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been very truly observed, that, in this case, the Venus was not physically incapacitated from prosecuting her voyage. With equal truth, has it been observed, that there was no legal impediment to her proceeding, because the voyage was not prohibited by the orders of November 1807; and consequently, the indorsement on her papers would not have increased the danger.

There did not, then, at the time the voyage was abandoned, exist, either in fact or in law, the restraint or detention, against which the underwriters insured. From fear, founded on misrepresentation, the voyage was broken up, and the vessel returned to her port of departure. Whether this might be justified, under any circumstances, it is unnecessary to determine. But the court is of opinion, that the circumstances of this case did not justify it. The Venus might have proceeded, and ought to have proceeded, until she could obtain further information. It would be dangerous in the extreme, if any false intelligence, received on a voyage, *might justify a [*82 master in acting as if that intelligence were true.

The case of *Blackenhagen v. The London Assurance Company*, has a strong bearing on this case, and though that was a decision at *nisi prius*, it is entitled to all the respect which is due to the court of common pleas. After the same opinion had been successively given by Lord ELLENBOROUGH, and by Sir JAMES MANSFIELD, it was affirmed by the whole court, and the jury having found against the opinion of the judge, a new trial was granted.

The court gives no opinion on the question how far the underwriters would have been liable, had the orders of council prohibited the trade to the Isle of France. This decision is not intended in any manner to affect that question.

Judgment affirmed, with costs.

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Assignment of bonds

A bond, in an action upon which it would be necessary to assign breaches, and call in a jury to assess damages, is not assignable, under the statute of Virginia.

ERROR to the Circuit Court for the district of Virginia, in an action of debt upon a bond, dated February 3d, 1784, the condition of which was, that if the obligor should pay to William Whetcroft, his attorney, heirs, executors, administrators or assigns, the sum of 3000*l.* current money of Virginia, on or before the 1st of January 1785, then the obligation to be void. Provided, that if the obligor, on application by the obligee, at the town of Fredericksburg, on or after the 1st of January 1785, should pay to the obligee 3000*l.* in officers' certificates of a certain description, or should pay the interest of six per cent. from the date of the bond, on such certificates, if not paid, and should annually and punctually pay the said six per *cent. [*83 when applied to, as before mentioned, in doing of which the condition of the bond was to be dischargeable by payment of the 3000*l.* officers' certificates, otherwise, the bond was to have its full force and effect.

Upon the pleas of payment, and conditions performed, the verdict and judgment below were for the plaintiff. The defendant brought his writ of error.

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Terrell and *Swann*, for the plaintiff in error, contended, that the bond was not assignable, under the act of assembly of Virginia, and therefore, the plaintiff below, who was the assignee, could not recover in his own name. The act of 1748 applies only to a bond given for a debt. And by a subsequent act, it is explained to mean a money debt. The subsequent act makes tobacco bonds assignable.

In the case of *Henderson v. Hepburn*, 2 Call 232, 238, it is decided, that an assignee cannot maintain an action of debt in his own name upon a bond with a collateral condition. *Craig v. Craig*, 1 Call 483. The condition of the bond is either to pay 3000*l.* by a certain day, or to pay 3000*l.* in certificates, or to pay interest on the certificates.

A bond is not assignable, unless it be for a debt so certain, as not to require the aid of a jury to assess the damages, or to ascertain the sum due.

February 24th, 1810. LIVINGSTON, J., delivered the opinion of the court, as follows:—On the 3d day of February 1784, the *plaintiff executed his bond to William Whetercroft, in the penal sum of 6000*l.*, to which there is a condition in the following words: “The condition of the above obligation is such, that if the said John Lewis shall well and truly pay to the said William Whetercroft the full sum of three thousand pounds, current money of Virginia, on or before the first day of January 1785, then this obligation to be void. Provided, and it is to be understood, that in case the said Lewis, on application by the said Whetercroft to him, in the town of Fredericksburg, on or after the said first day of January, shall pay unto the said William, or his attorney, the sum of three thousand pounds in officers’ certificates, issued under an act of assembly passed November 1781, for pay or arrearages of pay and depreciation, or shall well and truly pay the interest of six per centum from the date hereof, on the said certificates, if not paid, and shall moreover annually and punctually pay the said six per cent. when applied to as before mentioned, in doing of which, the condition of this bond is dischargeable by payment of the said three thousand pounds officers’ certificates; otherwise, the bond shall have its full force and effect.

This bond was assigned to the defendant, on the 3d of August 1790, and an action at law was brought on it, in the name of the assignee, in the circuit court of the United States for the district of Virginia, when judgment was rendered for the defendant. On this judgment, a writ of error has been sued out, and the plaintiff alleges that the same should be reversed, because the bond on which this action is brought is not assignable under the laws of Virginia, so as to enable the assignee to prosecute at law in his own name. Other causes of error have been assigned, but the opinion of the court being with the plaintiff on the first point, it will not be necessary to take any notice of the objections which have been made to the pleadings, or to the imperfect finding of the jury.

*A bond not being assignable at common law, the present question must turn altogether on the statutes of Virginia. It seems to have been for a long time doubted, after passing the act of 1748, c. 27, whether any but bonds conditioned to pay money or tobacco were assignable. That question was, however, at last settled by the court of appeals, in the case of *Henderson v. Hepburn*, in which it was decided, that a bond with a collateral condition was not, within the meaning of this act, assign-

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able. With this decision the court not only feels no inclination to interfere, but thinks it a fair and just exposition of the acts which had then been passed on this subject. The bonds intended by the legislature were most clearly such as were to become void on the payment of a sum certain, and where no intervention or assessment of a jury was necessary. Bonds which require particular breaches to be assigned, damages on which were to be estimated or liquidated by a jury, do not appear to have been contemplated.

It being then settled, that bonds with collateral conditions were not assignable under the laws in force at the time of the making of this assignment, it only remains to ascertain the true character of the condition of the bond on which this action is brought.

Although, by payment of 3000%. on or before a certain day, the obligor might have discharged himself from the penalty, it was part of the condition that, on the application of the obligee, by a certain day, a payment in certain certificates which were not money, might be substituted. This created an alternative by which the penalty might be discharged, either by money or officers' certificates; and although the consent of both parties might be necessary to a payment in the latter way, still, as it made part of the written contract, the court cannot but perceive that, on a certain contingency, it was to be considered as a bond on which it might, as it did, become necessary to assign breaches and call in a jury to assess damages. If we look at the record, we shall find the *parties, their counsel and the jury treating [*86 it as a bond of this description.

It is the opinion, therefore, of the court, that this bond was not assignable, under the laws of Virginia, and that the judgment of the circuit court for the district of Virginia must be reversed, and judgment on the verdict be arrested.

Judgment reversed.

RIDDLE & Co. v. MANDEVILLE & JAMESSON.

Mandate.—Costs in error.

The court below, upon a mandate, on reversal of its judgment, may award execution for the costs of the appellant in that court.

A MANDATE had been issued upon the reversal of the decree in this case at the last term, in which, "this court, proceeding to give such decree as the said circuit court ought to have given, doth decree and order, that the defendants pay to the plaintiffs the sum of \$1500, that being the amount of the note in the bill mentioned, together with interest thereon from the time the same became due, you are hereby commanded that such execution and proceedings be had on the said decree of the said supreme court, as, according to equity and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding." Nothing having been said respecting the costs, the court below had not issued execution for the costs of the appellant.

E. J. Lee moved the court for a further mandate to the court below, to award the costs of that court.

MARSHALL, Ch. J.—The court below is always competent to award costs in a chancery suit, in that court, and in case of a mandate, may issue execution therefor.