Dugan *et al.*, Executors of Clarke, *v.* United States.

Bills of exchange.

Where a bill of exchange was indorsed to T. T. T., treasurer of the United States, who received it, in that capacity, and for account of the United States, and the bill had been purchased by the secretary of the treasury (as one of the commissioners of the sinking-fund, and as agent of that board), with the money of the United States, and was afterwards indorsed by T. T. T., *173] treasurer of the United States, to W. & S., and by them presented to the drawees for acceptance, and protested for non-acceptance and non-payment, and sent back by W. & S., to the secretary of the treasury: *held*, that the indorsement to T. T. T. passed such an interest to the United States, as enabled them to maintain an action on the bill, against the first indorser.

Quære? Whether, when a bill is indorsed to an agent, for the use of his principal, an action on the bill can be maintained by the principal, in his own name?

However this may be, between private parties, the United States ought to be permitted to sue in their own name, whenever it appears, not only on the face of the instrument, but from all the evidence, that they alone are interested in the subject-matter of the controversy.[1]

Held, that United States might recover in the present action, without producing from W. & S., a receipt or a re-indorsement of the bill; that W. and S. were to be presumed to have acted as the agents or bankers of the United States; and that all the interest which W. & S. ever had in the bill, was divested by the act of returning it to the party from whom it was received.

If a person, who indorses a bill to another, whether for value, or for the purpose of collection, comes again to the possession thereof, he is to be regarded, unless the contrary appears in evidence, as the *bonâ fide* holder and proprietor of such bill, and is entitled to recover thereon, notwithstanding, there may be on it one or more indorsements in full, subsequent to the indorsement to him, without producing any receipt or indorsement back to him, from either of such indorsees, whose names he may strike from the bill or not, as he thinks proper.[2]

Error to the Circuit Court for the district of Maryland. By the special verdict in this cause, it appeared, that on he 22d of December 1801, Aquila Brown, at Baltimore, drew a bill of exchange on Messrs. Van Staphorst & Co., at Amsterdam, for 60,000 guilders, payable at 60 days sight, to the *174] order of James Clarke, the defendants' testator. James Clarke indorsed *the bill to Messrs. Brown & Hackman, who afterwards indorsed it to Beale Owings, who indorsed the same to Thomas T. Tucker, Esq., treasurer of the United States, or order, and delivered it to him, as treasurer as aforesaid, who received it, in that capacity, and on account of the United States.

It further appeared, that this bill had been purchased with money belonging to the United States, and under the order, and by an agent of the then secretary of the treasury of the United States, for the purpose of remitting the same to Europe, for the government of the United States, who, in ordering the purchase of this bill, acted as one of the commissioners of the sinking-fund, and as agent for that board. The bill was afterwards indorsed to Messrs. Wilhelm & Jan Willink, and N. J. & R. Van Staphorst, by Thomas Tucker, treasurer of the United States, and appears by an indorsement thereon, to have been registered by the proper officer, at the treasury of the United States, on the 28th of December 1801, before it was sent to Europe. The bill having been regularly presented for acceptance, by the last in-

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[1] United States *v.* Barker, 1 Paine 156; United States *v.* Boice, 2 McLean 352.

[2] Picquet *v.* Curtis, 1 Sumn. 478; United States *v.* Barker, 1 Paine 156; Cassel *v.* Dows, 1 Bl. C. C. 335; Lonsdale *v.* Brown, 3 W. C. C. 404; Cox *v.* Simms, 1 Cr. C. C. 238.

dorsees, to the drawees, was protested for non-acceptance. It was afterwards protested for non-payment, and then returned by them to the secretary of the treasury of the United States, for and on their behalf, who directed this action to be brought. Of these protests, due notice was given to the drawer of the bill.

On this state of facts, the circuit court rendered judgment for the United States, to reverse which, this writ of error was brought.

*Winder and *D. B. Ogden*, for the plaintiffs in error, argued: [*175
1. That the finding of the jury that Tucker indorsed the bill to Messrs. Willinks and Van Staphorst, which indorsement was filled up at the time by Tucker, and so remained at the trial and judgment below, showed the legal title to this bill out of the United States, and defeated their right to maintain the action. The transfer to the last indorsees being in full, a recovery could not be had, in the name of the United States, without producing from the indorsees a receipt or re-indorsement of the bill; and the indorsement, not being in blank, could not be stricken out, at the trial, so that the court and jury were bound to believe that that the title was not in the United States, but in the persons to whom Tucker had indorsed the bill. If a bill be indorsed in blank, and the indorsee fills up the blank indorsement, making it payable to himself, the action cannot be brought in the name of the indorser, which, otherwise, it might (Chitty on Bills 148, Am. ed. of 1807). Every indorsement, subsequent to that to the holder or plaintiff, must be stricken out of the bill, before or at the trial, in order to render the evidence correspondent to the declaration (Ibid. 378). Value received is implied in every act of indorsement, and a transfer by indorsement or delivery, vests in the assignee a right of action on the bill, against all the preceding parties to it. An indorser, having paid a bill, must, when he sues the acceptor, drawer or preceding indorser, prove that it was returned to him, and he paid it. *Mendez* v. *Cameron*, 1 Ld. Raym. 742. *The [*176
special verdict does not find that the indorsement to Willinks, &c., was as agents; but that, by the indorsement, the contents of the bill were directed to be paid to them. The finding that the bill was afterwards returned by them to the secretary of the treasury of the United States, for and on behalf of the United States, is not finding that they were agents; nor can the court infer it: and if they did, still, the outstanding indorsement shows the legal title in the last indorsee. It has been determined by the court, that 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. *Welch* v. *Lindo*, 7 Cr. 159.

2. The United States cannot be the indorsees of a bill, so as to entitle them to bring an action on it in their own name. It is essential to a bill of exchange, that it should be negotiable. The government of the United States, as such, are incapable of indorsing a bill; of receiving and giving notice of non-acceptance and non-payment. It is essential to the very nature of this species of instruments, that all the parties should be compelled to respond, according to the several liabilities they may contract in the course of the negotiation. But the United States cannot be sued, and consequently, cannot be made answerable as the drawers or indorsers of a bill. The

national legislature is, probably, competent to provide for the case, and to
*177] designate some public officer who shall be authorized to negotiate *bills for the United States. But until some statutory provision on the subject is made, the existence of such an authority in any particular officer of the government cannot be inferred.

3. But even supposing that any indorsement whatever can vest the legal title to a bill of exchange in the United States, so as to render them capable of maintaining an action on it, in their own name, the indorsement to Tucker, under the circumstances of this case, did not vest such a title in them. The treasurer of the United States has no authority, *ex officio*, to draw, or indorse, or otherwise negotiate bills. The only officers of the government who possess the power of drawing bills are the commissioners of the sinking fund; to them it is expressly given by law. But a power to draw or indorse bills, as an agent, cannot be delegated to another, unless the power of substitution be expressly given. Chitty on Bills 39, Am. ed. 1817. Besides, the agent constituted by the commissioners was the secretary of the treasury, who employed, not Tucker, but another person, to purchase the bill. Where a bill is payable to A., for the use of B., the latter has only an equitable, not a legal, interest. The right of assignment is in the former only. Ibid. 139; *Price* v. *Stephens*, 3 Mass. 225. Here, the action ought to have been brought in the name of the trustee, and not of the *cestui que trust.*

The *Attorney-General*, contrà, contended, that the position on the other side as to agency in the negotiation of bills was not law. An action could
*178] not be *maintained in the name of Tucker, for want of interest in him. According to the doctrine on the other side, he alone is suable, as well as empowered to sue. But all the authorities show, that an agent contracting on the behalf of government, is not personally liable (*Macbeath* v. *Haldimand*, 1 T. R. 172; *Unwin* v. *Wolseley*, Ibid. 674; *Myrtle* v. *Beaver*, 1 East 135; *Rice* v. *Chute*, Ibid. 579; *Hodgson* v. *Dexter*, 1 Cranch 363; *Jones* v. *Le Tombe*, 3 Dall. 384; *Brown* v. *Austin*, 1 Mass. 208; *Sheffield* v. *Watson*, 3 Caines 69; *Freeman* v. *Otis*, 9 Mass. 272); and the other alternative of the proposition, that he is personally capable of maintaining an action, cannot be supported. A person may become a party to a bill, not only by his own immediate act, but by procuration—by the act of his attorney or agent: and all persons may be agents, for this purpose, whether capable of contracting on their own account, so as to bind themselves or not. Chitty on Bills 34 (Am. ed. of 1817). An agent of the government, who draws or indorses a bill, will not be personally bound, even if he draws or indorses in his own name, without stating that he acts as agent. (Ibid. 40.) But here, Tucker subscribed the style of his office. It is sufficient to declare on a bill of exchange, according to the legal intendment and effect, and an averment that the indorsement was to the party interested, is satisfied by showing an indorsement to his agent. (Ibid. 365, 367, App'x, 528, 539.) The United States, though not natural persons engaged in commerce, may be parties to a bill of exchange. The United States are a body politic and
*179] corporate; and it has *long since ceased to be necessary, in a declaration on a bill of exchange, to state the custom of merchants, and that the parties to it were persons within the custom. Consequently, they have

the same right to sue on a bill as any other persons; and that they are not reciprocally liable to be sued, is an attribute of sovereignty. Individuals contracting with them rely on their dignity and justice. But the power of suing on their part is essential to the collection of the public revenue, to the support of government, and to the payment of the public debts.

February 19th, 1818. LIVINGSTON, Justice, delivered the opinion of the court, and after stating the facts, proceeded as follows:—The first question which will be disposed of, although not the first in the order of argument, will be, whether the indorsement of this bill to Mr. Tucker, under the peculiar circumstances attending the transaction, did not pass such an interest to the United States, as to enable them to sue in their own name. In deciding this point, it will be taken for granted, that no doubt can arise on the special verdict, as to the party really interested in this bill. It was purchased with the money of the United States; it was indorsed to their treasurer; it was registered at their treasury; it was forwarded by their secretary of the treasury, to whom it was returned, after it had been dishonored, for and on behalf, as the jury expressly find, of the United States. Indeed, without denying the bill to be the property of the United *States, it is supposed that the action should have been in the name of Mr. Tucker, their treasurer, and not in the name of the *cestui que trust.* If it be admitted, as it must be, that a party may, in some cases, declare according to the legal intendment of an instrument, it is not easy to conceive a case, where such intendment can be stronger, than in the case before the court. [*180

But it is supposed, that before any such intendment can be made, it must appear, that Mr. Tucker acted under some law, and that his conduct throughout comported with his duties as therein prescribed. It is sufficient for the present purpose, that he appears to have acted in his official character, and in conjunction with other officers of the treasury. The court is not bound to presume, that he acted otherwise than according to law, or those rules which had been established by the proper departments of government, for the transaction of business of this nature. If it be generally true, that when a bill is indorsed to the agent of another, for the use of his principal, an action cannot be maintained, in the name of such principal (on which point no opinion is given), the government should form an exception to such rule, and the United States be permitted to sue in their own name, whenever it appears, not only on the face of the instrument, but from all the evidence, that they alone were interested in the subject-matter of the controversy. There is a fitness that the public, by its own officers, should conduct all actions in which it is interested, and in its own name; and the inconveniences to which individuals may be exposed in this way, if any, are light, when weighed against *those which would result from its being always forced to bring an action in the name of an agent. Not only the death or bankruptcy of an agent may create difficulties, but set-offs may be interposed against the individual who is plaintiff, unless the court will take notice of the interest of the United States; and if they can do this to prevent a set-off, which courts of law have done, why not at once permit an action to be instituted in the name of the United States? [*181

An intimation was thrown out, that the United States had no right to

sue in any case, without an act of congress for the purpose. On this point, the court entertains no doubt. In all cases of contract with the United States, they must have a right to enforce the performance of such contract, or to recover damages for their violation, by actions in their own name, unless a different mode of suit be prescribed by law, which is not pretended to be the case here. It would be strange, to deny to them a right which is secured to every citizen of the United States.

It is next said by the plaintiff in error, that if the indorsement to Mr. Tucker, as treasurer of the United States, passed such an interest to the latter, as to enable them to sue in their own name, yet such title was divested, by Mr. Tucker's indorsing the bill to the Messrs. Willinks and Van Staphorst, which indorsement appeared on the bill, at the trial, and is still on it. The argument on this point is, that the transfer to the last indorsees being in full, a recovery cannot be had, in the name of the United States, without producing from them a receipt, or a re-indorsement of *the bill, and that this indorsement, not being in blank, could not be obliterated at the trial; so that the court and jury were bound to believe, that the title to this bill was not in the United States but in the gentlemen to whom Mr. Tucker had indorsed it.

*182]

The mere returning of this bill, with the protest for non-acceptance and non-payment, by the Messrs. Willinks and Van Staphorst, to the secretary of the treasury of the United States, for their account, is presumptive evidence of the former having acted only as agents or as bankers of the United States. When that is not the case, it is not usual to send a bill back to the last indorser, but to some third person, who may give notice of its being dishonored, and apply for payment to such indorser, as well as to every other party to the bill. In the case of an agency, then, so fully established, it would be vain to expect either a receipt or a re-indorsement of the bill. The first could not be given, consistent with the truth of the fact, and the latter might well be refused by a cautious person, who had no interest whatever in the transaction. In such case, therefore, a court may well say, that all the title which the last indorsees ever had in the bill, which was a mere right to collect it for the United States, was divested by the single act of returning it to the party of whom it was received.

But if this agency in the Messrs. Willinks and Van Staphorst were not established, the opinion of the court would be the same. After an examination of *the cases on this subject (which cannot all of them be reconciled), the court is of opinion, that if any person, who indorses a bill of exchange to another, whether for value, or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the *bonâ fide* holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsees, whose names he may strike from the bill, or not, as he may think proper.

*183]

Judgment affirmed.