*George R. Gaither, Plaintiff in error, *v.* Farmers' and Mechanics' Bank of Georgetown (for the use of Thomas Corcorran), Defendants in error.

Usury.

C. & Co. discounted their notes with the F. & M. Bank of Georgetown, at thirty days; and in lieu of money, they stipulated to take the post-notes of the bank, payable at a future day, without interest, while post-notes were at a discount of one and one-half per cent. in the market, at the time of the transaction: such a contract is usurious.

The indorsement of a promissory note of a stranger to the transaction, which was passed to the bank as a collateral security for the usurious loan, although the note itself is not tainted with the usury, yet the indorsement is void, and passes no property to the bank, in the note; and the subsequent payment of the original note, for which the security was given, and the repayment of the sum received as usury, will not give legality to the transaction. p. 43–4.

When an action is in its origin instituted in the name of A., for the use of B., the *cestui que use* is, by the law of Maryland, regarded as the real party to the suit. p. 42.

If a note be free from usury in its origin, no subsequent usurious transactions respecting it, can affect it with the taint of usury, although an indorser of the note, whose property in it was acquired through a usurious transaction, may not be able to maintain a suit upon it.[1] p. 33.

The act of assembly of Maryland declares "all bonds, contracts and assurances whatever, taken on an usurious contract, to be utterly void:" the indorsement of a promissory note, for a usurious consideration, is a contract within the statute, and void.[2] p. 43.

Farmers' & Mechanics' Bank *v.* Gaither, 3 Cr. C. C. 440, reversed.

Error to the Circuit Court for the District of Columbia. This suit was instituted by the defendants in error, against George R. Gaither, as the maker of a promissory note, dated Georgetown, 24th July 1822, for $1513.96, payable six months after date, to the order of W. W. Corcorran & Co. Indorsers, W. W. Corcorran & Co., and Thomas Corcorran.

Before the swearing of the jury in the case, it was stated by the counsel of both plaintiff and defendant, to one of the judges of the court (who, being a stockholder in the bank, objected to sitting in the case); and the same was also stated to the court, before the jury was sworn, that the bank was not interested in the event of the cause; and on the trial, it was also shown to the court, by the clerk, that this suit, standing on the docket in the name of the bank, was, by direction of the plaintiff, on the morning of and just before the cause was called for trial, entered for the use of Thomas Corcorran; and the jury were sworn to try the cause standing on the docket, to the use of Thomas Corcorran.

W. W. Corcorran & Co,, merchants of Alexandria, were in the frequent receipt of large discounts from the bank, upon their own notes, indorsed by Thomas Corcorran, for which *other notes, payable to them, were, from time to time, deposited in bank as collateral securities for the [*38 notes discounted; which collateral notes were kept in deposit by the bank, and, as collected, were passed to the credit of the borrowers; and the collateral notes, a short time before they became due, were so entered in the deposit book of the bank, as that the bank became the collectors upon their own account, of their respective amounts, to be appropriated as stated. The note of the plaintiff in error was treated in this manner; and, before it became due and was protested, it had been entered on the deposit book of the bank, and had remained in possession of the bank, until the day of the

[1] See Nichols *v.* Fearson, 7 Pet. 103; Oates *v.* National Bank, 100 U. S. 249.

[2] See Dill *v.* Ellicott, Tan. Dec. 233; Thomas *v.* Watson, Ibid. 497.

trial of the cause. The discounts of the bank for W. W. Corcorran & Co. were not, generally, to a large extent in cash; but when large discounts were made, it was with an understanding, that the proceeds of the same should be received in post-notes, having some time to run, without any rebate for the time being allowed by the bank, but the bank retaining the usual discount of six per cent. per annum, on the amount of the discounts; and the post-notes were made payable at various periods, from twenty to ninety days, but, most generally, payable when the note discounted, or the note received, as a collateral security, became due. The amount of discounts received by W. W. Corcorran & Co., from the 24th of July 1822, to the 22d of February 1823, was $77,732; and during that time, the post-notes issued for their use, by the bank, exceeded $59,000.

The post-notes, at the time they were received, were at a discount of one per cent. per month in the market; and some of those received by W. W. Corcorran & Co. were sold at that rate. The bank always held the note of the defendant below, as a collateral security for the notes discounted for W. W. Corcorran & Co.; and the defendant paid to the bank, on the 1st day of February 1823, $500 on account of the note. Within two days of the trial, when the bank having collected as much money as reduced the debt due by W. W. Corcorran & Co. to a small sum; they ordered the suit to be marked for the use of Thomas Corcorran, under authority of an order, dated February 17th, 1823, signed by W. W. Corcorran & Co., "to deliver to him what notes of theirs might remain in possession of the bank, after the debt due by them, for which they were left as collateral security, should be paid." The defendant below also proved, that the name of Thomas Corcorran was not upon the note, when it was passed to the bank, nor until after the note became due; and he produced, and offered in evidence to set off the promissory notes of W. W. Corcorran & Co., which had
*39] been transferred to him, *by the payee thereof, after the note upon which this suit was brought had been transferred to the bank, but before this suit was brought, and before they fell due, which was after the 17th of February 1823.

The plaintiff below offered W. S. Nicholls, admitted to be one of the stockholders of the bank, as a witness, who was objected to, as being interested in the event of the suit; but the court overruled the objection, and he was sworn and examined.

The defendants prayed the court to instruct the jury, that, if they believed the evidence of the transaction between the bank and W. W. Corcorran & Co. were usurious, the plaintiff could not recover; which instruction the court refused to give. The court refused to suffer the defendants to give the evidence of set-off, which they proposed to exhibit.

To these decisions of the court, a bill of exceptions was tendered, and the case was brought up to this court by writ of error.

Taylor and *Key*, for the plaintiff in error.—The admission of W. S. Nicholls as a witness, was erroneous, on two grounds: 1. He was interested in the event of the suit: 2. He was one of the parties plaintiff, on the record, he being a stockholder in the bank.

1. The suit was originally brought for the use of the Mechanics' Bank of Alexandria, and the bank is responsible for the costs of suit, to which the

witness will, as a stockholder, be obliged to contribute, on the failure of the suit. 2 Camp. 354. Phil. Ev. 57. Under the law of Maryland, the party to whose use the suit may be brought, is liable for costs; but he is only a security for the costs with the nominal plaintiff. The declaration of the counsel, that the bank had no interest in the cause, was made, in order to induce the judge, who was a stockholder, to sit, and whose high character placed him above the influence of interest. It was not intended to authorize the introduction of an interested witness, as to the effect of the declaration of parties or counsel. 1 Stark. part 4, 34.

2. If this suit can be sustained, it must be upon a legal title of the bank in the note; and as the note was made payable to W. W. Corcorran & Co., they must have indorsed it to the bank, in the course of their transactions with the bank, and for a usurious consideration. The facts make out a case from which the jury might have presumed usury, and there is nothing which will prevent the plaintiff in error from availing himself of this defence. They show that the notes of W. W. Corcorran & Co. were discounted by the bank, and no money paid for them, but the proceeds of the discount were paid in post-notes, generally payable when the notes discounted *by the bank became due, and upon which no rebate or reduction was made for the times the notes had to run. In the course of these [*40 transactions, and as a part of them, the note of the plaintiff in error was indorsed over to the bank by the borrowers, upon these usurious contracts. This was usury. Chitty on Bills (Phila. ed. 1821) 112. The statute makes the contract upon which usury is taken, void; and no title can be obtained under it. It is not the validity of the note which is questioned, but that of the transfer of the note by the indorsement. The plaintiff in error is liable to pay the note, but not to those who claim under an invalid transfer of it; no one can claim under such an indorsement. 1 Stark. 385; Chitty 105, 692. The bank having held the note under an invalid transfer, and instituted a suit upon it, the case cannot be altered, as to the right of the person to whose use it is marked. This change in the suit does not alter the relations of the parties, and give a right to the *cestui que use* which the plaintiffs in the suit did not possess. The whole of the evidence shows that the bank held the note for their own use; that it became theirs, through the usurious dealings with W. W. Corcorran & Co., and they could pass no right in it to any person.

3. Upon the evidence, the set-off ought to have been admitted. The law of Virginia authorizes a set-off to be allowed in such a case. A set-off is allowed against the party really claiming in the suit, although another may be nominally the plaintiff. Chitty 12; 1 T. R. 39; 4 Ibid. 341; 7 Ibid. 663; 16 East 36.

Jones and *Coxe*, for the defendants in error.—The question as to the interest of the bank in the event of the suit, and therefore, of the admission of W. S. Nichols, as a witness, was closed by the declarations of the counsel, before the cause came on for trial. The counsel had power to bind the parties by their admission, and the court below was bound to consider anything done to release the interest of the bank that could be done. The real party to the suit was the *cestui que use*, and, by a court of law, he would be so treated; and he has full power over the cause, in the same manner as if he

was the only party on the record. As to the nature of the interest of a witness who is nominal plaintiff. 4 Stark. 751, 770, 775, 776. When a corporation can be a witness. 4 Ibid. 1061, 426. By the laws of Maryland, 1796, ch. 43, § 13, the party for whose use the suit is marked, is liable to costs. Act of 1794, ch. 54, § 10. The bank held the note of Gaither, as trustees for W. W. Corcorran & Co., and the stockholders would have no interest in the same.

*41] *2. If there was usury between W. W. Corcorran & Co. and the bank, it cannot affect the claim in this suit. A usurious transaction between the payee of a note and the indorsee, will not discharge the maker; and the only danger to which he would be exposed, might be that of a double recovery—1st, by the payee, who had not legally passed away the note, and 2d, by the usurious indorsee. The law is settled, that the usury must affect the original contract, and will not affect collateral matters growing out of it. When given originally for an usurious consideration, all are affected by it; but the usury must have attached to the instrument itself, and it will not affect one given in lieu of it, to a person who was ignorant of the usury, at the inception of the first contract. 3 Esp. 22; 8 T. R. 390; 1 Camp. 165, in note; Philadelphia edition of Chitty on Bills, of 1817, page 95.

3. The note was never the property of the bank, it having been deposited as a collateral security for notes drawn by W. W. Corcorran & Co., and indorsed by Thomas Corcorran. The note was not deposited in reference to any particular negotiation, but as a security generally; and the right of the bank to it, if any existed, was not affected by subsequent transactions, although usurious. Ord on Usury 104.

4. The set-off was not admissible. It was not the subject of notice or plea; and the interest of Thomas Corcorran had attached, before any of the claims of the plaintiff in error arose.

Johnson, Justice, delivered the opinion of the court.—The plaintiff here was defendant in the court below, to an action instituted by the Farmers' and Mechanics' Bank of Georgetown, on a note made by him to W. W. Corcorran & Co., and by them indorsed in blank to the bank.

The record makes out a case for this court, of which the following is a summary: That W. W. Corcorran & Co. discounted their own notes with this bank, at thirty days; the bank expressly stipulating, that in lieu of money they should receive what they call a post-note of their own, payable at a future day, without interest. The evidence would make out that the post-notes given for this discounted note, were at thirty-five days after date; that it is, two days after the discounted note fell due; so that in fact there was no advance of money, although an interest of six per cent. per annum, was taken from the Corcorrans, and the post-notes of the bank were proved to be at a discount of one per cent. making one and a half per cent. for thirty days, or eighteen per cent. per annum. The note on which this suit was instituted, was passed to the bank as a collateral security for the dis-

*42] counted note, and was altogether unaffected with *usury in its origin. The ground on which the right of the bank is resisted, is, not that Gaither is discharged from his contract with W. W. Corcorran & Co., but that the indorsement to the plaintiff below, having been made to secure a

note given on a usurious contract, could vest no interest or cause of action in the indorsee. In order to avoid the pressure of this defence in the court below, the plaintiffs there gave in evidence a writing addressed by W. W. Corcorran & Co. to the bank, bearing date 17th February 1823, prior to the institution of that suit, in these words: "Please deliver to Thomas Corcorran what notes of ours may remain in your possession, after the debt due to the bank, for which they are left as collateral security, shall have been paid, or hold the same subject to his order." And it was further shown, that a few days before the issue was tried below, an adjustment had taken place between the bank and Thomas Corcorran (who was then indorser and assignee of W. W. Corcorran & Co.), upon which Gaither's note had been delivered to Thomas Corcorran; he then indorsed his name on Gaither's note, below that of W. W. Corcorran & Co., and thereupon, the bank, before the jury were charged, had the name of Thomas Corcorran entered on the docket, as the *cestui que use*, for whom they were prosecuting their suit, and the jury, it appears, were charged with the cause, according to the exhibition of parties, thus made upon the docket; that is, to try an issue between the bank, to the use of Thomas Corcorran, plaintiff, and Gaither, defendant. This practice is familiar with the Maryland courts, and when the action originates in that form, the *cestui que use* is regarded as the real party to the suit.

Is is now contended, that although substituted at the eleventh hour, Thomas Corcorran is to be regarded in that relation; and under that idea, this cause has been argued, as though the question of usury had been raised between Gaither and an innocent indorsee. But it is obviously impossible, in the present action, to pay any regard to Thomas Corcorran's interest or claims. The arrangement which introduced his name into the cause, was too obviously concocted for the purpose of rescuing the interests of the plaintiffs in the record, from the effects of the defence of usury. It, therefore, can pretend to no merit in the administration of justice. But if the effects of that transaction be examined, without reference to the motive, it is equally clear, it can have no bearing upon the present action. The interest in, or power over Gaither's note, was only inchoate and contingent, until all the debts due the bank should be paid, or they otherwise be induced to relinquish it to him; and this did *not take place until long posterior to the institution of the suit, and even after issue joined. The bank [*43
sue on their own interest, declare on their own right, and acknowledge no participation with Thomas Corcorran in the interest or the action, until the moment when the cause is going to trial. It was surely then too late to permit them to assume a new character, or interpose a new party; however liberally this court might be disposed to sacrifice the forms and rules of law, to the Maryland practice.

We will, therefore, put Thomas Corcorran's interest out of view, and will consider the parties, at the commencement of the action, as the parties at its close. This puts the question on the right of an innocent indorsee out of the cause; since the indorsee of Gaither's note received the usurious interest, and the indorser paid it. The only questions on the point of usury, then, are, 1st. Whether Gaither, in the relation in which he stood to these parties, could set up the usury in his defence. 2d. And whether that defence could be set up, after payment of the note on which the usury had been received.

The objection in the first point is, that as there was no usury in the concoction of Gaither's contract, he ought not to be permitted to avail himself of the usurious contract between the indorser and indorsee, to avoid a debt which he justly owes. And this is unquestionably true: for the rule cannot be doubted, that if the note be free from usury, in its origin, no subsequent usurious transactions respecting it, can affect it with the taint of usury. Nor does Gaither propose, by this defence, to relieve himself from paying the note; it goes only to his liability to pay it to this individual; and reason, analogy and adjudged cases will sustain the defence. Suppose, a note given to a woman, who marries, and then indorses it without her husband's authority; such indorsement would be void (1 East 432), and the indorsee could not recover; yet the husband and wife may recover. In a comment on the case of *Jones* v. *Davison*, in Holt's reports (1 Holt 256), a usurious note is likened to a bill of exchange on a bad stamp. If a stamp were necessary to give validity to an indorsement, it cannot be doubted, that none who claim through such an indorsement could maintain an action against the maker. The indorsement, though actual, was ineffectual for the purpose of transferring an interest in the note; it was a void act.

This case is governed by the laws of Maryland; and the act of Maryland against usury is in the words of the statute of Anne. It declares "all
*44] bonds, contracts and assurances *whatever, taken on a usurious contract," to be utterly void. Now, the indorsement of a negotiable note creates several contracts; and if, in this case, it could give a right of action against Gaither, the maker, it ought also to sustain an action against W. W. Corcorran & Co., the indorsers; but against them, it is perfectly clear, that an action could not be maintained, for they were parties to the usurious loan. It follows, that their indorsement was a void act, and the property, and, of consequence, the right of action, never passed to these plaintiffs. There is a very strong case on this subject, which we believe was not quoted in argument, to be found in the books to which we usually refer. We mean the case of *Harrison* v. *Hannell*, in Taunton's reports (5 Taunt. 780), in which the right of a collateral surety to avail himself of usury in the original transaction, is distinctly recognised, when the contract of the collateral was wholly unaffected by usury. The case was reserved for argument, and the whole court concurred in the legality of the defence. The language of the judges is strong, and applies to the case before us. One of them remarks, "that if a man lend 1000*l.* on a usurious interest, and gets from a third person a collateral security for 800*l.* only, without usurious interest, I hold that bond is void, not because it is given for securing usurious interest, but because it is given for enforcing a contract for usurious interest." And another says, "that if giving these collateral acceptances would alter the case, it would be a shift or device, by which the statutes of usury would be defeated."

With regard to the second point, it is necessary to see the force of the argument which would deduce from the payment of the discounted note, a cure to the taint with which the contract of indorsement was affected. The law declares it absolutely void; by what operation, then, is it to be rendered valid, by the payment of the discounted note? It is argued, by the payment and extinguishment of the latter note, the usury is extinct, and as if it had never existed. We cannot perceive how this reasoning can prevail,

either in point of fact or inference. In point of fact, the crime was only consummated by the payment of that note, since the bank thereby incurred a liability under the statute, to be sued for three times the sum paid them; and as to the inference, it seems very difficult to conceive, how the payment of the usurious note should operate to confirm or give birth to a contract, which the law declares never had existence, and was, *ab initio*, utterly null and void. There have been cases in which usurious contracts have been cancelled, the usury refunded, and new contracts substituted, free from the taint of usury; and the law gives to the offender this *locus pœnitentiæ*. But there is no analogy between such a *transaction and that here presented, in which the money loaned has been [*45 paid by the borrower, and only passed into the vaults of the bank, to be deposited with the usurious interest previously taken. We have not heard of the refunding of this usury; and this, at least, would have been indispensable to removing the taint. But even that would never have given validity to an indorsement, which, in the eye of the law, was, as though it had never existed.

As the decision on this point disposes of the right of action, and leaves no probability that the cause will be again brought up to this court, we deem it unnecessary to notice any other of the points made in argument.

The judgment was reversed, and the cause remanded to the circuit court, with directions to award a *venire facias de novo*.

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*George Minor, Philip H. Minor, Daniel Minor, William Minor and Smith Minor, Plaintiffs in error, *v.* The Mechanics' Bank of Alexandria, Defendants in error. [*46

Construction of statute.—Pleading.—Official bond.—Nolle prosequi

It is a general rule in the construction of public statutes, that the word "may," is to be construed "must," in all cases where the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power: and in all cases, the construction should be such as carries into effect the true intent and meaning of the legislature in the enactment. p. 64.

The provision in the act of congress, incorporating "the Mechanics' Bank of Alexandria," which requires, that the capital stock of the bank shall consist of 50,000 shares, of ten dollars each, is not a condition precedent; and the bank went legally into operation, with an actual capital less than that number of shares. p. 65.

Even if fraud had existed in the original subscription of this stock of the bank, it would be extremely difficult to maintain, that such a fraud, which was private, between the original subscribers to the stock and the commissioners, could be set up to injury of the subsequent purchasers of the stock who became *bonâ fide* holders of the same, without participation in, or notice thereof. p. 66.

The law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. p. 67.

What defects in pleading are, and are not, cured by verdict. p. 67.

The condition of an official bond, that the officer who gives it, shall "well and truly" execute the duties of his office, includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskilfully; if they are violated from want of capacity, or want of care; they can never be said to have been "well and truly executed."[1] p. 69.

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[1] Union Bank *v.* Forrest, 3 Cr. C. C. 218; Rochester City Bank *v.* Elwood, 21 N. Y. 88.