbrook* v. *Wight*, 24 Wendell, 169, 175; and, as a general principle, constructive possession is equivalent to actual, for the purposes of this lien; *Kollock & others* v. *Jackson*, 5 Georgia, 153, 155. If the factor make an unconditional delivery of possession his lien is gone; but if he deliver to one as his agent with notice of his lien and with orders to hold for him, the lien will be pre-

served; *Matthews & Hopkins* v. *Menedger*, 2 McLean, 145, 153; *Urquhart* v. *M'Iver*, 4 Johnson, 103, 116; *Hall* v. *Jackson & Tr.* (See *McFarland* v. *Wheeler*, 26 Wendell, 467; *Bigelow* v. *Heaton*, 6 Hill, 43); and though, when possession has been voluntarily given up, the factor cannot retake the goods, yet if they come again lawfully into his possession his lien will revive; *Moody* v. *Webster*, 3 Pickering, 424, 426. The lien of a factor, as given by law, is a cumulative security for the benefit of the factor, and does not vary his right of personal resort against the principal; advances are considered in law, as being made on the joint security of the person and the fund; an agreement to look to the fund only, if proved, would of course be valid, but it cannot be implied from the mere relation of principal and factor; *Burrill* v. *Phillips*, 1 Gallison, 360; *Peisch* v. *Dickson*, 1 Mason, 10; *Aycinena* v. *Peries*, 6 Watts & Sergeant, 244, 255; *M'Kenzie* v. *Nevius*, 22 Maine, 138, 147; *Mertens* v. *Nottebohms*, 4 Grattan, 163: accordingly, if there were no agreement at the time of the advances, to look to the fund exclusively, a factor under advances, having sold goods on credit, and the purchasers having failed, is not bound to wait till the time of payment by them has expired, before suing the principal for the advances: *Beckwith* v. *Sibley*, 11 Pickering, 482; *Upham and others* v. *Lefavour*, 11 Metcalf, 174, 183; the dictum, therefore, of Woodworth, J., in *Corlies* v. *Cumming*, 6 Cowen, 181, 184; "that from the nature of the contract resort must first be had to the fund, if it can be made available, before the principal is liable," is incorrect. Lien is a privilege given for the benefit of the factor, and exists only as between himself and the principal, and no question can arise upon it, but in their relations with one another; *Jones* v. *Sinclair*, 2 New Hampshire, 319, 321; *Holly* v. *Huggeford*, 8 Pickering, 73, 76.—It has been stated, above, that possession by the factor's servant or agent for him, is his possession for purposes of lien, and that he may deliver property to one as his servant or agent, with notice of his lien, and with directions to retain it: but a lien cannot be transferred by the tortious act of the factor; *Newbold* v. *Wright & Sheldon*, 4 Rawle, 195, 211. Indeed the right of lien depends so entirely on privity between the principal and factor, that if one to whom a consignment has been made, substitute another consignee in his place, without authority from the principal, such substituted agent will have no lien; *Solly* v. *Rathbone*, 2 Maule & Selwyn, 298; *Cochran* v. *Irlam*, 301; *Phelps* v. *Sinclair*, 2 New Hampshire, 554, 555. If a factor employ a sub-agent, though the latter deals with him under the belief, that he is the principal, the sub-agent will not acquire, on property of the principal's which may come into his hands, an original lien for the balance due to him by the factor: but if the sub-agent negotiate a contract between a third person, and the factor as a principal, such as a policy of insurance, on which he would be entitled to a general lien, the principal cannot have the benefit of this contract except subject to the lien against the factor which attached upon it when it was made; in such a case the policy is not property of the principal's which he had held unincumbered and had intrusted to his agent, but is an express contract made with and for the agent as a principal, which contract was from its inception affected with a lien, and the principal claiming under and by that contract, claims subject to all that affects that contract; *Westwood* v. *Bell & another*, 4 Campbell, 349; *Mann* v. *Forrester & another*, Id. 60; *McKenzie* v. *Nevius*, 22 Maine, 138, 145. But if a sub-agent, or a substituted agent, has notice, that the person employing him is an agent, he will acquire no lien for debts due by the agent; *Buckley* v. *Packard*,

20 Johnson, 421; *Martin* v. *Moulton*, 8 New Hampshire, 504, 506. The Factor's Act gives a lien to consignees, for advances to one in whose name as owner goods are shipped, though he be in fact an agent, if the consignee had no notice of the agency. See the note, on the right to pledge.

Domicil.

STEPHEN GUIER, CLAIMING AS THE FATHER OF THOMAS GUIER, DECEASED INTESTATE, AND FRANCIS O'DANIEL AND WILLIAM YOUNG, CLAIMING ON BEHALF OF THE BROTHERS AND SISTERS OF THE INTESTATE.

In the Orphans' Court for the City and County of Philadelphia.

1806.

[REPORTED, 1 BINNEY, 349–355.]

Of the principles relating to Domicil.

THE sum of 1400 dollars was in dispute under the following circumstances. Thomas Guier, the intestate, was the captain of a vessel, and was murdered in the West Indies in 1801. The money in controversy was part of the proceeds of certain coffee which came to Philadelphia, and was sold on his account after his death. O'Daniel and Young claimed it for his brothers and sisters by the law of Delaware; the father claimed it for himself by the law of Pennsylvania; and the question for the Court was by which law the distribution should be directed.

The facts were these: Stephen Guier, the father, and his family, including the intestate, at that time a minor, removed from the state of Connecticut to Delaware in March, 1795; where they settled on a farm belonging to his son Gideon, who was already resident there. In the same year Thomas sailed from Wilmington in Delaware, as a sailor in a vessel commanded by Gideon; and constantly afterwards followed the sea. In a second voyage with Gideon from Wilmington, he was cast away, and returned to Wilmington. In the winter of 1796, he lived in Gideon's house in Wilmington, and there went to school to learn navigation. In March, 1797, he took a protection from the Collector of

Philadelphia, and sailed from that port. From 1796 to 1798, during some part of which period he was of age, he always boarded when ashore with Gideon's widow in Wilmington, where he kept his trunks, clothes, books, and papers; and from 1798 to 1800 he boarded when ashore at an inn in the same town. In 1800 he became a member of a Free-mason's Lodge at Wilmington, and contributed his proportion of the room-rent. In the summer of 1801, he went to Connecticut on a visit to his relations; but, except in 1797, when he sailed from Philadelphia, and once when he sailed from New York, all his voyages from 1795 to 1801 began at Wilmington, during which period, he was successively seaman, mate and captain. All his owners resided at Wilmington. The protection from the Collector at Philadelphia stated him to be twenty-three years of age; but several witnesses swore to his being under age when he first went to Delaware. The Bank of Wilmington required two endorsers on his notes, as they did on the notes of all non-residents; and he never owned or rented a house, had never been assessed or paid a tax, nor ever voted at an election in the state of Delaware, though he once offered his vote and it was rejected. In 1801 he sailed and never returned. The sum in dispute had never been in Delaware, the coffee from which it proceeded having come direct from the West Indies to Philadelphia.

C. J. Ingersoll for the father, argued it upon three points. 1. That Thomas Guier had no *domicil* anywhere. 2. That where there is no *domicil* of preference, custom and the law of Pennsylvania establish the *lex loci rei sitæ* as the rule of succession to personal as well as to real property. 3. That the *locus rei sitæ* being Pennsylvania, and no *domicil* of preference being shown elsewhere, by the law of Pennsylvania the father was entitled to the succession.

Hopkinson and *Rodney* for the Delaware claimants.

On the 7th July, 1806, the opinion of the Court was delivered by

Rush, President. The case is embarrassed with little or no difficulty, whether considered on legal principles or matters of fact. The question is, where was he domiciled at the time of his death? and by what law shall the personal estate be distributed?

It is necessary to state both the law and the facts briefly. The position is too clear to be controverted, that personal estate must go according to the laws of the country in which a man is domiciled at the time of his death. There can be but one domicil for the purpose of distributing personal estate; and when that is ascertained, all such

property, wherever dispersed, will go in succession according to the laws of the country in which the intestate was *last* domiciled. Debts, having no *situs*, follow the person of the creditor; and the *lex loci rei sitæ* is with great propriety totally disregarded.

A man is prima facie domiciled at the place where he is resident at the time of his death; and it is incumbent on those who deny it, to repel this presumption of law, which may be done in several ways. It may be shown that the intestate was there as a traveller, or on some particular business, or on a visit, or for the sake of health; any of which circumstances will remove the presumption that he was domiciled at the *place* of his death. 1 Bos. & Pull. 230.

On a question of domicil the mode of living is not material, whether on rent, at lodgings, or in the house of a friend. The apparent or avowed intention of *constant* residence, not the manner of it, constitutes the domicil.

Minute circumstances in inquiries of this sort are taken into consideration: the immediate employment of the intestate, his general pursuits and habits in life, his friends and connexions, are circumstances which, thrown into the scale, may give it a decisive preponderance.

There is no fixed period of time necessary to create a domicil. It may be acquired after the shortest residence under certain circumstances; and under others, the longest residence may be insufficient for the purpose.

Bynkershoek, we are told, would not venture to define a domicil. Vattel says, it is a fixed residence, with an intention of always staying there. It may be defined, in our opinion, to be *a residence at a particular place accompanied with positive or presumptive proof of continuing it an unlimited time;* and is the conclusion of law on an extended view of facts and circumstances. The determination in the case of Major Bruce in the House of Lords does not militate with any part of this definition. Bruce left Scotland when very young, and became completely domiciled in the East Indies, in word and in deed, by a residence of sixteen or seventeen years. Towards the close of his life, and after making a fortune, he expressed a resolution of spending the remainder of his days in his native country, and accordingly took measures to send his property before him, when he suddenly died. It was held that he was clearly domiciled in the East Indies in the first instance, and that the intention to change could have no effect. Though declarations are good evidence that a person has changed his domicil, no fixed views of that sort can be supposed equivalent to the actual abandonment of one domicil, and the acquisition of another.

The domicil of origin arises from birth and connexions. *A minor during pupilage cannot acquire a domicil of his own. His domicil*

therefore follows that of his father, and remains until he acquires another, which he cannot do until he becomes a person sui juris.

With respect to the facts in the case before us, Thomas Guier left Connecticut in the year 1795, under age, in company with his father Stephen, who, quitting his native country, migrated to Delaware, and became a resident of that state by acts of the most unequivocal nature. There cannot be the least doubt that the father became domiciled there. His son Gideon was the harbinger of the family, and was actually a resident in Delaware in the year 1792, when he was a married man, a housekeeper, and the commander of a vessel. Induced probably by the establishment of his son in that part of the world, the old man followed his fortunes, and settling under his immediate auspices, became a farmer; a mode of life in itself more indicative than any other of views of permanent residence. The father being thus domiciled in Delaware, his minor son Thomas was domiciled there also, who, while under age, never acquired or could acquire a domicil *sui juris*. If it were a point of doubtful decision whether Thomas was ever domiciled by any action of his own, Delaware would of course be his *Domicilium originis*, and the country whose law would regulate the succession to his personal estate.

But we do not rest his domicil in Delaware on this ground; he acquired one of his own. From the time old Guier and family, with his son Thomas, arrived in Delaware, they seem to have been connected with Gideon Guier, and to have been both in some degree dependent upon him. He settled his father on a plantation, and Thomas became his apprentice in the seafaring business. Having served out his time, he received wages from his brother. About the year 1797 Thomas was shipwrecked, and returning by the way of New York, he proceeded not to Connecticut but to Wilmington. He studied navigation after he was of age in the borough of Wilmington. His diligence and good conduct recommended him to notice. In a year or two he became a mate, then a captain and part owner of a vessel, in which character he sailed in 1801, when he was murdered by the blacks in the island of St. Domingo. During this whole period we hear nothing from him of the *animus revertendi*. So far from it, that after paying a visit to his friends in Connecticut in 1800 or 1801, he hastened back to Wilmington as the place of his employment, and the residence of his friends. Not a single witness of the great number who have been examined in Connecticut and Delaware, ever heard a word escape his lips of his intention to return; or that Wilmington was only the place of his temporary residence. Thomas Guier entered the world as an adventurer, and in a few years acquired a good deal of property. It is therefore reasonable to believe he felt the full force of this irresistible cement to

locality and situation. This consideration founded on *interest*, furnishes the strongest proof that he had fixed on Wilmington as the place of his domicil. A remark of the unerring observer of human nature, that "where the treasure is the heart will be there also," may be here applied with strict propriety.

Several witnesses say they believe he had fixed his residence at Wilmington; others say they believe he has not fixed it there. This appears to be mere opinion. Not a word from Guier himself has been given in evidence, but his *silence* on the subject is an argument to show his views were permanently fixed on that country, in which his affairs wore the most promising aspect. When he proposed to settle his affairs, he does not think of Connecticut, but of sending to Judge Booth at New Castle, to draw his will in favour of that part of his family who were resident there.

It is, I think, extremely doubtful whether voting and paying taxes are in any case necessary to constitute a domicil, which being a question of general law, cannot depend on the municipal regulations of any state or nation. Voting is confined to a few countries, and taxes may not always be demanded. Guier was a seafaring man; and one of the witnesses says that between the 14th January, 1800, and the 15th October, 1801, he sailed six or seven times. Is it any wonder a single man thus engaged in trade should escape taxation? It frequently happens that young men who never go abroad are not discovered to be objects of taxation till they have reached the age of five or six and twenty. If Guier escaped taxation through the neglect of the officers of government, it is impossible to conceive how their neglect can have any effect on the question of domicil. The almost constant absence of a sailor from home, actually effaces from his mind voting at elections; yet it appears Guier was present at *one* election and offered his ticket, which, though not received, is a striking fact to show he considered himself in the light of a citizen. The ticket not being received does not alter the nature of the transaction on the part of Guier; the evidence resulting from it, of intention to settle and reside, is the same as if it had been actually received.

As to his sailing *one* voyage from Philadelphia, at which time it is probable he obtained a certificate of his being a native of Connecticut and a citizen of the United States, they appear to be accidental circumstances, such as may be looked for in the life of a sailor, and no wise incompatible with his residence in another place.

Employments of the most opposite character and description may have the same effect to produce a domicil. A man may be alike domiciled, whether he supports himself by ploughing the fields of his farm, or the waters of the ocean. It is not exclusively by any particular act

that a domicil, generally speaking, is acquired; but by a *train of conduct* manifesting that the country in which he died was the place of his choice, and to all appearance, of his intended residence. The sailor who spends whole years in combating the winds and waves, and the contented husbandman whose devious steps seldom pass the limits of his farm, may in their different walks of life, exhibit equal evidence of being domiciled in a country. Every circumstance in the conduct of old Guier and his son Thomas, taking into view the unsettled mode of life of the latter, affords the fullest proof that they were both domiciled in Delaware. If the proof be stronger in either case, it is in the case of Thomas, who, though employed in traversing the globe from clime to clime, constantly returned to Wilmington, the source and centre of his business, the seat and abode of his friends and connexions. His "heart untravelled" appears to have been immovably fixed on the spot, to which he was attached by the powerful tie of interest, and the strongest obligations of social duty; and never for a moment to have pointed with a wish to any other country.

We are of opinion that Thomas Guier was domiciled in the state of Delaware, during pupilage; and that he was also domiciled there after he became *sui juris;* and do decree that his personal property be distributed according to the laws of the State of Delaware.

[In further illustration of the principles relating to domicil, the Opinion of the Judges of the Supreme Court of Massachusetts, contained in 5 Metcalf, 587–591, is here inserted.]

To the Honourable the House of Representatives of the Commonwealth of Massachusetts:

THE undersigned, justices of the supreme judicial court, have taken into consideration the question upon which their opinion was requested by the Honourable House, by their order of the 10th of March instant, in the words following:

"Is a residence at a public institution, in any town in this Commonwealth, for the sole purpose of obtaining an education, a residence within the meaning of the constitution, which gives a person, who has his means of support from another place, either within or without this Commonwealth, a right to vote, or subjects him to the liability to pay taxes in such town?"

And in answer thereto, we respectfully submit the following opinion:

We feel considerable difficulty in giving a simple or direct answer to the question proposed, because neither of the circumstances stated constitutes a test of a person's right to vote, or liability to be taxed; nor are they very decisive circumstances bearing upon the question. On the contrary, a person may, in our opinion, reside at a public institution for the sole purpose of obtaining an education, and may have his means of support from another place, and yet he will, or will not, have a right to vote in the town where such an institution is established, according to circumstances not stated in the case on which the question is proposed.

By the constitution it is declared, that, to remove all doubts concerning the meaning of the word "inhabitant," every person shall be considered an inhabitant, for the purpose of electing and being elected into any office or place within this State, in that town, district or plantation, where he dwelleth, or hath his home.

In the third article of the amendments of the constitution, made by the convention of 1820, the qualification of inhabitancy is somewhat differently expressed. The right of voting is conferred on the citizen *who has resided* within this Commonwealth, and *who has resided* within the town or district, &c.

We consider these descriptions, though differing in terms, as identical in meaning, and that "inhabitant," mentioned in the original constitution, and "one who has resided," as expressed in the amendments, designate the same person. And both of these expressions, as used in the constitution and amendment, are equivalent to the familiar term domicil, and therefore the right of voting is confined to the place where one has his domicil, his home or place of abode.

The question, therefore, whether one residing at a place where there is a public literary institution, for the purposes of education, and who is in other respects qualified by the constitution to vote, has a right to vote there, will depend on the question whether he has a domicil there. His residence will not give him a right to vote there, if he has a domicil elsewhere; nor will his connexion with a public institution, solely for the purposes of education, preclude him from so voting, being otherwise qualified, if his domicil is there.

The question, what place is any person's domicil, or place of abode, is a question of fact. It is in most cases easily determined by a few decisive facts; but cases may be readily conceived, where the circumstances tending to fix the domicil are so nearly balanced, that a slight circumstance will turn the scale. In some cases, where the facts show a more or less frequent or continued residence in two places, either of which would be conclusively considered the person's place of domicil,

but for the circumstances attending the other, the intent of the party, to consider the one or the other his domicil, will determine it. One rule is, that the fact and intent must concur. Certain maxims on this subject we consider to be well settled, which afford some aid in ascertaining one's domicil. These are, that every person has a domicil somewhere; and no person can have more than one domicil at the same time, for one and the same purpose. It follows, from these maxims, that a man retains his domicil of origin till he changes it, by acquiring another; and so each successive domicil continues, until changed by acquiring another. And it is equally obvious, that the acquisition of a new domicil does, at the same instant, terminate the preceding one.

In applying these rules to the proposed question, we take it for granted that it was intended to apply to a case where the student has his domicil of origin at a place other than the town where the institution is situated. In that case, we are of opinion that his going to a public institution, and residing there solely for the purpose of education, would not, of itself, give him a right to vote there, because it would not necessarily change his domicil; but in such case, his right to vote at that place would depend upon all the circumstances connected with such residence. If he has a father living; if he still remains a member of his father's family; if he returns to pass his vacations; if he is maintained and supported by his father; these are strong circumstances, repelling the presumption of a change of domicil. So, if he have no father living; if he have a dwelling-house of his own, or real estate; of which he retains the occupation; if he have a mother or other connexions, with whom he has before been accustomed to reside, and to whose family he returns in vacations; if he describes himself of such place, and otherwise manifests his intent to continue his domicil there; these are all circumstances tending to prove that his domicil is not changed.

But if, having a father or mother, they should remove to the town where the college is situated, and he should still remain a member of the family of the parent; or if, having no parent, or being separated from his father's family, not being maintained or supported by him; or, if he has a family of his own, and removes with them to such town; or by purchase or lease takes up his permanent abode there, without intending to return to his former domicil; if he depend on his own property, income or industry for his support; these are circumstances, more or less conclusive, to show a change of domicil, and the acquisition of a domicil in the town where the college is situated. In general, it may be said that an intent to change one's domicil and place of abode is not so readily presumed from a residence at a public institution for the purposes of education, for a given length of time, as it would

be from a like removal from one town to another, and residing there for the ordinary purposes of life; and therefore stronger facts and circumstances must concur to establish the proof of change of domicil, in the one case than in the other. But where the proofs of change of domicil, drawn from the various sources already indicated, are such as to overcome the presumption of the continuance of the prior domicil, such preponderance of proof, concurring with an actual residence of the student in the town where the public institution is situated, will be sufficient to establish his domicil, and give him a right to vote in that town, with other municipal rights and privileges. And as liability to taxation for personal property depends on domicil, he will also be subject to taxation for his poll and general personal property; and to all other municipal duties in the same town.

For the information of the Honourable House, we respectfully refer to several decided cases, bearing upon this subject; Amherst v. Granby, 7 Mass. 1. Putnam v. Johnson, 10 Mass. 488. Harvard College v. Gore, 5 Pick. 370. Lyman v. Fiske, 17 Pick. 231. Abington v. North Bridgewater, 23 Pick. 170.

The question submitted supposes the case of a person residing at a public institution for the purpose of education, "who has his means of support from another place, either within or without this Commonwealth."

We do not consider this circumstance of much importance in determining the domicil. If, indeed, a young man, over twenty-one years of age, is still supported by his father or mother, it is a circumstance concurring with other proofs to show that he is still a member of the family of such parent, and so may bear on the question of domicil. But if he is emancipated from his father's family, and independent in his means of support, it is immaterial from what place his means of support are derived. If it be income from rents of real estate leased in another town, or dividends from the stock of a bank there situated, or interest of money invested on mortgage in such town, it seems to us that this circumstance would have no influence in deciding the question of domicil, and the consequent right to vote in any town.

LEMUEL SHAW,
S. S. WILDE,
CHARLES A. DEWEY,
SAMUEL HUBBARD.

Boston, March 15, 1843.

The succession to movable property, whether testamentary, or in case of intestacy; *Desesbats* v. *Berquier*, 1 Binney, 336; *Grattan* v. *Appleton et al.*, 3 Story, 755, 765; *Garland, Executor*, v. *Rowan*, 2 Smedes & Marshall, 617; *Bradley et al.* v. *Lowry*, 1 Speers' Equity, 3, 13; *In the Matter of Catharine Roberts' Will*, 8 Paige, 519, 525; *Suarez* v. *Mayor, &c., of New York*, 2 Sandford, 174, 177; *Sedgwick* v. *Ashburner*, 1 Bradford, 105, 106; *The Public Administrator* v. *Hughes*, Id. 126; *Harvey* v. *Richards*, 1 Mason, 381, 408; *Thomas and Wife* v. *Tanner*, 6 Monroe, 52, 58; *Dorsey's Ex'or, &c.* v. *Dorsey's Adm'r*, 5 J. J. Marshall, 280; *Sneed* v. *Ewing et ux.* Id. 460, 479; *Barnes' Adm'r* v. *Brashear et al.*, 2 B. Monroe, 380; *Atchison's Heirs* v. *Lindsey et al.*, 6 Id. 86, 89; *Varner, Ex'r.*, v. *Bevil et al.*, 17 Alabama, 286; *Rue High, Appellant*, 2 Douglass, 515, 522; *De Sobry* v. *De Laistre*, 2 Harris & Johnson, 191, 224; *Leake* v. *Gilchrist*, 2 Devereux, 73; the jurisdiction of the probate of wills; *Harvard College* v. *Gore*, 5 Pickering, 370; *Isham* v. *Gibbons*, 1 Bradford's Surrogate, R. 70; the liability to legacy duty; *Thomson* v. *The Advocate General*, 11 Clarke & Finelly, 1; the right of voting; *Cadwalader* v. *Howell & Moore*, 3 Harrison, 138; *The State* v. *Hallett*, 8 Alabama, 159; liability to taxation; *Moore* v. *Wilkins*, 10 New Hampshire, 452, 455; and to military duty; *Shattuck* v. *Maynard*, 3 Id. 123; the jurisdiction of the federal courts as between citizens of different States; *Lessee of Cooper* v. *Galbraith*, 3 Washington, 546; *Read* v. *Bertrand*, 4 Id. 514; national character, for purposes of trade, and in case of war; *The Ship Ann Green*, 1 Gallison, 275, 285; *The Brig Joseph*, Id. 545, 551; *Wildes et al.* v. *Parker*, 3 Sumner, 593; *Livingston and Gilchrist* v. *Mary'd Ins. Co.*, 7 Cranch, 506, 542; *The Venus*, 8 Id. 253, 278, &c.; *Elbers* v. *United Ins. Company*, 16 Johnson, 128; depend upon the party's domicil, or legal residence. A distinction, however, should be noted between *national* domicil, upon which the *law* applicable to the person and personal rights depends, and the *domestic*, or local domicil within a nation or state, upon which certain municipal privileges and obligations depend, such as taxation, settlement, and voting. It is to the former, that the general law of domicil, as regulated by the law of nations, is directly and principally applicable; the latter, liable to be affected by the municipal policy, or the special statutes, of the nation or state, may involve some other considerations; yet it is desirable that the latter should be assimilated to the former, as far as is practicable. In statutes relating to settlement, taxation, voting, &c., the language generally used is, not *domicil*, but *dwelling, home, inhabitant, resident*, &c. In some cases, the purpose and policy of the enactment show that such words are not to be understood in the sense of *domicil*. Thus, *In the Matter of Thompson*, 1 Wendell, 43, it was decided, that *residence* out of the state, for the purpose of being subject to foreign attachment, did not import that the domicil should be out of the state. In *Harvard College* v. *Gore*, 5 Pickering, 231, and *Lyman* v. *Fiske*, 17 Id. 231, it was intimated that *habitation* might have a different meaning from domicil; and *In the matter of Wrigley*, 4 Wendell, 602; S. C. 8 Id. 134, 140, a case relating to jurisdiction in insolvency, it was said that *Inhabitancy* and *Residence* do not mean precisely the same thing as *domicil*, when the latter term is applied to the succession to personal estate; and in *Exeter* v. *Brighton*, 15 Maine, 58, 60, a distinction was noted between *home* in reference to settlement, and *domicil*. But all distinctions of this kind depend, not upon the *words* of the statutes, but upon the purpose contemplated; and these various words, appear to have received in the foregoing cases, the same construction that would have been applied to

domicil, in reference to the subject then in question, had it been used, though, perhaps, not the meaning of domicil used in respect to succession to property and other subjects depending on *national* consideration only. In some later cases in Massachusetts, and New Hampshire, the terms 'Resident,' 'Inhabitant,' 'having a dwelling or home,' &c., used in regard to voting, the settlement of paupers, and taxation, are declared to be synonymous with domicil as understood at common law; *Abington* v. *North Bridgewater*, 23 Pickering, 170, 176; *Blanchard* v. *Stearns and others*, 5 Metcalf, 298, 304; opinion of judges; *Moore* v. *Wilkins*, 10 New Hampshire, 452. In *Lessee of Hylton* v. *Brown*, 1 Washington, C. C. 299, 314; 3 Id. 555, *inhabitant*, in a proclamation, was interpreted as referring to *domicil*: and see *Lamb* v. *Smythe*, 15 Meeson & Welsby, 433, 434. In *Crawford* v. *Wilson*, 4 Barbour's Supreme Court, 505, 522, where this subject was extensively examined, it was held that the terms *legal residence*, *inhabitancy*, and *domicil*, mean the same thing. In *Isham* v. *Gibbons*, 1 Bradford's Surrogate, R., 70, 84, where the cases were reviewed, it was said, that "these expressions should be construed in connexion with the matter to which they are applied. In statutes designed to give creditors prompt remedies against absent debtors, it is just to consider the word resident as meaning an actual resident merely. In provisions relating, however, to testamentary cases, which depend upon the law of domicil, it is equally rational to construe the term in consonance with the established law, rather than indulge the supposition that the Legislature intended to overrule the law of domicil." See *Quinby* v. *Duncan*, 4 Harrington, 383; and *Brundred* v. *Del Hoyo*, Spencer, 328, 333; *Bartlett* v. *Brisbane*, 2 Richardson, 489.

The definition of *domicil* is confessed to be uncertain. In *Somerville* v. *Ld. Somerville*, 5 Ves. 750, 755, 789, the definition of the civil law, "Ubi quis Larem rerumque ac fortunarum suarum summam constituit," was cited; but the Master of the Rolls (Sir R. P. Arden), censured it as very vague and difficult to apply, and said that in his opinion Bynkershoek was very wise in not hazarding a definition. Another description has been cited from Dig. Lib. 50, tit. 16, l. 203; "Eam domum unicuique nostrum debere existimari, ubi quisque sedes et tabulas haberet, suarumque rerum constitutionem fecisset." In *Putnam* v. *Johnson et al.*, 10 Massachusetts, 488, 495, 501, Vattel's definition was cited, "the habitation fixed in any place, with an intention of always staying there;" but Parker, J., observed that it was too strict, if taken literally, to govern in a question relating to voting, and that probably Vattel's meaning was, that the habitation fixed in any place, without any present intention of removing therefrom, is the domicil; at least, that this definition is better suited to the circumstances of this country. See the definitions collected in *Crawford* v. *Wilson*, 4 Barbour's Supreme Court, 505, 522: and see *White* v. *Brown*, Wallace, Jr., 217, 262, and *Horne* v. *Horne*, 9 Iredell, 99, 107, and see *Heirs of Holliman* v. *Peebles*, 1 Texas, 673, 688. In *Green* v. *Windham*, 13 Maine, 225, 228, Weston, C. J., said, "Whoever removes into a town, for the purpose of remaining there for an indefinite period, thereby establishes his domicil in that town. It is not necessary that he should go, with a fixed resolution to spend his days there. He might have in contemplation many contingencies, which would induce him to go elsewhere. Some persons are more restless in their character, and migratory in their habits than others, but they may and do acquire a domicil, wherever they establish themselves for the time being, with an intention to remain, until inducements may arise to remove." Domicil, as is remarked in the prin-

cipal case, does not depend upon the mode of living, whether at housekeeping or at lodgings; *Waterborough* v. *Newfield*, 8 Greenleaf, 203; and in *Bradley et al.* v. *Lowry*, 1 Speers' Equity, 3, 16, it was supposed that a national domicil, that is a domicil in a state, for the purpose of being governed by its law in respect to testamentary succession, might be acquired without any fixed place of residence in the state, where the previous domicil had been unequivocally abandoned.

But if the maxims be sound, that for some purposes, every person has a domicil somewhere, and that for the same purpose, a person can have but one domicil, the definition of domicil is, practically, of less importance; for the determination of it does not depend upon the presence of any particular circumstance, but upon a comparison and preponderance of facts and circumstances. The domicil of a person is in that place which has more of the qualities of a principal and permanent residence, or has a greater pretension to be considered such, than any other place. Accordingly, a very interrupted residence, or even a temporary stay, may constitute domicil, when no other place has so good a pretension to be the domicil. Thus in a case of a fisherman, a single man, who in summer lived in his boat, and in winter lodged with a family in a town, the domicil, in respect to settlement, was held to be in that town; *Boothbay* v. *Wiscasset*, 3 Greenleaf, 354: and in another case, where a clergyman had abandoned his former dwelling-place in H., with no intention of returning there, and had taken up his personal residence in M., upon an invitation to preach there for one year, as he had no home elsewhere to return to, and, so far as appeared, no intention of going to any particular place at the expiration of that time, it was decided that his domicil was in M. for the purpose of taxation; *Moore* v. *Wilkins*, 10 New Hampshire, 452. For practical purposes, it is enough, in general, to observe, that domicil is legal residence; that it is a question of fact and of intent; and that if these elements are found, the reference of the domicil to one place or to another, depends upon the comparative weight of the circumstances. "It depends," said the Chief Justice, in *Thorndike* v. *City of Boston*, 1 Metcalf, 242, 245, "upon the preponderance of the evidence in favour of two or more places; and it may often occur, that the evidence of facts tending to establish the domicil in one place, would be entirely conclusive, were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fix it, beyond question, in another. So on the contrary, very slight circumstances may fix one's domicil, if not controlled by more conclusive facts fixing it in another place." "It depends," said the same judge, again, in *Abington* v. *North Bridgewater*, 23 Pickering, 170, 178, "not upon proving particular facts, but whether all the facts and circumstances taken together, tending to show that a man has his home or domicil in one place, overbalance all the like proofs, tending to establish it in another; such an inquiry, therefore, involves a comparison of proofs, and in making that comparison, there are some facts, which the law deems decisive, unless controlled and counteracted by others still more stringent. The place of a man's dwelling-house is first regarded, in contradistinction to any place of business, trade or occupation. If he has more than one dwelling-house, that in which he sleeps, or passes his nights, if it can be distinguished, will govern. And we think it settled by authority, that if the dwelling-house is partly in one place and partly in another, the occupant must be deemed to dwell in that town in which he habitually sleeps, if it can be ascertained." It seems, too, that even the same facts, according to the different characters of the persons, may have a different operation in the determination of do-

micil. In *Somerville* v. *Lord Somerville*, 5 Vesey, 750, 789, the Master of the Rolls referred to a distinction, in regard to a town-house, and a country-house, as concerned a person in business and one not in business; that a person not under an obligation of duty to live in the capital in a permanent manner, as a nobleman or gentleman, having his mansion-house, his residence, in the country, and resorting to the metropolis for any particular purpose, or for the general purpose of residing in the metropolis, shall be considered domiciled in the country; on the other hand, a merchant, whose business lies in the metropolis, shall be considered as having his domicil there, and not at his country residence; and said that he should be inclined to concur in that distinction.

The cases discover certain principles or maxims, in relation to domicil, which it may be proper to consider in order. The distinction, however, between *national* domicil, that is, the being invested with a national character in the view of other nations, as for purposes of succession to personal property, &c., and the domestic domicil in relation to other places within the same sovereignty, ought to be kept in mind, and it cannot be pronounced to be quite certain that all the principles belonging to the former, apply to the latter. The one depends on the law of nations, and the other on the municipal law of the particular country: and though the same reasons, perhaps, exist in both cases, yet as there is some distinction in the origin of the principles, there may be a difference in their practical result.

1. One of these maxims is, that every person must have a domicil somewhere. This is stated as a general maxim, in some cases that concerned the questions of voting and taxation; *Abington* v. *North Bridgewater*, 23 Pickering, 170, 177; *Thorndike* v. *City of Boston*, 1 Metcalf, 242, 245; Judges' Opinion; *Crawford* v. *Wilson*, 4 Barbour's Supreme Court, 505, 518. There can be no doubt that it is true of national domicil; every man, for example, is to be considered subject to some law in regard to the disposal of his property upon his death. See *Rue High, Appellant*, 2 Douglass, 515, 523. In Massachusetts, also, it appears to be held that every one qualified as a voter in the state, must have a domicil somewhere within the state, for the purpose of voting; see *Putnam* v. *Johnson et al.*, 10 Massachusetts, 488, 499. But whether a person, while a citizen or resident of one state, may be without any domicil in respect to taxation, settlement, and perhaps some other matters, is connected with the question, presently to be considered, whether a domicil can be abandoned, and wholly cease, before a new domicil is acquired.

2. Another principle is, that a person can have in law but one domicil for one and the same purpose. In *Somerville* v. *Lord Somerville*, 5 Vesey, 750, 786, indeed, Lord Alvanley spoke of a person having more than one domicil for some purposes, though he could have but one in regard to succession to personal property: and in *Greene* v. *Greene*, 11 Pickering, 411, 416, Wilde, J. said that, speaking individually, he should have thought that a person might have two domicils in different states, or within different jurisdictions, so as to be amenable to a libel for divorce, in either. See Bailey, B.'s remarks to the same effect in *In re Bruce*; 2 C. & J. 445. These opinions, however, appear to be either loosely expressed, or ill founded: for the principle is believed to be unquestionable, and of universal application, that a person can have but one domicil, at one time, *for the same purpose*. This is strongly asserted in *Abington* v. *North Bridgewater*, 23 Pickering, 170, 177; "The supposition, that a man can have two domicils," said Shaw, C. J. "would lead to the absurdest consequences. If he had two domicils within the limits of distant sovereign

states, in case of war, what would be an act of imperative duty to one, would make him a traitor to the other. As not only sovereigns, but all their subjects, collectively and individually, are put into a state of hostility by war, he would become an enemy to himself, and bound to commit hostilities and afford protection, to the same persons and property at the same time. But without such an extravagant supposition, suppose he were domiciled within two military districts of the same state, he might be bound to do personal service at two places, at the same time; or in two counties, he would be compellable, on peril of attachment, to serve on juries at two remote shire towns; or in two towns, to do watch and ward, in two different places. Or, to apply an illustration from the present case. By the provincial laws cited, a man was liable to be removed by a warrant, to the place of his settlement, habitancy or residence, for all these terms are used. If it were possible, that he could have a settlement or habitancy, in two different towns at the same time, it would follow that two sets of civil officers, each acting under a legal warrant, would be bound to remove him by force, the one to one town, and the other to another. These propositions, therefore, that every person must have some domicil, and can have but one at a time, for the same purpose, are rather to be regarded as *postulata*, than as propositions to be proved." See also *Walke & others* v. *The Bank of Circleville*, 15 Ohio, 288, 299, and *Crawford* v. *Wilson*, 4 Barbour's Supreme Court, 505, 518. It is possible however that *for different purposes* the domicil may be in different places; thus in *Putnam* v. *Jackson et al.* 10 Massachusetts, 488, it was said that the home of a citizen for the purpose of voting might be in one place and his legal settlement in another. In Massachusetts, however, the practice, as to the place of voting, seems to be not very strict or regular; see *Lincoln* v. *Hapgood et al.*, 11 Id. 350, 353; *Harvard College* v. *Gore*, 5 Pickering, 370, 375. In *Isham* v. *Gibbons*, 1 Bradford, 70, 83, it was said that though there can be but one principal domicil for cases of testacy or intestacy, yet there might be two or more domicils for different purposes.

3. A third maxim is, that a domicil once acquired, continues until a new domicil has been acquired; or, perhaps, it is more correct to say, at least for some purposes, that it continues until it is abandoned; that is, until it is left with intention not to return, or, until an intention to abandon it is executed and carried into effect. The domicil of origin prevails until it is proved to have ceased, and then the one acquired is in like manner continued; *Abington* v. *North Bridgewater*, 23 Pickering, 170, 177: see *Goodwin* v. *McCoy*, 13 Alabama, 271, 278; *Crawford* v. *Wilson*, 4 Barbour's Supreme Court, 505, 518; *Isham* v. *Gibbons*, 1 Bradford, 70, 85; *Heirs of Holliman* v. *Peebles*, 1 Texas, 673, 689; *Burnham et al.* v. *Rangeley*, 1 Woodbury & Minot, 8, 11; *White* v. *Brown*, Wallace, Jr. 217, 264. Change of domicil consists of fact and intention. A removal of one's self and family, with a *bona fide* intention of abandoning the former place of residence, and becoming an inhabitant or resident of the place to which the removal is made, is an immediate change of domicil; *Burnham et al.* v. *Rangeley*, 1 Woodbury & Minot, 8, 12; *Bradley et al.* v. *Lowry*, 1 Speers' Equity, 3, 15; *Lessee of Cooper* v. *Galbraith*, 3 Washington, 546, 554; *Read* v. *Bertrand*, 4 Id. 514; *In the matter of Catharine Roberts's Will*, 8 Paige, 519; *Horne* v. *Horne*, 9 Iredell, 99. Domicil, it was said in another case, may be acquired by the shortest residence, if with a design of permanent settlement; and great length of time will not of itself establish domicil, where the purpose was, and continues to be, temporary; though a residence, originally for tem-

porary purposes, may, after a lapse of time, by the supervention of new views and new purposes, become a permanent settlement: *The Ship Ann Green, &c.*, 1 Gallison, 275, 285; *The Venus*, 8 Cranch, 253, 279. The fact and intent, therefore, must concur. See *Horne* v. *Horne, and Heirs of Holleman* v. *Peebles*. An intention, alone, to remove, not executed by an actual removal, does not make a change of domicil; *Hallowell* v. *Saco*, 5 Greenleaf, 143, 145; *Greene* v. *Windham*, 13 Maine, 225, 228; *Gorham* v. *Springfield*, 21 Id. 58; *The State* v. *Hallett*, 8 Alabama, 159; *Bruce* v. *Bruce*, 2 Bosanquet & Puller, 229, 230; S. C. 5 Campbell's Lives, 529. And, on the other hand, an absence from one's domicil for a temporary period, or a special purpose, attended with an *animus revertendi*, will not amount to an extinguishment or change of domicil; *Bradley et al.* v. *Lowry*, 1 Speers' Equity, 3, 14; see *Isham* v. *Gibbons*, 1 Bradford, 70, 86. A seafaring man, absent on long voyages from his home, does not thereby lose his domicil; *Granby* v. *Amherst*, 7 Massachusetts, 1, 5; *Thorndike* v. *City of Boston*, 1 Metcalf, 242, 246. If a man leave his family in his former residence, and go elsewhere for a particular purpose, and does not abandon his family, but visits them or sends them supplies, and intends to return to them, his domicil is unchanged though he may continue absent for months or years; *Knox* v. *Waldborough*, 3 Greenleaf, 455; *Richmond* v. *Vassalborough*, 5 Id. 396; *Waterborough* v. *Newfield*, 8 Id. 203, 205; *Jennison* v. *Hapgood*, 10 Pickering, 79, 98; *Shattuck* v. *Maynard*, 3 New Hampshire, 123; *Lessee of Hylton* v. *Brown*, 1 Washington C. C. 299, 314; 3 Id. 555. In like manner, if a man's separation from his family be an enforced removal, as by an imprisonment in another place, his legal residence continues unchanged; *Grant* v. *Dalliber*, 11 Connecticut, 234, 238. It has been held, also, that if a man take part of his family with him, and leave the rest, and intend to return, his domicil continues for the purpose of taxation; *Bump* v. *Smith*, 11 New Hampshire, 48; and there can be no doubt, that the case is the same, where a person takes his whole family with him. Thus, if a person having his domicil unquestionably established in a certain place, goes to pass the winter months in a neighbouring city, his domicil is not changed thereby; *Harvard College* v. *Gore*, 5 Pickering, 370; *Cadwalader* v. *Howell & Moore*, 3 Harrison, 138; see *Isham* v. *Gibbons*, 1 Bradford, 70, 89. And where a person having his domicil in a certain school district, went into another district to teach school for four months, and then returned to his previous residence, it was held that the *animus revertendi* kept up the legal residence and domicil in the former place, though the actual dwelling was elsewhere; *Crawford* v. *Wilson*, 4 Barbour's Supreme Court, 505, 523. This principle was carried very far in *Sears* v. *City of Boston*, 1 Metcalf, 250. There, the party had gone to Paris with his family, intending to remain there three years, and had leased his dwelling-house and furniture in Boston, and hired a house in Paris, both for one year; and it was decided, that as the intention to return, showed that Paris was a place of temporary and not of permanent abode, the original domicil was not extinguished, but continued for the purpose of rendering the party liable to taxation. "Where an old resident and inhabitant," the Court said, "having a domicil from his birth in a particular place, goes to another place or country, the great question whether he has changed his domicil, will depend mainly upon the question, to be determined from all the circumstances, whether the new residence is temporary or permanent; whether it is occasional, for the purpose of a visit, or of accomplishing a temporary object; or whether it is for the purpose of continued residence and abode, un-

til some new resolution be taken to remove. If the departure from one's fixed and settled abode, is for a purpose in its nature temporary, whether it be business or pleasure, accompanied with an intent of returning and resuming the former place of abode as soon as such purpose is accomplished; in general, such a person continues to be an inhabitant at such place of abode, for all purposes of enjoying civil and political privileges, and of being subject to civil duties."—On the other hand, if a person with his family leave the domicil of origin, and take up a residence in another country, without any intention of returning, thereby assuming that country as his definite abode and place of residence until some new intention has been formed or resolution taken, his domicil at the former place ceases, and he is not liable to taxation there; *Thorndike* v. *City of Boston*, Id. 242, 246. The change of domicil, apparently, does not depend so much upon the new settlement being accompanied with an intention to continue in it indefinitely, as upon its being without an intention to return: thus, if one leave his father's house to reside at college for the purpose of instruction and keep up his connexion with his original home by returning during the vacations, and resuming his residence there after he is graduated, his domicil will continue to be at his father's residence; *Granby* v. *Amherst*, 7 Massachusetts, 1, 5; but if he has disconnected himself from his father's residence, and abandoned it, and afterwards resides at college for the purposes of education, his domicil will be there notwithstanding he may not intend to remain there for ever; *Putnam* v. *Johnson et al.*, 10 Id. 488, 500. If a man intending to move with his family, visits the place of removal beforehand, to make arrangements, or even sleeps there occasionally for convenience, and then transfers his family, the change of domicil takes effect from the time of removing with the family; *Williams* v. *Whiting et al.*, 11 Massachusetts, 424; *The State* v. *Hallett*, 8 Alabama, 159; *Stiles* v. *Lay*, 9 Id. 795; but if he has definitely changed his residence, and taken up his abode permanently in a new place, the fact that his family remains behind until he can remove them conveniently, and that he visits them occasionally, will not prevent the new place being his domicil; *Cambridge* v. *Charlestown*, 13 Massachusetts, 150. Change of domicil, being a question of fact and intention, is to be determined upon all the circumstances of the case; *Lessee of Cooper* v. *Galbraith*, 3 Washington, 546, 554; *Waterborough* v. *Newfield*, 8 Greenleaf, 203: the declarations or letters of the party, *ante litem motam*, or when no motive existed to falsify, or deceive, the payment of taxes, the official acts of public officers, such as a register of voters, or a service of a notification, are admissible evidence upon the subject; *In the matter of Catharine Roberts's will*, 8 Paige, 519; *Burnham et al.* v. *Rangely*, 1 Woodbury & Minot, 8, 9; *Thorndike* v. *City of Boston*, 1 Metcalf, 242; *Kilburn* v. *Bennett*, 3 Id. 199; *Lyman* v. *Fiske*, 17 Pickering, 231; *West Boylston* v. *Sterling*, Id. 126; *Isham* v. *Gibbons*, 1 Bradford, 70, 86. On a question of citizenship in different states, an exercise of the right of suffrage was said to be conclusive, in *Shelton* v. *Tiffin et al.*, 6 Howard's S. Ct. 164, 185.

It has been intimated above, that it may be doubtful whether a domicil can be discontinued, until a new one has been acquired. In reference to *national* domicil, not merely in its enlarged sense of allegiance to a sovereign, but in its narrower sense of being subject to the jurisdiction of a particular system of law, it seems to be settled and unquestionable, that a domicil is not extinguished by a mere abandonment, but continues until a new one has been acquired, *facto et animo*, though the clear abandonment of a domicil would strengthen the pre-

sumption of the acquisition of a new domicil elsewhere: and the succession to property, therefore, would be governed by the law of the old domicil until a new domicil is acquired; *Munroe* v. *Douglas*, 5 Maddock, 379, 405; *Bradley et al.* v. *Lowry*, 1 Speers' Equity, 3, 14; *Jennison* v. *Hapgood*, 10 Pickering, 79, 98: if a party die *in transitu* from one domicil to another, his property will be distributed according to the law of the former domicil; *The State* v. *Hallett*, 8 Alabama, 169. In several cases also, relating to voting, taxation, and settlement, the maxim that the old domicil continues until a new one is acquired, is laid down as a general one; *Abington* v. *North Bridegwater*, 23 Pickering, 170, 177; *Thorndike* v. *City of Boston; Moore* v. *Wilkins*, 10 New Hampshire, 452, 456; *Cadwalader* v. *Howell & Moore*, 3 Harrison, 138, 144; *The State* v. *Hallett*, 8 Alabama, 159, 161. Some decisions, however, make it doubtful whether in the case where a place of domicil is quitted with the intention never to return to it, the extinction of the domicil in that place does not date from the time of such departure, so far as concerns the liability to taxation, and the right of voting, and settlement, and some other matters, without a reference to whether or when a domicil is acquired elsewhere. Thus in *Kilburn* v. *Bennett*, 3 Metcalf, 199, where a person abandoned his domicil in G. and went to T. in the same state, to the house of his brother, intending to make his home there until he should go into another state, the court appear to have been of opinion that he ceased to be taxable in G. as soon as he abandoned that place, or left it *sine animo revertendi*, though perhaps they would not have said that he acquired a domicil for any purpose in T. In *Exeter* v. *Brighton*, 15 Maine, 58, 60, the court expressly took the distinction between home, in respect to settlement, and domicil in its broadest sense, and held that the former ceased upon abandonment, though no new home was at once acquired; "If a party abandon his former residence," said the court, "with an intention not to return, but to fix his home elsewhere, while in the transit to his new, and it may be distant, destination, we are of opinion, that whatever may be said of his domicil, his home has ceased at his former residence within the meaning of the statute for the support and relief of the poor:" and the decision in *Jamaica* v. *Townshend*, 19 Vermont, 267, is to the same effect. However, the maxims that every man has in law a domicil somewhere, and that one domicil is not extinguished until another is acquired, seem to be founded in policy and reason; and perhaps they ought to receive a general application.

4. A fourth maxim is, that the native domicil easily reverts. See *White* v. *Brown*, Wallace, Jr., 217, 265. It is accordingly settled that if a native citizen of one country, goes to reside in a foreign country, and there acquires a domicil by residence, without renouncing his original allegiance, his native domicil reverts as soon as he begins to execute an intention of returning, that is, from the moment that he puts himself in motion, *bona fide*, to quit the country, *sine animo revertendi;* because the foreign domicil was merely adventitious and *de facto*, and prevails only while actual and complete; *The Indian Chief*, 3 Robinson's Admiralty, 17, 24; *The Venus*, 8 Cranch, 253, 280, 301; *The State* v. *Hallet*, 8 Alabama, 159; *Case of Miller's Estate*, 3 Rawle, 312, 319; see also, *The Ship Ann Green*, 1 Gallison, 275, 286; *Catlin* v. *Gladding*, 4 Mason, 308: *In the matter of Wrigley*, 8 Wendell, 134, 140. But this principle seems to apply only to *national* domicil, in its most enlarged sense, as referring to native allegiance or citizenship, where the question is between native and foreigner; it probably has no application in a question between the domicil of origin, and an

acquired domicil, when both are under the same sovereign jurisdiction. Accordingly, in *Munroe* v. *Douglass*, 5 Maddock, 379, 405, where the controversy was between the native domicil in Scotland, and a domicil of residence in India, the Vice Chancellor (Leach) said that he could find no difference in principle between the original domicil and an acquired domicil.

As a general principle, the domicil of a feme covert follows that of her husband; *Greene* v. *Greene*, 11 Pickering, 411, 414, 415: but this will not be applied in a case of adversary relations between the parties, so as to oust the jurisdiction of a court of a libel for divorce, for the husband might change in his domicil perpetually, and defeat the application altogether; for the purpose, therefore, of filing a libel for divorce, although the husband has moved away, the wife's domicil will be held to continue, or to be where she actually resides; *Harteau* v. *Harteau*, 14 Pickering, 181; *Harding et ux.* v. *Alden*, 9 Greenleaf, 140, 147; *Irby* v. *Wilson*, 1 Devereux & Battle's Equity, 568, 582. The domicil of a minor not emancipated, is that of his parents, and changes with it: the domicil of a minor whose parents are dead, or of a person non-compos, may be changed by the authority or with the assent of his guardian, or those who have the legal care of him; *Holyoke* v. *Haskins et ux.* 5 Pickering, 20; *Leeds* v. *Freeport*, 1 Fairfield, 356.

The principles relating to Domicil, as will be seen, are simple: the difficulty consists in the application of them. An interesting case, since the publication of the first edition of this work, will be found in *Rue High, appellant*, 2 Douglass, 515; and another still more curious and perplexing, in *White* v. *Brown*, Wallace, Jr., 217. The latter is perhaps the most extraordinary case on Domicil that ever arose in a court of justice. It consisted in settling the legal residence of Matthias Aspden, a man so eccentric as to be almost insane, who, for purposes of pecuniary interest, had endeavoured, through forty years, to appear an Englishman in England, and an American in America. By the decision in that case, great force is given to the principles that a domicil, once settled, continues till a clear intention to change it, is carried into execution, and that the domicil of origin easily reverts.

INDEX

TO

THE PRINCIPAL MATTERS IN THE NOTES TO VOL. I.

ACCOUNT.
- application of a general payment, to a running account, 299, 300
- of interest on accounts, 505, 506
- liability incurred by an agent in crediting the principal with outstanding debts, in an account, 633–635
- duty of an agent, to account on demand, or at reasonable times, 672, 673

ADMINISTRATORS,
- rights and duties of, at law, and in equity, in regard to fraudulent conveyances of their intestate, 74, 75
- when interest is due by, 514, 515
- when allowed, 515, 516

AGENCY.
- appointment and powers of agents, 544–556
- special, or express, agency, 544–550
- implied agency, 550–556
- general agency, 550–554
- distinction between authority and instructions, 554, 555
- termination of agency by full execution, by revocation, death, &c., 567, 568
- respective liabilities of principal and agent on sealed contracts, 579–587
- respective liabilities on parol contracts, express and implied, 602–617
- of the personal liability of the agent of a foreign principal, 612
- respective rights of action of principal and agent on parol contracts, 602
- of the principal's ownership of property in the hands of his agent, and his right to recover it, in specie, in case of the agent's death, or insolvency, 650–652
- duty of an agent, is, to use diligence, obey instructions, keep his principal informed, and account upon demand or at reasonable times, 665
- rights of agent, against his principal are, to indemnity, and compensation, 691–697
- when interest is due to and by agents, 526–528

ANNUITY.
- of interest on arrears of an annuity by will, 509

APPLICATION OF PAYMENTS, 286–303
- the debtor may, at or before payment, prescribe the application, 286, 287
- if he does not, the application devolves on the creditor, who may apply as he pleases, 287, 288
- creditor may make the application at any time, 289–291
- if neither debtor nor creditor make an application, the court will make it, 292–298
- where the payment is by the debtor, the court will apply it to the debt which is least secured, 293–298
- where the payment is by the law, it will be applied rateably, 300
- application in case of an open account, 299, 300
- application where interest has accrued, 298

ASSIGNMENTS.
- for the benefit of creditors, 95–102
- with preferences, 95
- by banks and other corporations, when insolvent, 95
- for security of a future or contingent liability, 95
- when made to creditors directly, their assent is necessary, when made to a trustee, it is not, 95, 96

ASSIGNMENTS (*continued*).
assent of absent trustee presumed, for the purpose of giving operation to the deed, 96
creditors may in equity compel assignee to execute the trust, 96
Of the circumstances which render assignments fraudulent, 96–102
postponing the sale and payment beyond a reasonable time, 96, 97
reserving a power of revocation, and introducing such limitations and conditions as enable the debtor to defeat the conveyance, 97
selection of incompetent assignee, 97
reservation of a power in the assignee or the debtor to declare or alter preferences, 97
reservation of any use or benefit to the debtor, 97, 98
condition of release upon a conveyance of part of the debtor's property, fraudulent, 99
stipulation for a release, upon a conveyance of all the debtor's property, as a condition either of participation in the fund, or of preference, fraudulent, in New York, Ohio, and Missouri, &c., 100
stipulation for a release, as a condition of participation, fraudulent in Connecticut, Illinois, and now, in Maine and New Hampshire, but not in Pennsylvania, Virginia, and South Carolina, 100
an assignment fraudulent in part, is void in toto, 101
when a creditor is estopped from impeaching a fraudulent assignment, 101
statutory provisions on the subject of assignment, 102

ATTACHMENT.
of foreign, and domestic, attachment against partnership effects, for the debt of one partner, 470, 471

ATTORNEY.
the appointment of an attorney by an infant, is void, 250, 251
of the execution of deeds by an attorney for a principal, 579–589
termination of an attorney's power, by the death, &c., of the principal, 567

BILL OF EXCHANGE.
requisites of a negotiable bill, 312–326
see *Endorser, Negotiability, Negotiation, Notice, Presentment.*

BILL OF LADING.
not negotiable, 326

COLLOQUIUM.
meaning and office of, in slander, 157, 158, 159

COMMISSIONS.
of an agent or factor, 694

CONSIGNEE. See *Agency and Factor.*

CONTRACT.
under seal, by agent for principal—mode of execution, and liability upon, 579–589
parol contract, mode of executing, by agent for principal, 588, 589
liability, and right of action, of agent and principal upon parol contracts, 602–622

CONVEYANCE. See *Fraudulent and Voluntary.*

CORPORATION.
in a state of insolvency, may make a general assignment for creditors with preferences, 95
liability of, in assumpsit, and non-liability of agent, where the agent has executed a sealed instrument for the corporation, in his own name, 582, 585
liability of a municipal corporation for the acts of its officers, 622

DAMAGES.
in actions of slander and libel, 197–208
evidence in mitigation, 197–204
aggravation, 204–208

DEED.
execution of, by an attorney for a principal, 579–588
to bind principal, a deed must, in the granting or covenanting part, be in his name, and must be executed in his name, 579–584
form of execution, 582, 583
operation against the principal of a deed executed erroneously in the agent's name, at law, 584
in equity, 585
liability of agent on a deed executed not in the principal's name, 585
liability of public officer contracting in his own name, 586
authority to execute a deed must be under seal, 587
of the execution of deeds by one partner for the firm, 446–448

DEL CREDERE.
contract created by a *del crederc* commission, 635, 636

DEMAND.
of interest on a debt payable on demand, 499
of the liability of an agent, receiving money, to an action, before demand, 672, 673
See *Presentment and Notice.*

DOMICIL, 706–714

ENDORSER.
liability of the endorser of a non-negotiable note, 322–325
of the presentment necessary to charge the endorser of a negotiable note, 360–369
form of notice of dishonour, 375–383.
time of giving notice, 389–395
mode of communicating notice, 400

EQUITY.
in equity, an administrator of an insolvent estate, is a trustee for creditors, 75
distinction between law and equity as to the extent of a valuable consideration, 79, 80.
relief given to creditors in equity against fraudulent conveyances, 83–85
jurisdiction in equity over assignees for the benefit of creditors, 96
proceedings in equity by and against infants, 265, 266, 267
application of an unappropriated payment by a court upon principles of equity, 292–298
equity will relieve against the unintentional extinguishment of a partnership liability by a bond given by one partner, 448
equity will not stop an execution against one member of a partnership, which is about to be levied on the firm effects, 470
of the respective rights of joint and separate creditors of a partnership, in equity, 469–478
of real estate held by a partnership, in equity, 487–492
equity aids the defective or erroneous execution of deeds for a principal, by an attorney in his own name, 585

EXECUTION.
mode of executing a common law writ against partnership effects for a debt of one partner, 471–474
execution of deeds, and of written contracts, not under seal, by an agent for his principal, 579–589

EXECUTORS.
when interest is due by, 513–515

FACTOR.
definition of, 630
may sell on credit, 630–636
cannot pledge, 643, 644
Factor's Act, 644–648
when interest is due by factors who have received money, 513
of the factor's general lien, 694, 695, 696, 697
of the contract created by a commission *del credere*, 635, 636
of the principal's ownership of property in the factor's hands, 650–652

FRAUDULENT CONVEYANCES.
statutes 13 Eliz. c. 5, and 27 Eliz. c. 4, 67
distinction between fraud at common law, before the statutes, and under them, 68
of fraud against previous creditors, 68, 69, 70, 71
against subsequent creditors, 71, 72
who are creditors within st. 13 Eliz. c. 5, 73, 74, 75
right of administrator as trustee for creditors to set aside a fraudulent conveyance, at law and in equity, 74, 75
fraudulent conveyance good between the parties, and their representatives, 75, 76
what property is within st. 13 Eliz. c. 5, 76, 77
of fraud against purchasers, 77, 78
who are purchasers within st. 27 Eliz. c. 4, 78, 79
what property is within 27 Eliz. c. 4, 79
of what frauds purchasers may take advantage, 79
of the protection of purchasers under both statutes, 79–83
of relief in equity against fraudulent conveyances, 83–85

GUARANTY.
a guaranty is not negotiable, 337
cannot be given by one partner for the firm, 453

GUARDIAN.
liability of, for interest, 514

GUARDIAN AD LITEM.
defence of suits against infants, at law and in equity, by, 265, 266

INDEMNITY.
of the right of an agent to indemnity from his principal, 691–694

INFANCY.
general rules as to the validity of contracts by infants, stated, 247, 248
the only contract binding upon an infant is the implied contract for necessaries, 248, 249
an act which he cannot perform is the appointment of an attorney, 250, 251
all other contracts, voidable, 251, 252
practice where one of the parties to a joint contract is an infant, 252, 253
who may avoid an infant's voidable contract, 253
affirmance, by express promise, of infant's executory parol contracts, 253, 254
and of his contracts under seal, 254, 255, 256
implied ratification by acts, 256
ratification of *purchase* of chattels and of real estate, 257
ratification of *sale*, 257, 258
time and manner of avoiding infant's voidable contracts, 258, 259
consequences of avoidance of executory, and of executed, contracts, 259–262
liability of an infant for torts, 262, 263
liability in case, 262
trover, 263
trespass, 263, 264
of suits at law by an infant, 264
against infants, 264, 265
of proceedings in chancery by and against infants, 265, 266
avoidance of judicial proceedings against infants, 266, 267

INNUENDO.
office of, in actions for slander, 157, 158, 159, 160
in actions and indictments for libel, 161, 162
effect of verdict or judgment on the truth of an innuendo, 160, 161

INSTRUCTIONS.
of an agent's duty to obey instructions, as between himself and his principal, 667–671
distinction between authority and instructions as regards third persons, 554, 555, 556

INTEREST, 496–523
of an express agreement to pay, 496, 498
of implied agreements to pay, 498
when due as damages for detention of a debt, 498–509
on a debt payable at a time certain, interest due from time of payment, 498, 499
on a debt payable on demand, due only from time of demand, 499.
when interest is due against a surety, 499, 500.
of interest on rent arrere, 500, 501.
on judgments, 501, 502.
on unliquidated damages, 503–505
on a running account, 505, 506
on mutual accounts between merchants, 506
in trover, case and trespass, 507
on legacies, 507, 508, 509
on arrears of annuity, 509
when interest is due on account of money received, or paid, 509, 510
on money lent, or paid and expended, 510
on money had and received, 510
when interest is due by factors or agents, 513
when, by executors and administrators, 513–515
when, to administrators, 513–515
when by vendee in possession, 516
interest not due when payment is prevented by the act of the law or the act of the creditor, 516–518
interest due according to the law, of the place of contract or of payment, 519
assessment of interest in courts of law, on verdict and on writ of error, 520, 521
of interest allowed by courts of equity, 521, 522
application of a general payment to debt carrying interest, 298

INTEREST ON INTEREST, 522, 523

JUDGMENTS.
of interests on, 501

JUSTIFICATION.
in actions of slander and libel, 178–180

LAND.
held by a partnership, incidents of, in equity, 487–492

LEGACIES.
of interest on, 507–509

LEX LOCI CONTRACTUS.
application of, to the rate of interest, 519

LIBEL.
distinction between libel and slander, 131, 132

LIBEL (*continued*).
definition of libel, 132–135
instances of libel, 135, 136
publications of libel, 136–138
construction and pleadings in actions for libel, 161
evidence in, 166
justification, 178–180
damages. 197–208

LIEN.
of the factor's general lien, by common law and commercial usage, 694–697
of the lien given by the Factor's Act, 643–648

MAIL.
when notice of the dishonour of a note or bill may be sent by mail, 403

MALICIOUS PROSECUTION.
action for, 216–229

MARRIAGE.
a valuable consideration for a conveyance, as against creditors, 80–82

NECESSARIES.
liability of an infant for, 248, 249

NEGOTIABILITY of Instruments, 312–327
distinction between promissory note, and special agreement, 312–315
to be negotiable, the engagement to pay must be absolute, and not contingent, 315, 316, 317
must not be payable out of a particular fund, 317, 318
bill drawn by or on the government, not negotiable, 318
must be for a sum certain, 319
must be payable in money only, 319, 320
must express a payee, 320, 321
must contain negotiable words "or order, or bearer," 321, 322
liability of endorser of a note not negotiable, 322–325
no other instruments, negotiable, 326, 327

NEGOTIATION of Instruments, 336, 339
transfer for antecedent debt, 336, 337
of the circumstances which render an endorsee subject to the equities existing between the original parties, 337–339

NOTICE, of the dishonour of a bill or note, form of, 375–383

NOTICE (*continued*).
time of, 389–395
mode of communicating, 400–406
when the parties reside in the same place, notice cannot be sent through the post-office, 401–403
when they do not, it may be sent by mail, 403
place to which notice must be sent, 403–406.
notice need not be in writing, 406

OVERDUE, note or bill, is subject to the equities between the parties, 338, 339
a note or bill endorsed and negotiated overdue, must be presented within a reasonable time, to charge the endorser, 360

PARTNERSHIP.
power of one partner to bind the firm, 440–453
each partner is the general agent of the firm, 440
whether one partner may make a general assignment, 442–444
one partner cannot bind the firm by sealed instrument, without authority or ratification, express or implied, which may be by parol, 446–448
cannot appear, nor authorize an appearance for the firm, 449
nor refer to arbitration, 449
nor give the firm notes or property for his own private debt, nor for the accommodation of third persons, 449–453
nor give a guaranty in the firm name, 453
of the respective rights of the creditors of the firm and of individual partners, 469–478
of real estate, held by a partnership, 487–492

PAYMENTS, APPLICATION OF, 286–303

PLEDGE.
at common law, a factor cannot pledge, 643, 644
power to pledge, given by the Factor's Act, 644–648

POST-OFFICE.
may be employed for the transmission of notices, but not for the deposit of them, 401, 402, 403, 404.

PREFERENCES.
in general assignments for creditors, allowed at common law, 95

PREFERENCES.
in several states, forbidden by statutes, 102

PRESENTMENT.
of a note or bill, 360–369
when necessary, to charge drawer or endorser, 360
when excused, 360, 361
day, and time of day, when it must be made, 361, 362, 363
manner of presentment, 363
place of presentment, 364, 365
of presentment of a note or bill payable at a particular place, in order to charge the maker or acceptor, and the endorser, 365–369

PRIVILEGED COMMUNICATION, 180–187

PROCHEIN AMY.
suits brought by infants, by, 264, 265
appointment, admission, and powers of, 264–266

PROMISSORY NOTE.
requisites of a negotiable note, 312–326
see *Negotiability*, *Negotiation*, *Notice*, *Presentment*.

PUBLICATION.
of libel, 136–138

RATIFICATION.
of an infant's voidable parol contracts, by express promise after age, 253, 254
of his contracts under seal, 254–256
implied ratification by acts after age, 256
of ratification by a principal of acts done without authority, by one assuming to be agent, 572–574
ratification, express and implied, 572
there can be no ratification without full knowledge, 574
of ratification as a discharge of the agent's liability to the principal, 670, 671

REAL ESTATE.
held by a partnership, 487–492

RELEASE.
of the validity of a condition of release in an assignment for creditors, 99–101

RENT ARRERE.
of interest on, 500, 501

RESPONDEAT SUPERIOR, 619–622

SET-OFF.
of the set-offs or defences to which the endorsee of a negotiable note or bill, with notice, express or implied, is subject, 339

SLANDER.
definition of, 110, 111
charge of penal offence involving moral turpitude, 111–123
imputation of an offensive disease, 123
words injurious to one's official or business character, 123–126
cases of special damage, 126–128
slander of title, 128
construction and pleadings in actions of slander; innuendo and colloquium, 152–167
evidence in actions of slander, 164–166: 197–208
justification, 178–180
damages in actions of slander, 197–208

SURETY.
when interest begins to accrue against, 499, 500
application of payments, where one of the debts is with surety, 294
application to an account, where there are different sets of sureties, 300

TIME.
of presentment of a bill or note, 361, 363
of giving notice of dishonour, 389–395

VOLUNTARY CONVEYANCES.
generally fraudulent against previous creditors, 68–71
not void against subsequent creditors, unless actually fraudulent, 71
distinction between the law of England and this country as to the validity of voluntary conveyances against subsequent purchasers, with and without notice, 77, 78
distinction between law and equity as to valuable consideration, 79, 80
what is a valuable consideration, 80
of marriage, as a valuable consideration, 80, 81, 82, 83
voluntary conveyance may become supported by a valuable consideration ex post facto, 82