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[PRACTICE. PLEADING. JURISDICTION.]

ANDERSON CHILDRESS, Executor of JOEL CHILDRESS, *Plaintiff in Error*,

v.

EMORY and M'CLEUR, Executors of JOHN G. COMEGYS, surviving partner of WILLIAM COCHRAN & COMEGYS, *Defendants in Error*.

The Courts of the United States have jurisdiction of suits by or against executors and administrators, if they are citizens of different States, &c. although their testators or intestates might not have been entitled to sue, or liable to be sued in those Courts.

It is, in general, not necessary, in deriving title to a bill or note, through the endorsement of a partnership firm, or from the surviving partner, through the act of the law, to state particularly the names of the persons composing the firm.

A declaration, averring that "J. C., *by his agent*, A. C., *made*" the note, &c. is good.

A general profert of letters testamentary, is sufficient, and if the defendant would object to their insufficiency, he must crave oyer: or, if it be alleged that the plaintiffs are not executors, the objection must be taken by plea in abatement.

Debt, against an executor, should be in the *detinet* only, unless he has made himself personally responsible, as by a *devastavit*.

An action of debt lies, upon a promissory note, against executors.

The wager of law, if it ever had a legal existence in the United States, is now completely abolished.

ERROR to the Circuit Court of Tennessee. The defendants in error, citizens of the State of Maryland, and executors of John G. Comegys, the surving partner of the late firm of "William Cochran & Comegys," brought an action of debt in the *detinet*, on a promissory note, executed by

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the said Anderson Childress, as the agent of said Joel Childress; both of whom were citizens of the State of Tennessee. The declaration stated the plaintiffs in said suit, (now defendants in error,) to be the executors of the last will and testament of John G. Comegys, deceased, who was the surviving partner of the late firm of William Cochran & Comegys; that on the first of May, 1817, the said Joel Childress, by his agent, A. Childress, made his promissory note to the firm of William Cochran & Comegys, and thereby promised to pay to William Cochran & Comegys, or order, the sum of 1897 dollars and 28 cents, for value received. That the said Joel, in his lifetime, did not pay the said firm of William Cochran & Comegys, nor did he pay the said John G. Comegys, surviving partner of said late firm of William Cochran & Comegys, the said sum of money, or any part thereof, nor has he paid the same, or any part thereof to the said plaintiffs, executors as aforesaid, nor hath the said Anderson Childress's executors as aforesaid, paid the said sum, or any part thereof, to the late firm of William Cochran & Comegys, nor to John G. Comegys, surviving partner of the said firm, nor hath he paid the said sum, or any part thereof, unto the said plaintiffs, executors aforesaid, but so to do hath wholly refused, and still doth, to the damage of said plaintiffs 500 dollars; and, therefore, they sue, and they bring here into Court, the letters testamentary, by which it will appear they are qualified, &c.

To this declaration, the defendant, now plaintiff

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1st. That said declaration alleges, that said note was made to a late firm of William Cochran & Comegys, and that the plaintiffs are executors of the surviving partner of that firm; but whom said partner survived, or who comprised that firm, does not appear.

2d. That an action of debt cannot be maintained against the defendant, (now plaintiff in error,) as executor upon a promissory note.

3d. That it is not alleged that said pretended promissory note was signed by said Joel Childress, or the defendant.

4th. That the declaration omits to state any damages.

5th. There is no sufficient profert of any letters testamentary, to show the right of said plaintiffs to maintain this suit.

Joinder in demurrer. After argument, the Court overruled all the said causes of demurrer; and gave judgment, that the plaintiffs do recover the sum of 1897 dollars and 28 cents, debt, together with 360 dollars and 47 cents, for their damages, sustained by reason of the detention thereof, as also their costs, to be levied of the goods and chattels of Joel Childress, deceased, in the possession of said Anderson Childress; and on default thereof, the costs to be levied of the proper goods of said defendant.

March 8th. Mr. *Webster*, for the plaintiff in error, argued, 1. That the action was misconceived, debt not

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being an appropriate remedy against an executor or administrator, on a simple contract. He conceived it unnecessary to inquire into the origin of this rule, or the principle which sustained it, as it rested on the clearest authorities of the English law, and had become an established doctrine, from which this Court would not be inclined to depart; as it was of more consequence that the law should be certain and fixed, than that plaintiffs should be allowed a choice of remedies. Because the reason, on which a remedy may have been originally given or refused by the law, may have ceased, it does not, therefore, follow, that the established rules of practice and pleading are to be altered. The wager of law has ceased, but many rules of practice and pleading, founded upon it, have survived, and have become rules of property, which cannot be now safely disturbed. The statute of limitations may or may not apply, according to the form of the action, and the party has a right to the benefit of the distinction. On the English law it is clear that debt cannot be maintained in this case, as the testator might have waged his law, which none can do who defend in a representative character; hence it is, that in the case of simple contracts, debt has been superseded by the action of assumpsit, in which, as the testator could not have waged his law, his executor is not deprived of any defence which might have been used by the testator.[a]

[a] Barry v. Robinson, 1 *New. Rep.* 294. 1 *Chitty's Plead.* 84. 93. 107.

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2. The next cause of demurrer, in this case, is the want of *certainty* in the declaration, which states the note to have been made to a late firm of "*William Cochran & Comegys*," and that the plaintiffs are executors of the surviving partner of that firm; but of whom that firm was composed, or whom the said partner survived, do not appear. It cannot be *inferred* that the firm of William Cochran & Comegys was composed of William Cochran and John G. Comegys, nor that the latter survived the former, and is the Comegys alluded to in the firm, and in the note in controversy. These are matters which should have been stated with sufficient certainty, and not have been left to mere conjecture.[a]

3. This declaration is defective, also, in not stating that the note was either signed by Joel Childress, or by Anderson Childress, or by him as the *lawfully authorized agent* of Joel.

4. There is no sufficient profert of any letters testamentary, evincing the right of the defendants in error to maintain this suit. The authority whence they emanated does not appear. An executor must show by whom his letters were granted; and here it does not appear whether they were granted in Maryland, or in the State of Tennessee.[b]

5. The declaration states the defendants in error to be citizens of the State of Maryland, and the plaintiff in error to be a citizen of the State

a 1 *Chitty's Plead.* 236. 256. 3 *Caines' Rep.* 170.
b 3 *Bac. Abr.* 94.

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of Tennessee; but it is not stated that the *testators* of either party were citizens of different States: *non constat*, but they were all citizens of the State of Tennessee.[a] The case, therefore, may be considered as falling within the provisions of the Judiciary Act of 1789, c. 20.

Mr. *D. Hoffman*, contra, argued, that the action of debt was an appropriate remedy on a promissory note, against the personal representatives of the maker or endorser of such note. The reason assigned in England for denying this remedy against an executor or administrator, does not apply even in that country to the case of a promissory note, which is not that species of *simple contract* to which the books allude, when speaking of the trial by wager of law.

The question is altogether new, even in that country whence we are to derive our law on this obsolete subject; and has never received a judicial discussion or determination in this country. Some research, therefore, into this ancient subject, will be essential to its due determination. It is said, that debt will not lie against an executor, on the simple contract debt of his testator; and, in England, this, as a general proposition, is undoubtedly true. Still, however, it can, with no propriety, be compared to a *rule of property*, which, though now, in many instances, arbitrary and unmeaning, must be maintained, as long possessions, valuable estates, and the firmest titles

[a] 4 *Cranch's Rep.* 46. 6 *Cranch*, 332.

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may be dependent on it. But, whether a creditor by simple contract resorts to the one remedy or the other, is of no consequence to any one but himself. This election of remedy, then, will not be denied, unless for an adequate reason. This Court is under no necessity to sanction an unmeaning *dictum* of English law, at all times absurd, and at no period either approved by the lawyers of the times, or settled on any fixed principle. No reason has ever been assigned for exempting executors from responsibility on this remedy, except the one, that as none, who defend *jure repræsentationis*, can wage their law, and as the testator, in debt on simple contract, had this privilege, the executor shall not be thus sued. But it will be endeavoured to be shown, that this was originally a gross perversion of reason; that the rule should have been either the reverse, or that, in order to preserve any thing like consistency in the law, executors and administrators ought never to have been responsible, in any form of action, for the simple contracts of those whom they represent.

The inquiry then will be, (1) Whether the *testator* was ever permitted, even in England, to wage his law, in debt on a *promissory note*. (2) If he were allowed, whether this antiquated doctrine of the common law is proper to be adopted as a part of our jurisprudence. (3) Whether in law, or in practice, it ever has been recognised, or used, in the State of Tennessee, or elsewhere in this country.

1. On examining the history and progress of

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this singular species of trial, it will be found to have been uniformly applied to the *evidence of the demand*, and was in no case an incident to the nature of the *action or remedy*. Whenever the debt or demand was sufficiently evidenced, whenever it was notorious in its nature, or defined in its extent; or, finally, whenever it did not rest merely *in verbis*, there wager of law did not obtain. We may, then, inquire, *first*, in what cases wager of law was not allowed by the common law; and, *secondly*, in what description of cases it was permitted; and, from an examination of the reasons which sustained, or repudiated wager of law in these cases, we shall find that, in principle, it never could have been applied to the case of a promissory note, and that, in fact, it never has been so applied.

First, then, wager of law was not allowed in the following cases: (1) In an action of debt on any *specialty;* for here, as Plowden observes, a debt is contracted by three distinct acts of solemn consent, signing, sealing, and delivery of the instrument; each act strengthens the evidence of consideration, and adds force and efficacy to the demand. It would not be proper, therefore, that a mere act *in pais*, or the oath of the party, should render that inoperative which has been guarded by so many acts of deliberation. The maxim in such case being, *unumquod que dissolvitur eo modo quo colligatur*. (2) In debt on any record, there can be no wager of law, for similar reasons. The debt has become notorious and certain; the record brought it into existence, and, at law, the

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record should ordinarily declare its annihilation. (3) In an action of debt for rent, even on a parol lease, the defendant is not permitted to wage his law, because, as it is said, the demand savours of the *realty*, which, in fact, means, that the claim arises from the defendant's perception of the profits of the land; that his occupation is notorious, his entry into the land was, perhaps, *coram paribus curiæ*, and if not, that the notoriety of his occupation should, on the principle I have stated, oust the wager of law. (4) So, in an action of account, where the receipts have been by the hands of a third person, and not from the plaintiff himself, wager of law will not lie; and the reason assigned is, that this third person may well be supposed competent to prove the receipts, and this supposition, *per se*, is sufficient to exclude the wager of law. (5) In debt by a gaoler against his prisoner, or by an innkeeper against his guest, for board, &c. the defendant cannot resort to this mode of trial; and the principle which excludes it in these cases, is essentially the same, viz. the presumed notoriety of the demand. Prisons and inns are *quasi publici juris;* the prisoner and the guest must be received, and their reception is not a matter of privacy, but is presumed to be provable. *Aliter*, in the case of a *victualler*, who sues for matters furnished to his customers; his claim may be defeated by the defendant's oath.[a] (6) Wager of law is not permitted in debt for any

a Pinchon's case, 9 *Co. Rep.* 87 *b.* City of London v. Wood, 12 *Mod.* 684.

penalty given by statute, for this is a matter *in consimili casu* with debts by specialty or record. (7) Nor was it allowed against an account settled by auditors, for here the debt becomes susceptible of proof, is rendered certain, and though still a simple contract debt, yet, as it does not rest *in verbis* merely, it shall not be left to the conscience only of the defendant. (8) Where the claim or demand was in any degree connected with the realty, wager of law would not lie ; for the *pares curiæ* were supposed to be cognizant of such matters. Hence, for example, where the plaintiff leased a room to the defendant, and then took him and his wife to board ; in debt, for the boarding, it was held, that even this accidental connexion of the matter with the realty, was sufficient to rescue it from the operation of the wager of law.[a] (9) So, in debt for wages due for serving under the statute of labourers ; as the service is compulsory and notorious, the defendant cannot wage his law. (10) Likewise, in debt by an attorney for his fees, though there be no writing, yet, as he is an officer of the Court, his demand cannot be defeated by wager of law.[b] (11) Wager of law is never permitted in the case of contempt, trespass, or deceit, for these, *per se*, charge the defendant with immoral conduct, which renders his oath suspicious.[c] (12) Nor will it lie in a *quo minus*, for reasons similar to those already suggested.[d]

a 28 *Henry* VI. 4. 9 *Edward* IV. 1.
b 39 *Henry* VI. *pl.* 34.
c *Co. Litt.* 295 *a*.
d Slade's case, 4 *Co. Rep.* 95 *b*.

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(13) Nor against any claim founded on *prescription*, for this is notorious, and susceptible of proof.[a] (14) Lastly; in an action of debt by a merchant stranger, on any species of simple contract, the defendant was not permitted to wage his law. Even in those early times, the Courts were strongly disposed to rescue commercial contracts and dealings from this species of trial, as may be seen by the intended operation of the statute *de mercatoribus*, and particularly in the case of foreign creditors, who, it was presumed, could not so easily obtain the requisite evidence of their claims as resident merchants; and this may be seen in Godfrey and Dixon's case.[b]

From the cases enumerated, it appears, that wherever the plaintiff's demand is certain, and is so evidenced as to exclude the idea of a mere secret or verbal contract between the parties, there the defendant could neither deny the contract, nor maintain its discharge by his oath and that of his compurgators.

If we examine the cases in which the defendant has been allowed this mode of trial, we shall find the same principle strongly manifested. The books furnish us with only six classes of cases in which a defendant is permitted to wage his law. (1) In debt, on *simple contract*; by which we are not to understand, (as I shall presently show,) every species of simple contract, but such only which, as the authorities express themselves, "are

a 2 *Ventr.* 261. 1 *Mod.* 121.
b *Palmer's Rep.* 14. *Fleta*, 136.

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dependent on the slippery memory of man, or the uncertainty of verbal agreements." (2) In debt on an award, under a *parol* submission. It has, indeed, been urged, that wager of law ought not, on principle, to be permitted in such a case, as the action is grounded on a notorious transaction, and by the interposition of third persons. But it was held, that the award is not the ground of action, but the submission, which may be private.[a] (3) In an action of account against a receiver, on receipts from the plaintiff himself, the defendant may wage his law, for here the action itself shows that the matter is private between the parties; and this differs from the case already adverted to, where the receipts were by the hands of third persons. (4) In detinue, where the matter is no way connected with the realty, the defendant may wage his law. Here the gist of the action is the detainer. But in detinue for a charter of feoffment, wager of law will not lie, as it concerns the freehold; every thing regarding which, is presumed to be matter of notoriety.[b] (5) In debt for an *amerciament*, in a Court not of record, it is said by some, that the defendant may wage his law. But, an enlightened Baron of the Exchequer says, that if this be law, it must be on the ground of the insignificancy of the debt, which seldom exceeds 40 shillings, and which can be safely left to the consciences of men, and ought not

[a] *Co. Litt.* 295. 12 *Mod.* 681.

[b] *Cro. Eliz.* 790. 2 *Rolls' Abr.* 108. *Year Book*, 14 *Hen.* VI. *pl.* 1.

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to trouble the *country* in the trial thereof.[a] Holt, Ch. J., however, is decidedly of opinion, that the defendant cannot wage his law in this case: for, says he, "the plaintiff hath now sufficient proof to make out his cause; it hath ceased to be a matter of secrecy, and hence cannot be defeated by the oath of the defendant." (6) and lastly; In real actions, the defendant may wage his law of non-summons, this being often in secret, and not vouched by any writing.[b]

From the cases enumerated, of the allowance or denial of this mode of trial, it is manifest that it has only been tolerated in a few special cases; and these, (to use the language of Holt,) "are all grounded on a feeble foundation, or are of small consideration in the law." They abundantly prove, that wager of law originated in the "unstable evidence of the demand," in the "feebleness and exility of the plaintiff's cause of action," and that it had no connexion whatever with the particular nature of the *remedy* by which the demand was sought to be enforced.

My position then is, that wager of law, in its origin, principle, and practice, never did apply to *written*, though unsealed evidences of debt; and, *a multo fortiori*, not to promissory notes. It is conceded, however, that a different opinion has been entertained, and that it has been supposed that the principle which regulates the admission or rejection of wager of law, is the pre-

a 12 *Mod.* 681.
b *Br. Ley. Gager. pl.* 27. 57. 103.

sence or absence of a *seal*, or something equivalent thereto; and that all contracts, not of record, or not under seal, are parol or simple contracts, in reference to this mode of trial. That this opinion is erroneous, has already been partly shown; and, that it is altogether unsound, I shall now endeavour further to illustrate.

As to the origin of this "tempter to corrupt perjury," Lord Coke confidently refers it to the law of God, which permitted the bailee of an ox, or other cattle, to discharge himself, by his own oath, from all responsibility for the death or loss of the animal. Others have regarded it as a mistaken application, by the early ecclesiastics of England, of the *decisory oath* of the civilians; and some have supposed that it was introduced by them with the oath *ex officio*, so often used in cases of ecclesiastical cognizance. But whether it be the offspring of Saxon rudeness, or finds its exemplar in the more refined code of imperial Rome, is not very material: certain it is, that the *simple contracts* alluded to in the books, mean nothing more than such an unsustained or unevidenced contract, as ought, in conscience, to be outweighed by the oath of the party sought to be charged. In the first Edward's reign, we find, that if a creditor sued on a *verbal* demand, he was required to make *rationabilem monstrationem* that a debt existed. For this purpose he produced his *secta*; the defendant might then *vadiare legem*, that is, wage his law against the plaintiff's *secta*. We find, also, that no secta was ever required where the plaintiff could produce *any wri-*

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ting; and, as the wager of law was for the purpose of disproving the testimony of the secta, according to the then prevailing maxim, *lex vincit sectam,* it seems to follow, that no wager of law was ever allowed where the plaintiff's claim was evidenced by any writing. The waging of law, therefore, may be considered as springing from the *secta,* and was a proof to silence the presumption raised by this preliminary evidence, adduced in support of mere *verbal contracts.*[a] The secta, and the defendant's oath, and compurgators, appear to have been requisite only "in respect of the weakness and inconsiderableness of the plaintiff's evidence of debt." This view of the subject is strongly shown in the well known case on this antiquated learning, *The City of London* v. *Wood.*[b] In that case, Holt, Ch. J., remarks, that wager of law is allowable, not because the debt may be discharged, or paid in *private,* but because the ground of action is itself secret; for, that if the privacy of payment, or the possibility thereof, were the occasion of wager of law, that might be a reason, in all cases where it is admitted, that this trial will not be allowed. The theory of this subject clearly evinces, that wager of law could at no time have been applicable to the species of simple contract now under consideration. Promissory notes surely are entitled to as much respect as a stated account by auditors, against which, we have seen, there could be no wager of

a *Bract.* 409. *Fleta,* 136. 138.
b 12 *Mod.* 670. 680. 682.

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law; and they have all that certainty, notoriety, and evidence in their nature, so often alluded to, and which constitute the only basis on which the admission or rejection of this summary proceeding can rest.

If we for a moment inquire into the nature of this species of simple contract, we cannot fail to perceive, that it has no one feature in common with those in which the defendant has been permitted to wage his law. Notes and bills are contracts *sui generis*; they are instruments of a peculiar character, neither specialties, nor parol contracts. They cannot be regarded as mere parol or simple contracts, neither before, nor since the statute 3 and 4 Anne, c. 9., and, consequently, ought not to be embraced within the principle which sustains the wager of law, allowing this to be even broader than has been stated. For, first, even prior to the statute of Anne, the plaintiff need not have averred nor proved any consideration: the mere statement of the promise, and the defendant's liability, constituted a sufficient *prima facie* evidence of debt. Even between the original parties they imported a consideration; and the *onus probandi* of the absence, or failure of consideration, lies on the defendant.[a]

The doctrine, then, of *Rann* v. *Hughes*,[b] which qualified the *obiter* opinion of Mr. Justice Wilmot, in *Pillans* v. *Van Meirop*, is itself too broad;

[a] 2 *Lord Raym.* 1481. *Chitty. Bills*, 7. 12. 87. 452. 1 *Chitty's Plead.* 295. 2 *Phill. Evid.* 6. 10. 3 *Maule & Selw.* 352. 5 *Cranch*, 332. 5 *Wheat. Rep.* 277. 9 *Johns. Rep.* 217.

[b] 7 *T. R.* 350.

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for, though the common law has not adopted the well known distinction of the civilians, between contracts *ex literis* and *ex verbis*, yet notes and bills are exceptions, firmly ingrafted on the general rule. Secondly. If, then, these instruments, at all times, imported a *prima facie* consideration, the statute has clothed them with an additional property. They are no longer mere choses in action; their simple negotiability, though they remain in the hands of the original parties, imparts to them a further dignity, which distinguishes them from all other simple contracts; they are originally evidences of debt, and, after endorsement, the statute raises an irresistible presumption in favour of honest holders, a *presumptio juris et de jure.*

May we not, then, assert, with confidence, that these instruments, which have sprung into life and utility long after the wager of law had gone into almost desuetude, cannot be those "secret contracts, whose feebleness and exility" should subject them to avoidance by the defendant's oath?

Again; It will be borne in mind, that when wager of law was first practised, the principle which would not allow an action of *debt* on simple contract, against an executor, also deprived the creditor of every other remedy. The maxim then applied, was *actio personalis moritur cum persona.* But, after the introduction of the action of assumpsit, it was held by the Courts, not only that the debt survived against the personal representatives of the deceased, but the debtor himself

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was not permitted to wage his law in this form of action. It is manifest, however, that both of these opinions originated in the mistaken application of the principle which sustained wager of law, viz. to the *form of the remedy* instead of the *evidence of the debt;* and that, in truth, there was no legal necessity to resort to such refinements to get rid, either of the maxim, or of wager of law.

When case on assumpsit was introduced, promissory notes were scarcely known. Prior to Elizabeth's reign, debt was the only remedy on simple contract. The Year Books furnish no instance of the action of assumpsit, and *Slade's case*[a] is the first judicial sanction of this form of action. This was shortly after followed by *Pinchon's case*,[b] in which assumpsit was enforced against executors, and wager of law was denied to the testator. But, in introducing the remedy by assumpsit, it was by no means the design of the Courts to abolish the remedy by debt on simple contract. It was an additional remedy, intended to avoid an inconvenient maxim in one case, and a no less inconvenient mode of trial in another. The action of debt, however, remained a suitable remedy in all cases of simple contract, where wager of law would not lie. In the case now under consideration, assumpsit might, indeed, have been brought against the executors of Childress. If, in debt against Childress himself, he

a 4 *Co. Rep.* 92. 44 *Eliz.*
b 9 *Co.* 86.

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could not have waged his law, why should this remedy be denied against his executors? If the testator had not this privilege, the plaintiff had his election to sue in debt or assumpsit. Of late, debt on simple contract has become a more favourite and practiced remedy. In some respects, it is preferable to assumpsit; for, in debt, the judgment is *final*, and not interlocutory, as in assumpsit. The defendant, also, in some cases, is compellable to find bail in error, though the judgment be by *nil dicit*, or on demurrer.[a] Both in England and this country, *debt* is brought on notes and bills, wherever the responsibility is not merely collateral;[b] and no reason can be assigned for refusing it in the present case, except the one I have endeavoured to show was never applicable to this species of simple contract. It is material to be recollected, that wager of law was not at any time a well fixed or established privilege. In the reign of Edward III. the Courts very consistently held, that where a testator might wage his law, his executors might also.[c] The grounds of its application were always, in a degree, uncertain; and its admission or rejection, was under the sound discretion of the Court. Wager of law, says Ch. Baron Ward, is a matter *ex gratia curiæ*. Judges are to use a sort of discretion in admitting people to it.[d]

a 1 *H. Bl.* 550. 3 *East's Rep.* 359. 2 *Saund.* 216. 1 *Chitty's Plead.* 107.

b Bishop v. Young, 2 *Bos. & Pull.* 78. Rabourg v. Peyton, 2 *Wheat. Rep.* 385.

c 29 *Edw.* III. 36 *b.* 37 *a.*

d 12 *Mod.* 676.

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As to the recent case of *Barry* v. *Robinson*,[a] it does, indeed, decide, that an action of debt cannot be maintained against an executor or administrator, on the simple contract debt of his testator or intestate, such as a promissory note; and the reason assigned for denying the remedy, was the one I have endeavoured to refute. But ought this case to outweigh those which have been advanced in support of a contrary opinion? It is a solitary case, standing amidst the accumulated decisions of centuries. From the days of Elizabeth to the year 1805, and since, no case can be found, in which wager of law has been applied to the case of a promissory note, though debt has been frequently brought on notes and bills. The point now under consideration passed *sub silentio* in the case of *Barry* v. *Robinson*; it was not adverted to, either in the argument at the bar, or by the Court. Had the question been made, and the mind of the Court been expressly directed to the distinction between these evidences of debt and other simple contracts, the decision must have been different. In that case, perhaps, there was no objection to resort to another form of action; but in the circumstances of the present case, if this action cannot be sustained, it will be of little avail to prosecute in another form. Sir James Mansfield, in that case, rested his opinion on the distinction between debt and assumpsit, as applicable to the case of executors; but no inquiry was made as to the nature of the proof to sustain

[a] 1 *New. Rep.* 293.

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the action. He admitted, that the distinction was not founded in good sense, but denied his power to alter the law. I have endeavoured to show, that the law needed no alteration, as this summary mode of trial was not applicable, and never had been applied to such substantial evidences of debt as notes and bills.

2. But even supposing that, by the common law of England, the testator could have waged his law in this case, is it proper that this antiquated doctrine should be adopted as a part of our jurisprudence? The wager of battle, and the various other barbarous modes of trial invented by a superstitious age, are equally portions of the common law; yet, all will allow, that they are wholly at variance with the genius and spirit of our institutions, and are not fit to be incorporated with our jurisprudence. At one time the plaintiff was obliged to produce his *secta;* and, though our declarations still conclude with an *inde producit sectam*, in compliance with the fashion of former times, yet, an attempt at this day, practically to revive this preliminary proof, would, no doubt, be regarded as the result of a most adventurous and indiscriminate admiration of the common law.

3. The wager of law has never been adopted in this country. The reported adjudications of this country do not allude to the distinction between debt and assumpsit on simple contracts, nor is wager of law once mentioned in any of them. The statutes of the various States are equally

silent, with the exception of New-Jersey[a] and South Carolina.[b] In the former State, wager of law is abolished in all cases except of non-summons in real actions; and, in South Carolina, wager of law is abolished in the action of *detinue*. This provision, no doubt, was *ex abundanti cautela*. Detinue is there a practiced remedy for the recovery of slaves, being preferable to replevin or trover. As slaves are not connected with the *realty*, so as to oust the wager of law, if it otherwise obtained, it might have been supposed, that this mode of trial would be attempted in detinue for slaves, and to remove this possibility the statute was enacted, for there is no instance of its adoption in this, or any other action; nor does the present record furnish any reason for supposing, that it is known to the law or practice of the Courts of Tennessee. It is, also, proper to remark, that promissory notes, in the State of Tennessee, rest on precisely the same principles as in England; and the statute of Anne is there in force. Wager of law is a mode of trial hostile to the liberal spirit of our laws. By this trial the defendant becomes not only a witness in his own cause, but the only witness; and one, too, who cannot be contradicted either by proofs or circumstances. The judgment thereon is *final;* more conclusive than a verdict, for, when the defendant is sworn *de fidelitate*, and his eleven compurgators *de credu-*

a *Rev. Laws of N. J.* 1795.
b *Grimke's Laws of S. Car.*

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litate, all controversy is terminated. There could be no new trial, for any cause whatever.[a] If ever so flagrantly abused by perjury, there can be no remedy; for it was a well established maxim, that "indictment for perjury lies not for false swearing in the trial by wager of law."[b] The mock solemnity in the manner of waging law, would ill suit the simplicity of judicial proceedings in this enlightened age and country.[c] Trial by jury is the only mode of trial known to our common law jurisprudence. The Judiciary Act of 1789, c. 20. s. 34. provides, that the laws of the several States shall be rules of decision on all trials at common law, except where the laws of the United States shall otherwise require. The constitution expressly guaranties trial by jury in all common law cases, where the amount exceeds twenty dollars. And though the phraseology of this article of the constitution seems to aim at the preservation of that which was before the admitted mode of trial, yet there can be no doubt that it was a primary object to abolish all summary trials, all barbarous and unsuitable modes of judicial investigation.

The other causes of demurrer may be more briefly examined. It is clear, from the declaration, that the firm of *William Cochran & Comegys* was composed of but two persons, viz. William Cochran & Comegys. The declaration alleges, that *John G.* Comegys was the surviving partner of this firm, and this is equivalent to an

a 2 *Salk.* 682. 2 *Vent.* 171. 12 *Mod.* 676.
b 1 *Vent.* 296. *Co. Litt.* 295.
c Bract. 411. *Fleta*, 137. 2 *Lill. Abr.* 824.

express averment that the Comegys of the firm, and John G. Comegys, who survived, are the same persons; that the firm was composed of none else, and that John G. Comegys survived William Cochran. The forms of declaring or pleading do not require that every possible inference should be negatived. All that is required, is "certainty to a common intent," or, at most, "certainty to a certain intent in general;" by which is meant, what, upon a fair and reasonable construction, may be called certain, without recurring to possible facts, which do not appear.[a] This species of certainty is sufficient in all declarations, replications, and even indictments. If there be sufficient certainty to enable the defendant to *answer*, the jury to *decide*, and the Court to render *judgment*, it is well, though the nicety of critics may not be gratified. It is said, that a more rigid certainty is sometimes required, but this is doubtful; and, if not, it obtains only in two cases, viz. in pleas of estoppel, and alien enemy, which are not favoured, and are, therefore, said to demand a certainty to "a certain intent in every particular."[b] On inspecting this declaration, could a reasonable doubt be entertained by the defendant below, the Court or jury, that this firm was composed of any but the two persons mentioned, and that John G. Comegys is the person alluded to in the firm, and in the note, and that he survived William Cochran?

The next objection to the declaration regards

[a] 2 *H. Bl.* 530. *Cowp.* 682. 1 *Saund.* 276. 1 *Chitty's Plead.* 237.

[b] 8 *Term Rep.* 167. *Dougl.* 159.

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the mode in which Joel Childress is alleged to have made this note. But it would not have been proper to have stated, that the note was *signed* by Joel Childress, for this was not the *fact;* nor that it was made by A. Childress, for the debt was not his, but Joel's. The declaration might have stated, that the note was *made by Joel*, without noting the agency, for this is its legal operation. But the allegation in this case is according to the fact, viz. that "the said Joel Childress, by his *agent*, A. Childress, *made*," &c. and this is the safest and usual mode. Whether A. Childress were the lawfully authorized agent of Joel, is matter of proof, not of pleading.[a]

It is, also, objected, that there is no sufficient profert of the letters testamentary; and that it does not appear from what authority they emanated. The *omission* of profert is, no doubt, cause of special demurrer; but, where profert is made, its sufficiency is matter of evidence only, and a demurrer to it, *as evidence*, would lie. But the demurrer in this case, is not for the omission, nor for defectively making the profert, nor does it appear in the shape of a demurrer to evidence, complaining of the insufficiency of the authority granting the letters. But were this the case, *non constat* from this record, by whom they were granted, which surely was the fault of the plaintiff in error, not of the defendant; how the Court below was to have judged this matter, or how this Court

a 1 *H. Bl.* 313. 6 *Term Rep.* 659. 2 *Phill. Evid.* 4, 5. note *a*. *Chitty. Bills*, 627. note *a*. note *b*.

can judge of the sufficiency of the letters, for they do not appear to have been legally before the Court below, and they are not before this in any form. This was the fault of the defendant below. After the profert, he should have craved *oyer*, and then demurred.[a]

But this demurrer, I presume, cannot be sustained on any ground; for if the letters proffered were those of the State of Tennessee, the plaintiffs' right to sue will not be questioned: and if the letters were granted in Maryland, the statute of 1809, c. 121. s. 1, 2. of Tennessee, expressly authorizes executors or administrators to sue in the Courts of that State, under letters granted by *any of the sister States.*

The last objection which has been made, is to the jurisdiction of the Court, viz. that the declaration only avers the *parties* to this suit to be citizens of different States, but has not stated their respective *testators* to be citizens of different States. But this is not a case embraced by the 11th section of the Judiciary Act of 1789, c. 20. Executors are not *assignees*, within the letter or spirit of that act: they are something more than assignees; they are representatives, who are not mere instruments, for they have the property of their testator, both legal and equitable, vested in them. They are the absolute owners of the property, as to all strangers: they are the lords of all the contracts made with their testator; they may release, sue, or receive payment on them;

a 2 *Wils. Rep.* 413. 1 *Chitty's Plead.* 416.

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and, until the estate is settled, not even the legatees, or distributees, can interfere with them. This is a case, then, under the constitution; and the *controversy* is between citizens of different States, not nominally merely, but substantially. It is, therefore, immaterial to inquire, whether their respective *testators* were citizens of the same, or of different States.[a]

March 14th. Mr. Justice STORY delivered the opinion of the Court. This is an action brought by the executors of John G. Comegys, who was surviving partner of the firm of William Cochran & Comegys, to recover the contents of a promissory note, made by Joel Childress, deceased, (whose executor the plaintiff in error is,) payable to the firm of William Cochran & Comegys. The cause came before the Circuit Court for the District of West Tennessee, upon a special demurrer to the declaration; and the Court having overruled the demurrer, it has been brought here by writ of error.

The several causes assigned for special demurrer have been argued at the bar; but before we proceed to the consideration of them, we may as well dispose of the objection taken to the jurisdiction. The parties, executors, are, in the writ and declaration, averred to be citizens of different States; but it is not alleged that their testators were citizens of different States; and the case

a Chappedelaine v. Dechenaux, 4 *Cranch's Rep.* 306. *Serg. Const. Law*, 113. 117.

has, therefore, been supposed to be affected by the 11th section of the Judiciary Act of 1789, c. 20. But that section has never been construed to apply to executors and administrators. They are the real parties in interest before the Court, and succeed to all the rights of their testators, by operation of law, and no other persons are the representatives of the personalty, capable of suing and being sued. They are contradistinguished, therefore, from assignees, who claim by the act of the parties. The point was expressly adjudged in *Chappedelaine* v. *Dechenaux*, (4 *Cranch's Rep.* 306.) and, indeed, has not been seriously pressed on the present occasion.

The first cause of demurrer is, that the declaration states the note to have been made to the firm of William Cochran & Comegys, but does not state who in particular the persons composing that firm were. Upon consideration, we do not think this objection ought to prevail. The firm are not parties to the suit; and if Comegys was, as the declaration asserts, the surviving partner of the firm, his executor is the sole party entitled to sue. It is not necessary, in general, in deriving a title through the endorsement of a firm, to allege, in particular, who the persons are composing that firm; for, if the endorsement be made in the name of the firm, by a person duly authorized, it gives a complete title, whoever may compose the firm. (See 3 *Chitty's Plead.* 2. 39.) If this be so, in respect to a derivative title, from the act of the parties, more particularity and certainty do not seem essential in a derivative title by the

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act of the law. A more technical averment might, indeed, have been framed upon the rules of good pleading; but the substance is preserved. And there is some convenience in not imposing any unnecessary particularity, since it would add to the proofs; and it is not always easy to ascertain or prove the persons composing firms, whose names are on negotiable instruments, especially where they reside at a distance; and every embarrassment in the proofs, would materially diminish the circulation of these valuable facilities of commerce.

Another cause of demurrer is, that the declaration does not aver that the note was signed by Joel Childress. To this it is sufficient to answer, that the declaration does state, that "Joel Childress, by his agent, A. Childress, made" the note; and it is not necessary to state that he signed it; it is sufficient if he made it. The note might have been declared on as the note of the principal, according to its legal operation, without noticing the agency; and though it would have been technically more accurate to have averred, that the principal, by his agent, in that behalf duly authorized, made the note, yet it is not indispensable; for, if he makes it by his agent, it is a necessary inference of law, that the agent is authorized, for, otherwise, the note would not be made by the principal; and that the demurrer itself admits. (See *Chitty on Bills, Appx. Sect. p.* 528. *and* notes, *id. Bayley on Bills,* 103. 2 *Phillips' Evid. ch.* 1. *s.* 1. *p.* 4. 6.)

Another cause of demurrer is, that the declara-

tion omits to state any damages; but this, if in any respect material in an action of debt, is cured by the writ, which avers an *ad damnum* of 500 dollars.

Another cause of demurrer is, that the letters testamentary are not sufficiently set forth to show the right of the plaintiffs to sue. But profert is made of the letters testamentary, in the usual form; and if the defendant would have objected to them as insufficient, he should have craved oyer, so as to have brought them before the Court. Unless oyer be craved and granted, they cannot be judicially examined. And if the plaintiffs were not executors, that objection should have been taken by way of abatement, and does not arise upon a demurrer in bar. It may be added, that, by the laws of Tennessee, executors and administrators, under grants of administration by other States of the Union, are entitled to sue in the Courts of Tennessee without such letters granted by the State. (*Act of Tennessee*, 1809, ch. 121. s. 1, 2.)

It was, also, suggested at the bar, but not assigned as cause of demurrer, that the action ought not to have been in the *detinet* only; but in the *debet et detinet*. This is a mistake. Debt against an executor, in general, should be in the *detinet* only, unless he has made himself personally responsible, as by a *devastavit*. (*Comyn's Dig. Pleader*, 2 D. 2. 1 *Chitty's Plead.* 292. 344. 2 *Chitty's Plead.* 141. note *f*. *Hope* v. *Bague*, 3 *East*, 6. 1 *Saund. Rep.* 1. note 1. 1 *Saund.* 112. note 1.) And if it had been other-

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wise, the objection could only have been taken advantage of on special demurrer, for it is but matter of form, and cured by our statute of jeofails. (*Burland* v. *Tyler*, 2 *Lord Raym.* 1391. 2 *Chitty's Pl.* 141. note *f*. *Act of* 1789, ch. 20. s. 32.)

But the most important objection remains to be considered; and that is, that an action of debt does not lie upon a promissory note against executors. It is argued, that debt does not lie upon a simple contract generally against executors; and the case of *Barry* v. *Robinson*, in 4 *Bos. & Pull.* 293. has been cited as directly in point. Certainly, if this be the settled rule of the common law, we are not at liberty to disregard it, even though the reason of the rule may appear to be frivolous, or may have ceased to be felt as just in its practical operation. But we do not admit, that the rule of the common law is as it has been stated at the bar. We understand, on the contrary, that the general rule is, that debt does lie against executors upon a simple contract; and that an exception is, that it does not lie in the particular case, where the testator may wage his law. When, therefore, it is established in any given case, that there can be no wager of law by the testator, debt is a proper remedy. Lord Chief Baron Comyns lays down the doctrine, that debt lies against executors upon any debt or contract without specialty, where the testator could not have waged his law; and he puts the case of debt for rent upon a parol lease to exemplify it. (*Com. Dig. Administration*, B. 14. See, also, *Com. Dig. Pleader*, 2 *W.* 45. tit. 2 D. 2.) The same

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doctrine is laid down in elementary writers. (1 *Chitty's Plead.* 106. *Chitty on Bills*, ch. 6. p. 426.) Upon this ground, the action of debt is admitted to lie against executors in cases of simple contract, in Courts where the wager of law is not admitted, as in the Courts of London, by custom. So, in the Court of Exchequer, upon a more general principle, the wager of law is not allowed upon a *quo minus*. (*Com. Dig. Plead.* 2 *W.* 45. *Godbolt*, 291. 1 *Chitty's Plead.* 106. 93. *Bohun's Hist. of London*, 86.) The reason is obvious; the plaintiff shall not, by the form of his action, deprive the executor of any lawful plea, that might have been pleaded by his testator; and as the executor can in no case wage his law, (*Com. Dig. Pleader*, 2 *W.* 45.) he shall not be compelled to answer to an action, in which his testator might have used that defence. Even the doctrine, with these limitations, is so purely artificial, that the executor may waive the benefit of it; and, therefore, if he omits to demur, and pleads in bar to the action, and a verdict is found against him, he cannot take advantage of the objection, either in arrest of judgment, or upon a writ of error. (2 *Saund. Rep.* 74. note 2. by *Williams*, and the authorities there cited. *Norwood* v. *Read*, *Plowd.* 182. *Cro. Eliz.* 557.) Style, in his Practical Register, lays down the rule with its exact limitations. "No action," says he, "shall ever lie against an executor or administrator, where the testator or intestate might have waged their law; because they have lost the benefit of making that defence, which is a good defence in that action;

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and, if their intestate or testator had been living, they might have taken advantage of it." (*Style's Pr. Reg. and Comp. Atty. in Courts of Common Law*, (1707,) p. 666.)

In the view, therefore, which we take of this case, we do not think it necessary to enter into the consideration, whether the case in 4 *Bos. & Pull.* 293. which denies that debt will lie against executors upon a promissory note of the testator, is law. There is, indeed, some reason to question, at least since the statute of Anne, which has put negotiable instruments upon a new and peculiar footing, whether, upon the authorities and general doctrines which regulate that defence, it ought to be applied to such instruments. The cases cited at the bar by the plaintiff's counsel, contain reasoning on this point, which would deserve very serious consideration. But waiving any discussion of this point, and assuming the case in 4 *Bos. & Pull.* 293. to have been rightly decided, it does not govern the case now before the Court; for that case does not affect to assert or decide, that the action of debt will not lie in cases where there can be no wager of law.

Now, whatever may be said upon the question, whether the wager of law was ever introduced into the common law of our country by the emigration of our ancestors, it is perfectly clear, that it cannot, since the establishment of the State of Tennessee, have had a legal existence in its jurisprudence. The constitution of that State has expressly declared, that the trial by jury shall remain inviolate; and the constitution of the United

States has also declared, that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. Any attempt to set up the wager of law, would be utterly inconsistent with this acknowledged right. So that the wager of law, if it ever had a legal existence in the United States, is now completely abolished. If, then, we apply the rule of the common law to the present case, we shall arrive, necessarily, at the conclusion, that the action of debt does lie against the executor, because the testator could never have waged his law in this case.

Upon the whole, the judgment of the Circuit Court is affirmed, with 6 per cent. damages, and costs.

[Practice. Pleadings.]

Siglar and Nall, Administrators of William Nall, deceased, *Plaintiffs in Error*,

v.

John Haywood, Public Treasurer of the State of North Carolina, *Defendant in Error*.

An executor or administrator is not liable to a judgment beyond the assets to be administered, unless he pleads a false plea.

If he fail to sustain his plea of *plene administravit*, it is not necessarily a false plea, within his own knowledge; and, if it be found against him, the verdict ought to find the amount of assets unadministered, and the defendant is liable for that sum only.

In such a case, the judgment is *de bonis testatoris*, and not *de bonis propriis*.