in a suit must be competent to sue, otherwise the action cannot be supported: and the case of *Perry* v. *Jackson*, cited from 4 Term Reports 516, decides, that a plea of the statute of limitations, which is good as to one partner, bars them both in a joint action. When once the statute runs against one of two parties entitled to a joint action, it operates as a bar to such joint action.

It is, therefore, the opinion of the court, that as this answer to the objection fails, the replication must be adjudged insufficient, and of course, the bar must prevail.

Judgment affirmed.

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## Welch *v.* Lindo. (*a*)

*Promissory notes.*

The mere possession of a promissory note, by an indorsee, who had indorsed it to another, is not sufficient evidence of his right of action against his indorser, without a re-assignment or receipt from the last indorsee.

An indorsement "without recourse," is not evidence of money had and received by the indorser, to the use of the indorsee.

Error to the Circuit Court for the district of Columbia, sitting at Alexandria.

*160] *Welch brought an action of *assumpsit* against Lindo, upon his indorsement of a promissory note. The declaration contained two counts. The 1st count stated, that one John Kercheval, on the 25th of August 1796, made and delivered a promissory note to Lindo, payable to his order, on demand, for $246, for value received. That Lindo, on the 24th of January 1800, indorsed it to Welch (the plaintiff), in these words, viz: "Pay the within to James Welch, or order, without any recourse whatever on A. Lindo." That on the 30th of April 1800, Welch assigned the note to a certain William Hodgsett, by writing on the back thereof, the following words, viz: "I assign the within to William Hodgsett," and signed his name thereto, and delivered it to Hodgsett. That Kercheval failed to pay the money to Hodgsett, on demand, whereupon, Hodgsett, as assignee of the note, brought suit against Kercheval, the maker thereof, in the circuit court of Woodford county, in the state of Kentucky; in which suit Kercheval pleaded that he had paid the debt to Lindo; upon which plea, issue was joined, and the jury found a general verdict thereupon, for the defendant, Kercheval, upon which the court rendered a judgment, which still remains in full force; by reason of which premises, the plaintiff (Welch) became liable to pay to Hodgsett the $246, with interest, from the time the suit was brought (viz., the 11th of June 1803), until the 2d of November 1804, the time when he paid the same to Hodgsett, and the costs of that suit, amounting to $11.72, and did pay the same; of all which premises, the defendant had notice, and by reason whereof, he became liable to pay the said $246, with interest on the same, and the said $11.72, being the costs as aforesaid; and being so liable, the defendant, in consideration thereof, afterwards, &c., undertook, &c., to pay the same sum to the plaintiff, &c. The 2d count was for money had and received to the plaintiff's use.

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(*a*) March 2d, 1812. Present, all the judges.

Upon the issue of *non assumpsit*, there was a verdict in the court below, for the plaintiff, on the first count, and for the defendent, on the second count, but the judgment on the first count was arrested, and judgment was entered for the defendant.

*Upon the trial, the plaintiff took a bill of exceptions, which [*161 stated, that he offered in evidence, a duly authenticated copy of the record of the circuit court of Woodford county, in the suit of Hodgsett against Kercheval, which was inserted in the bill of exceptions; and produced the original promissory note, with its indorsements, and proved the handwriting of the defendant, Lindo, to his indorsement, and offered no other evidence; whereupon, the defendant's counsel, prayed the court to instruct the jury, that the evidence, so offered and produced, was not of itself competent to enable the plaintiff to maintain his action; and the court decided, that it was not competent to enable the plaintiff to recover upon the second count, but the judges were divided in opinion, whether the same was competent to support the first count; and therefore, refused to give the instruction as prayed. To the opinion, that the evidence was not competent to support the action upon the count for money had and received, the plaintiff excepted. The motion in arrest of judgment, was grounded upon the general insufficiency of the first count.

*E. J. Lee*, for plaintiff in error.—1. There was sufficient evidence *primâ facie*, to support the count for money had and received. The indorsement of the note was evidence of money had and received, and the record showed, that the consideration for which it was received had failed: and where a man pays money upon a consideration which fails, he may recover it back by the action for money had and received. 1 Esp. N. P. 3, 4; Doug. 696; Chitty 190, 123–5; 3 Cranch 318; 2 Burr. 1226; *Green* v. *Hart*, 1 Johns. 590; *Russel* v. *Ball*, 2 Ibid. 52; 2 Burr. 1005, 1008, 1010, 1011.

2. The first count shows a good cause of action. It was not necessary to aver fraud; but if it was, the want of such an averment is cured by the verdict; for a verdict helps everything which is necessary to be proved upon the trial, and without proof of which, no verdict ought to have been given for the plaintiff. Carth. 389; 10 Mod. 300; 2 Vin. Abr. 396, W, a, and *b*.

**Swann* and *Jones*, contrà.—1. The evidence was insufficient, [*162 even if it had been a common indorsement. The note having been assigned by the plaintiff, to Hodgsett, it did not appear but that the right of action was still in the latter; but Lindo, having expressly stipulated in his indorsement, that he would not be liable, cannot be made liable by an implied *assumpsit*.

2. The first count was bad, because, 1st. it did not aver any consideration for the indorsement: 2d. The defendant expressly excluded his liability: 3d. No fraud is averred: and 4th. There was no averment of a re-assignment of the note.

*E. J. Lee*, in reply.—The possession of the note by the plaintiff, was evidence, that he had repaid the money to Hodgsett. A re-assignment of the note would have made Welch a remote assignee, and he could not have

maintained a suit at law against Lindo. Lindo, by implication, warranted that the money was due from Kercheval, as every vendor warrants his title. The record between Hodgsett and Kercheval, shows fraud in Lindo.

March 9th, 1812. All the judges being present, MARSHALL, Ch. J., delivered the following opinion of the court :—This was an action brought by the plaintiff against the defendant, in the circuit court for the county of Alexandria. The declaration contained two counts. The first was special, and the second for money had and received, by the defendant to the plaintiff's use.

At the trial of the cause, the plaintiff gave in evidence, the record of the proceedings in a court in the state of Kentucky, in a cause in which William Hodgsett, assignee of James Welch, who was assignee of Abraham Lindo, was plaintiff, and John Kercheval was defendant. This suit was instituted on a promissory note. The defendant pleaded payment to Lindo. Issue *163] *was joined on this plea, and a verdict was found for the defendant. The plaintiff also produced the original note, with the indorsements thereon, the last of which was an assignment made by him to Hodgsett. On the prayer of the defendant, the court decided, that this evidence was not, in itself, sufficient to support the action on the second count, and to this opinion, the counsel for the plaintiff excepted.

The testimony offered by the plaintiff, was certainly incompetent, of itself, to prove that the defendant had received money to his use. The mere possession of a note, which he had assigned to another, could not, while that assignment remained, be evidence that the note was his property. Some re-assignment or receipt from the last assignee was necessary, while the indorsements remained to prove that the title against the prior indorser was in him, and that he had paid a sum of money which gave him a claim on that indorser. And if the record of the state of Kentucky could prove that Lindo had received the money due upon the note, it would not prove that he had received it to the use of the plaintiff. Nor, under this indorsement, which is an assignment of the note, without expressing value received, and that, too, without recourse against the assignor, can it be fairly inferred that the nominal value of the note was actually paid. There is, then, no error, in the direction given by the circuit court.

On the first count, there was a verdict for the plaintiff, but judgment was arrested, because that count was insufficient in law. This count states, that a promissory note was made by John Kercheval, payable to Abraham Lindo ; that Lindo indorsed that note to the plaintiff, in these words, "pay the within to James Welch, or order, without any recourse whatever on A. Lindo ;" that the plaintiff indorsed the said note to William Hodgsett, who instituted a suit thereon, in which the said Kercheval pleaded, that he had paid the debt to Abraham Lindo. A verdict was found for the defendant, *164] on which a judgment *was rendered, which remains in full force. By these proceedings, the plaintiff became liable to pay the said Hodgsett the amount of the said note and costs of suit, which he had actually paid. The declaration then proceeds to state, that, by reason of the premises, the defendant, Abraham Lindo, became liable to pay the plaintiff, the amount of the said note and costs of suit, and, being so liable, he assumed, &c.

Under the mere assignment from Lindo to Welch, it is clear, that this suit is not sustainable; because it is a part of the contract, that Lindo shall not be liable under his indorsement. The count is also defective, in not stating that the indorsement was made on a valuable consideration, and also in not averring that Lindo had actually received the money for which the note was given. These are substantial faults, which are not cured by a verdict. The declaration presents a case in which there was no liability on the part of the defendant, to the plaintiff, which can sustain the *assumpsit* found by the verdict. There is no error, and the judgment is affirmed.

Judgment affirmed.

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## State of New Jersey *v.* Wilson.

*Constitutional law.—Obligation of contracts.*

A legislative act, declaring that certain lands which should be purchased for the Indians, should not, thereafter, be subject to any tax, constituted a contract, which could not be rescinded by a subsequent legislative act—such repealing act being void, under that clause of the constitution of the United States, which prohibits a state from passing any law impairing the obligation of contracts.[1]

State *v.* Wilson, 1 Pennington 300, reversed.

This case was submitted to this court, upon a statement of facts, without argument.

March 3d, 1812. All the judges being present, Marshall, Ch. J., delivered the opinion of the court, as follows:—This is a writ of error to a judgment rendered in the court of last resort in the state of New Jersey, by which the plaintiffs allege they are deprived of a right secured to them by the constitution of the United States. *The case appears to be this: [*165

The remnant of the tribe of Delaware Indians, previous to the 20th February 1758, had claims to a considerable portion of lands in New Jersey, to extinguish which became an object with the government and proprietors under the conveyance from King Charles II. to the Duke of York. For this purpose, a convention was held, in February 1758, between the Indians, and commissioners appointed by the government of New Jersey; at which the Indians agreed to specify particularly the lands which they claimed; release their claim to all others; and to appoint certain chiefs to treat with commissioners on the part of the government, for the final extinguishment of their whole claim.

On the 9th of August 1758, the Indian deputies met the commissioners, and delivered to them a proposition reduced to writing: the basis of which was, that the government should purchase a tract of land on which they might reside, in consideration of which they would release their claim to all other lands in New Jersey, south of the river Rariton. This proposition appears to have been assented to by the commissioners; and the legislature, on the 12th of August 1758, passed an act to give effect to this agreement.

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[1] S. P. State Bank *v.* Knoop, 16 How. 369; Ohio Life Ins. and Trust Co. *v.* Debolt, Id. 416; Dodge *v.* Woolsey, 18 Id. 331; Mechanics' and Traders' Bank *v.* Debolt, Id. 380; Mechanics' and Traders' Bank *v.* Thomas, Id. 384; Jefferson Branch Bank *v.* Skelly, 1 Black 436; Franklin Branch Bank *v.* Ohio, Id. 374; Wright *v.* Sill, 2 Id. 544; McGee *v.* Mathis, 4 Wall. 143; Home of the Friendless *v.* Rouse, 8 Id. 430.