would have a right to show, that he had accounted for the value of such advance, by delivering the equivalent provisions for which it was originally made. In this view also, the fourth question might be answered in the affirmative.

The opinion of the court will be certified accordingly to the circuit court of Kentucky :

1. That under the contract marked B, the defendant is not entitled to the sums disallowed in the paper D, nor to the sums specifically charged in the first and second items of the paper C, which were disallowed by the treasury officers ; but is entitled to the sum charged in the third item of the paper C, which was disallowed by the same officers, if Fort Deposit was within the reputed boundary of the Choctaw country.

*146] *2. That the defendant is not entitled to the first and second items in the paper C, on the ground, that the place at which the rations were delivered is not specially provided for in the contract ; but that he has a right to show, that the sum allowed by the secretary of war for those rations, is not a reasonable compensation.

3. That upon such proof, the defendant is entitled to a reasonable compensation for those rations, to be ascertained by the jury.

4. That the defendant ought to be permitted to claim a credit for the above sums due him in this suit.

Certificate accordingly.

Young *v.* Bryan *et al.*

Jurisdiction.

The circuit court has jurisdiction of a suit brought by the indorsee of a promissory note, who is a citizen of one state, against the indorser, who is a citizen of a different state, whether a suit could be be brought in that court by the indorsee, against the maker or not.[1]

No protest of a promissory note, or inland bill of exchange, is necessary.[2]

Error to the Circuit Court of Tennessee. This was an action of *assumpsit*, brought in the court below, by the defendants in error, citizens of Pennsylvania, against the the plaintiff in error, a citizen *of Tennessee, as the indorser of a promissory note made by another citizen *147]

[1] Mollan *v.* Torrance, 9 Wheat. 537 ; Evans *v.* Gee, 11 Pet. 80 ; Coffee *v.* Planters' Bank, 13 How. 183. The holder of a note payable to bearer, may sue in a circuit court, if otherwise capable. Bank of Kentucky *v.* Wister, 2 Pet. 319 ; Bonnafee *v.* Williams, 3 How. 574 ; White *v.* Vermont and Massachusetts Railroad Co., 21 Id. 575 ; Bradford *v.* Jenks, 2 McLean 130 ; Halsted *v.* Lyon, Id. 226 ; Sackett *v.* Davis, 3 Id. 101. And this, though the note be indorsed by the payee. Varner *v.* West, 1 Woods 493. So also, the circuit court has jurisdiction of a suit by the holder of a railroad bond, payable in blank. White *v.* Vermont and Massachusetts Railroad Co., 21 How. 575. And by the holder of a coupon bond, payable to bearer. Thomson *v.* Lee County, 3 Wall. 327. In a suit by the indorsee of a promissory note, the jurisdiction is determined by the citizenship of the indorser at the time of the commencement of the action and not at the making of the indorsement. Chamberlain *v.* Eckert, 2 Biss. 126. But the plaintiff must show that the indorser is a citizen of a different state, though he indorsed solely for the accommodation of the maker. Noell *v.* Mitchell, 4 Id. 346. And he must allege that the citizenship of the parties through whom he claims title, is different from that of the defendant. Morgan's Executor *v.* Gay, 19 Wall. 81.

[2] Union Bank *v.* Hyde, *post*, p. 572 ; Nicholls *v.* Webb, 8 Wheat. 320 ; Stephenson *v.* Dickson, 24 Penn. St. 148.

of Tennessee, and indorsed to the plaintiffs. The only questions in the cause were : 1. Whether the court below had jurisdiction : and 2. Whether notice of protest was necessary to charge the indorser in this case. Judgment having been rendered against the defendant below, the cause was brought by writ of error to this court.

February 22d. *Eaton*, for the plaintiff in error, argued : 1. That under the 11th section of the judiciary act of 1789, c. 20, the court below had not jurisdiction. The decision of this court, in the cases of *Montalet* v. *Murray*, 4 Cranch 46, and *Turner* v. *Bank of North America*, 4 Dall. 11, shows, that where jurisdiction does not attach between the drawer and drawee, assignment cannot give jurisdiction. The indorser can only transfer, by the assignment, the rights and interest he possesses ; as he had no right (he and the maker being citizens of the same state) to sue in the federal court, he could not, consequently, create any such right by the assignment. It would amount to a creation of jurisdiction, by consent, which the law does not warrant. The case of *Slacum* v. *Pomery*, 6 Cranch 221, went off on the ground of the want of notice. At any rate, that was a *foreign* bill, and perhaps, within the operation of the 11th section of the judiciary act : it is, then, not authority in this case. In the language of the 11th section of the judiciary act, *this is a " suit to recover the contents of a promissory note in favor of an assignee," &c. [*148] The declaration contains but a single count, founded upon the assignment, non-payment and consequent liability of the plaintiff in error. There is no count for money had and received ; there is but a single count, and that is to recover the contents of the note, a *chose in action*, which is against the express provision of the act. There is no distinct, substantive contract, between the indorser and holder of the note ; and, if there were any, it is not declared on.

2. No notice of protest was given. This was necessary to charge the indorser : *French* v. *Bank of Columbia*, 4 Cranch 141 ; *Donaldson* v. *Means*, 4 Dall. 109; and the declaration should contain an averment of notice of protest. *Slacum* v. *Pomery*, 6 Cranch 221.

Sergeant, contrà, admitted : 1. That where, by the judiciary act, jurisdiction does not attach between the maker and the payee of a note, assignment cannot give jurisdiction. Such, and no more, is the amount of the decisions referred to. If the payee of the note could not maintain a suit in the federal courts against the maker, neither can the indorsee maintain a suit in the federal courts against the maker. But the jurisdiction of the federal courts extends to the case of a suit brought by the indorsee against the indorser, being citizens of different states, whether a suit could have been there brought against the makers or not. By the words of the act, a general jurisdiction is given, in terms, *embracing all cases where citizens of different states are parties. [*149] Being in conformity with the provisions of the constitution, and intended to secure to the suitor an impartial tribunal, it ought to be liberally construed. Out of this general grant, there is a particular exception, which ought not to be extended beyond its natural construction, but rather to be strictly taken, being against constitutional right ; and if there be doubt, that interpretation should be given, which is most favorable to the jurisdiction. The words are, " nor shall any district or circuit

court have cognisance of any suit to recover the contents of any promissory note, or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in case of foreign bills of exchange." These words necessarily import a recovery by an assignee, claiming through the medium of an assignment, of the same contents which might have been recovered by the assignor, if he had not assigned. They apply only to a derivative claim. If the payee should make a special indorsement to a citizen of the same state, and such indorsee should indorse the note to a citizen of a different state, the latter, perhaps, could not sue the first indorsee in the federal court, because he would be obliged to claim under the assignment, and in the right of the assignor. But if the payee indorse the note to a citizen of a different state, there is a new contract entered into between the indorser and the indorsee, by the indorsement, and the indorsee would claim
*150] upon the footing of *that contract, without regard to the original engagement, except for the fact (upon which the liability of the indorsee arises), that the note has been dishonored. The contract is so entirely independent, that the indorsee would be liable, though the note were forged, or the maker fictitious. The assignment, it is true, is the evidence of the contract, and in a certain sense, the foundation of his claim ; but he does not claim through it, nor under it, nor does he claim at all as assignee. In the case of a note payable to bearer, and transferrible by delivery, it is believed, there could be no doubt of the jurisdiction, in favor of a *bonâ fide* holder, being a citizen of a different state from the maker, through whatever hands it might have passed in its course to him. He would claim in his own right, and not by assignment. In the case of a general indorsement, also transferrible by delivery, and conferring upon the *bonâ fide* holder an original right of suit against the indorser, the court would have jurisdiction of a suit against the indorser, for the same reason. And in case of a special indorsement to a citizen of a different state, the argument, if possible, is still stronger. Neither of these is within the words of the act. The plain intention of the provision is effectuated, by the construction contended for on the part of the defendants in error. The design of the exception was, either to prevent colorable transfers, for the purpose of giving jurisdiction, or to enable the party to a negotiable contract, to secure to himself the jurisdiction of the state courts. The interpretation contended for, does not interfere
*151] with these views. *It is in the power of the indorser to fix the jurisdiction, by making a special indorsement, as it is in the power of the maker to escape the federal jurisdiction, by making the note payable to a citizen of the same state. But, as it must be admitted, that where the note is payable to a citizen of a different state, or, being payable to bearer, comes into the hands of a citizen of a different state, the maker may become subject to federal jurisdiction, it would seem to follow, conclusively, that the indorser (omitting to guard himself, and thereby voluntarily waiving the right) would also be liable. It may be remarked, in the particular case under consideration, that the note appears, from the evidence, to have been made, and probably, indorsed, for the very purpose of being delivered to the plaintiffs below, who were, and were known to be, citizens of Pennsylvania.

2. It appears fully in evidence, that notice of non-payment by the maker,

was, in due time, given to the indorser. This is all that was necessary to be done, no protest being required of a note or inland bill of exchange. *Slacum* v. *Pomery*, 6 Cranch 221, was the case of a foreign bill.

Marshall, Ch. J., delivered the opinion of the court, that a suit may be brought in the circuit court, by the indorsee against the indorser, whether a suit could be there brought against the maker or not. In such a case, the indorser does not claim through an assignment. It is a new contract, *entered into by the indorser and indorsee, upon which the suit is brought; and if the indorsee is a citizen of a different state, he may bring an action against the indorser in the circuit court. [*152

As to the other objection insisted upon by the plaintiff in error, all that was incumbent upon the holder, was, to give due notice to the indorser. No protest of a promissory note or inland bill of exchange is necessary.

Judgment affirmed.

The Bello Corrunes: The Spanish Consul, Claimant.

Powers of foreign consuls.—Illegal capture.—Forfeiture.—Salvage.

A foreign consul has a right to claim, or institute a proceeding *in rem*, where the rights of property of his fellow-citizens are in question, without a special procuration from those for whose benefit he acts.[1]

But a consul cannot receive actual restitution of the *res* in controversy, without a special authority from the particular individuals who are entitled.

A capture, made by citizens of the United States, of property belonging to subjects of a country in amity with the United States, is unlawful, wheresoever the capturing vessel may have been equipped, or by whomsoever commissioned; and the property thus captured, if brought within the neutral limits of this country, will be restored to the original owners.[2]

Whatever difficulty there may be, under our municipal institutions, in punishing as pirates, citizens of the United States, who take from a state at war with Spain, a commission to cruise against that power, contrary *to the 14th article of the Spanish treaty, yet, there is no doubt, that such acts are to be considered as piratical acts, for all civil purposes, and the offending parties cannot appear and claim in our courts the property thus taken. [*153

It seems, that the terms, "a state with which the king shall be at war," in the 14th article of the treaty, include the South American provinces which have revolted against Spain.

But however this may be, the neutrality act of June 1797, extends the same prohibition, with all its consequences, to a colony revolting, and making war against its parent country.

In the case of such an illegal capture, the property of the lawful owners cannot be forfeited, for a violation of the revenue laws of the country, by the captors or by persons who have rescued the property from their possession.

The rights of salvage may be forfeited by spoliation, smuggling or other gross misconduct of the salvors.[3]

Appeal from the Circuit Court of Rhode Island. This was the case of a Spanish vessel and cargo, stranded on Block Island, and there seized by the officers of the customs.

An information on behalf of the United States was filed in the district court, against the property, as forfeited, for an alleged breach of the revenue

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[1] The London Packet, 1 Mason 14; The Adolph, 1 Curt. 87; The Huntress, 2 Wall. Jr. C. C. 59.

[2] The Conception, *post*, p. 239. And see The Fanny, 9 Wheat. 658.

[3] The John Perkins, 3 Ware 89; The Sarah A. Boice, 2 Int. R. Rec. 45.