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.

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

Minor v. Mechanics' Bank.

The officers of a bank are held out to the public, as having authority to act according to the general usage, practice and course of their business; and their acts, within the scope of such usage, practice and course of business, would, in general, bind the bank, in favor of third persons, possessing no other knowledge.[1] p. 70.

No act or vote of the board of directors of a bank, in violation of their own duties, and in fraud of the rights and interests of the stockholders of the bank, will justify the cashier of the bank in acts which are in violation of the stipulation in his official bond, "well and truly" to execute the duties of his office. Acts done by a cashier, under the authority of such a vote, or of a usage permitted by the directors, in violation of the trusts assumed by them, are on the responsibility of the cashier, and of his sureties. p. 71.

The official bond of a cashier must be construed to cover all defaults in duty which are annexed to the office, from time to time, by those who are authorized to control the affairs of the bank; and the sureties in the bond are presumed to enter into a contract, with reference to the rights and authorities of the president and directors, under the charter and by-laws. p. 73.

*47] On a joint and several bond, the plaintiff may sue one or all of the obligors; *but in strictness of law, he cannot sue an intermediate number; he must sue all or one. But if such error be not taken advantage of, by plea in abatement, it is waived, by pleading to the merits. p. 73.

According to modern decisions, a *nolle prosequi* does not amount to a *retraxit*, but simply to an agreement not to proceed further in that suit, as to the particular person or cause of action to which it was applied. p. 74.

In an action on a joint and several bond, some of the parties' sureties severed in their pleadings from the principal, and a trial and verdict were had against them; afterwards, the principal was called upon to plead, and did so; judgment was then entered against the sureties; and a *nolle prosequi* entered against the principal; to this judgment, or the proceedings, no exception was taken in the court below, nor was a new trial asked by the sureties: The court held, that there is no decision exactly in point to the case; that there is no distinction between the entry of a *nolle prosequi*, before, and the entry after judgment, as applicable to this case. The decisions of the courts of the United States, upon this proceeding, have been on the ground, that the question is matter of practice and convenience. p. 75.

When the defendants sever in their pleadings, a *nolle prosequi* ought to be allowed against one defendant: it is a practice which violates no rules of pleading, and will generally subserve the public convenience. In the administration of justice, matters of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice. p. 80.

ERROR to the Circuit Court for the District of Columbia. An act of congress was passed on the 16th of May 1812, entitled, "an act to incorporate a bank in the town of Alexandria, by the name and style of the Mechanics' Bank of Alexandria;" which institution soon afterwards went into operation; subscriptions for filling up the capital stock of the corporation and bank having been opened in the town of Alexandria, on the first Monday in June 1812, under the direction of fifteen commissioners, appointed for that purpose. On the 3d of September 1817, Philip H. Minor was elected cashier of the bank; and on the same day, by a resolution of the board of directors, it was ordered, "that the present officers of the bank do the whole duties of the bank."

In the office of cashier, Philip H. Minor was the successor of William Patton, jr., who died in August 1817; and before his appointment as cashier, Philip H. Minor (who had, several years preceding, served as an officer of the bank, for some time as discount clerk, and afterwards as book-keeper), had, in March 1817, been appointed teller for one year, ending in March 1818, from the time of his appointment; and had given approved bond and security, conditioned that he would well and truly execute the duties of the office of teller. After the appointment of Philip H. Minor, in September

[1] Case *v.* Bank, 100 U. S. 454.

1817, to be cashier of the bank; and the order of the board, on the same day, relative to the whole duties of the bank being performed by the then officers of the bank; no renewal of the appointment *of teller was made, and he usually performed the duties of cashier and teller. On [*48
the 19th day of March 1818, Philip H. Minor, and the plaintiffs in error, executed a joint and several bond, in the sum of $20,000, which contained the following condition:

"Whereas, the above-bound Philip H. Minor, hath been duly elected to the office of cashier of the Mechanics' Bank of Alexandria, the conditions of the above obligation are such, that if the above-bound Philip H. Minor shall well and truly execute the duties of cashier of the Mechanics' Bank of Alexandria, then this obligation to be void, but otherwise shall remain in full force and virtue in law.

PHILIP H. MINOR, (L. S.)
GEORGE MINOR, (L. S.)
D. MINOR, (L. S.)
WILLIAM MINOR, (L. S.)
SMITH MINOR, (L. S.)"

In the circuit court of the district of Columbia, for the county of Alexandria, the defendants in error instituted an action of debt upon this bond, against all the obligors; and the declaration filed in the same, was for the penalty, without taking notice of the condition. *Oyer* of the bond and condition having been prayed, &c., the defendants, being the sureties of Philip H. Minor, to wit, George Minor, Daniel Minor, William Minor and Smith Minor, pleaded joint pleas, separate from Philip H. Minor, the cashier of the bank. The substance of these pleas was as follows:

1. The Mechanics' Bank was not competent to sue, because the commissioners, who, by the act of incorporation, were authorized to open and take subscriptions to the capital stock of the company, and who took the subscriptions, had colluded with the subscribers to the stock, and that $180,000 of the stock had been fraudulently subscribed; and that an election for directors of the bank was fraudulently and illegally held, by which the persons named as commissioners were elected the directors of the bank; the votes of the fraudulent holders of the stock, amounting to $180,000, having been taken at the said election; that afterwards, the sums paid by the fraudulent or collusive holders of the $180,000 stock, were, by the president and directors, paid back to them; and thereby the capital was diminished to $320,000; and by the said proceedings, the capital stock of the bank was reduced below $500,000, as was collusively held out *to the public; [*49
without this, that the plaintiffs, the obligees in the bond, or any other person whatsoever, at the time and times of making the said bond, and of commencing the suit thereon, or at any time whatsoever, used, claimed or exercised, or yet use, claim or exercise, the name and style, privileges and capacities, of the said supposed corporation, or ever claimed to compose the same, otherwise, or by any other ways or means, or in any other manner or form whatsoever, than in virtue of the said subscription, conducted and concluded as aforesaid; and so the said defendants say, the said supposed writing obligatory, in manner and form aforesaid made, is utterly inoperative and void in law; and this they are ready to verify, &c.

2. The second plea stated, that the defendants ought not to be charged,

&c., because the plaintiffs demand the said debt, and bring this action, as pretending and claiming to be a corporation aggregate, in and by virtue of the act of congress, mentioned in the first plea, by the name of the Mechanics' Bank of Alexandria, to be composed of the subscribers to the said Mechanics' Bank of Alexandria, which subscribers were not in being at the time of the passing of the said act, but were to be composed of such persons only, as thereafter might subscribe thereto, according to the provisions of the act; whereas, the subscriptions were not taken according to the said provisions, so as to entitle the persons pretending to be subscribers to the said bank, and their successors and assigns, to compose the said corporation, wherefore, there was not any person authorized, or lawfully competent, to take the bond, which is the subject of this suit; nor was there any such person, at the commencement of this suit, capable of instituting and prosecuting the same, but that the said persons did, unjustly and illegally, arrogate to themselves to compose the said corporation, without the capital stock having been filled by subscription, or the supposed corporation having been composed of actual subscribers to the bank, pursuant to the directions of the said act of congress, or other lawful warrant whatsoever, contrary to the purview and effect of the said act of congress; and so the defendants say, that the said writing obligatory was, at the time of making the same, and is, utterly void in law, &c.

3. The third plea alleged, that the cashier had well and truly performed the condition of the bond, according to the tenor and effect, and the true intent and meaning of it.

4. The fourth plea alleged, that the cashier had performed the condition of the bond, "to the best of his ability, skill and judgment," without any fraud, deceit, or wilful default or breach of duties, whatever.

*50] 5. The fifth plea alleged, that the cashier had performed his *duties, in obedience to, and in pursuance of, the rules, orders, usages and customs of trade and business, ordained, established and practised in the bank, by authority of the president and directors thereof.

6. The sixth plea asserted, that although the duties of the cashier had not been performed by him, yet the non-performance was by the wrong, connivance and permission of the president and directors of the institution.

7. The seventh plea stated, that the bank had not been damnified by the acts of the cashier.

8. The eighth plea was, that although the bank was damnified by the acts of the cashier, yet it was by the wrong and connivance of the president and directors, &c.

9. The ninth plea stated, that the business and affairs of the company, and the conduct and duties of the cashier, were performed under the regulation and management of the president and directors, who had been chosen according to the provisions of the act of incorporation; and if, at any time, the corporation has sustained damage, since the making of the writing obligatory, by reason of any matter contained therein, it has been by the wrong, connivance or permission of the said president and directors.

To the first and second pleas, the plaintiffs below put in general demurrers, and on each of the seven remaining pleas, issue was taken by general

replications; all precisely in the same terms, as follows: "And the said Mechanics' Bank of Alexandria, by Thomas Swann, their attorney, say, they ought not to be precluded, &c., because they say, that the said cause of action, in the declaration mentioned, did accrue as in the said declaration and breaches are set forth; without that, that the matters set forth in the said plea, are true; and this they pray may be inquired of by the country, and the defendants likewise." But at the next term, the plaintiffs withdrew these general replications as to the 3d and 4th pleas; and to these two pleas put in special replications, leaving the issues on the remaining five to stand on the general replications and issues as above. The replications thus put in to the 3d and 4th pleas, and rejoinders of the defendants taking issue upon the same (being precisely in the same terms, *mutatis mutandis*, to each), were as follows:

"And the said Mechanics' Bank of Alexandria, by Thomas Swann, their attorney, say, that they ought not to be precluded from having and maintaining their action aforesaid against the said defendants, George Minor, Daniel Minor, William Minor and Smith Minor, by anything alleged by the said defendants in their third plea, pleaded as aforesaid: because they say, *that the board of directors of the said Mechanics' Bank of Alexandria, in pursuance of the authority granted to them by the act of congress, incorporating the said bank, did duly make and declare sundry by-laws for the government of the said bank, its officers and affairs, and among other laws so made and declared as aforesaid, they did enact and declare, in substance, as follows, to wit: [*51

Section 2d, article 5th. It shall be the duty of the cashier to countersign at the bank, all the bills or notes to be signed by the president, by order of the directors; carefully to observe the conduct of the persons employed under him; duly to examine into the settlement of the cash-account at the bank; count the money deposited in the vaults, every evening; compare the amount thereof with the balance of the cash-account of that day, and in case of disagreement, report the same to the next meeting of the directors; to see that all deeds appertaining are duly recorded; and to do and perform all other duties that may, from time to time, be required of him by the president or board of directors relative to the affairs of the institution.

Article 6th. It shall be the duty of every other officer, clerk and servant of the bank, to do and perform all other duties that may, from time to time, be required of them respectively by the president and cashier; and in no case to divulge the transactions of the bank.

Article 8th. That no officer of the bank, the president excepted, shall leave the bank, after it closes, until the cashier's account shall be found to agree, or if it does not agree, until a strict examination be made to discover the error.

Section 3d, article 3d. That no discount shall be made, without the consent of a majority of the directors present; nor shall any reason be required by the directors to each other, nor assigned to the public, for refusing discounts.

Which said by-laws, so made, enacted and declared as aforesaid, were, at the time of the sealing and delivery of the writing obligatory in the declaration mentioned, in full force and effect. And the said plaintiffs say,

that the said Philip H. Minor, in the said writing obligatory mentioned, was duly appointed cashier of the said Mechanics' Bank of Alexandria; and in virtue of his said appointment, did accept the office of said cashier; and on the day of the date of the said writing obligatory in the declaration mentioned, did thereupon enter upon the duties of the said cashier; and the said plaintiffs further say, that the said Philip H. Minor did not well and truly execute the duties of the said Mechanics' Bank, as cashier of the said bank, according to the true intent and meaning *of the condi- *52] tion of the said writing obligatory, but violated his duty as cashier aforesaid, and broke the condition of the said writing obligatory, in the following instances, that is to say:

1. That during the period that the said Philip H. Minor acted as cashier of the said Mechanics' Bank, under the writing obligatory, as aforesaid, he, the said Philip, as cashier aforesaid, received into his custody and keeping the moneys of the said bank, amounting to very large sums, that is to say, amounting altogether to $500,000 and upwards; which said moneys, so received as aforesaid, the said Philip, although often required, hath failed to account for, or to pay over to the said bank, or to make a correct report of the same, from time to time, to the board of directors of the said bank.

2. And further, that he, the said Philip, during the period aforesaid, and in his capacity of cashier aforesaid, wrongfully, and contrary to the duty of his office of cashier aforesaid, did waste, and suffer to be wasted, of the moneys of the said bank, in his care and custody, as cashier aforesaid, the sum of $30,000 and upwards, whereby the same became entirely lost to the said bank.

3. And the plaintiffs further say, that the said Philip, during the period aforesaid, and in his capacity of cashier aforesaid, wrongfully, and contrary to the duty of his office of cashier aforesaid, and without the authority of the said bank, did apply and appropriate, of the proper money of the said bank in his care and custody, as cashier aforesaid, to his own proper use, the sum of $5728, and to the use of Thomas J. Minor and himself, the said Philip H. Minor, the further sums of $3179.00, 1898.63 — 5077.63

so that the said sums were entirely lost to the said bank.

4. And the plaintiffs further say, that the said P. H. Minor, during the period aforesaid, and in his capacity of cashier aforesaid, wrongfully, and contrary to the duty of his office of cashier aforesaid, and without the authority of the said bank, did pay away, and did suffer and permit to be paid away, of the proper moneys and funds of the said bank in his care and keeping, as cashier aforesaid, to Jabez B. Rooker, divers sums of money, amounting altogether to the sum of $4967.30; and to one Francis Adams, divers others sums, amounting altogether to the sum of $1884.18; and to William F. Thornton, divers other sums of money, amounting altogether to the sum of $7407.25; and to Benjamin G. Thornton, divers other sums of money, amounting altogether to the sum of $4810.74; and to Lewis *Hipkins, *53] the sum of $2375; and to Robert Young, divers other sums of money, amounting altogether to the sum of $9294.44; so that the said several sums of money were entirely lost to the said bank.

5. And the said plaintiffs further say, that the said Philip H. Minor, dur-

ing the period aforesaid, and in his capacity of cashier aforesaid, and without the authority of the said bank, did indorse upon a certain check, drawn by Lewis Hipkins upon the said Mechanics' Bank, in favor of "note in city or bearer" for $3000, that the same was "good;" when in fact and in truth, the said Lewis Hipkins had no money or funds in the said Mechanics' Bank, at the time of the said indorsement, to pay the said check, nor has he, at any time since, had in the said bank any money or funds to pay the said check, so indorsed as aforesaid, and the said bank have actually paid and taken upon themselves the payment of the same.

7. And the said plaintiffs further say, that Benjamin G. Thornton, on the 18th day of December 1818, drew a certain bill or draft upon a certain bank in the state of Ohio, called the Bank of New Lancaster, which bill or draft was in substance as follows:

"Alexandria, December 18, 1818. Cashier Bank of New Lancaster, Ohio. Pay to the order of W. F. Thornton, ten days after sight, four thousand seven hundred and fifty dollars, and charge the same as per advice, to yours, &c. B. G. Thornton."

And the said plaintiffs say, that the said Philip H. Minor, while he acted as cashier aforesaid, under the writing obligatory aforesaid, wrongfully, and contrary to the duty of his office of cashier aforesaid, and without the authority of the said bank, did advance and pay, upon the credit of the said draft or bill, to William F. Thornton and Lewis Hipkins, the amount of the said draft, that is to say, the sum of $4750; by means of which said advancement, so made as aforesaid, the said sum has been entirely lost to the said bank.

8. And the said plaintiffs further say, that the said Philip H. Minor, while he acted as cashier aforesaid, under the writing obligatory aforesaid, wrongfully, and contrary to his duty as cashier, and with a view to deceive and mislead the board of directors of the said bank, did make sundry false and erroneous entries in the books of the said bank, in his care and custody as cashier aforesaid; and among others, the following, to wit, a charge against the Bank of Alexandria, of the date of the 31st of August 1818, for the fum of $1791; and another against the Bank of Potomac, of the date *of the 31st of August 1818, for the sum of $2581.25; and another against the Bank of Washington, of the date of the 2d of March [*54
1818, for $1000; when in fact and in truth, at the periods aforesaid, there was nothing due from the said last-mentioned banks to the said Mechanics' Bank; by means of which said false entries and charges, the said Mechanics' Bank have lost the said several sums of money. All which said several matters and things the said plaintiffs are ready to verify. Wherefore, &c.

To these pleas, the plaintiffs in error put in the following replication: "And the said defendants, George Minor, Daniel Minor, William Minor and Smith Minor say, that the said Mechanics' Bank of Alexandria ought not to have or maintain their aforesaid action against the said defendants, by reason of anything by the said Mechanics' Bank of Alexandria, in their said replication to the said third plea of the defendants, above, in replying, alleged; because they say, that the said Philip H. Minor, in the said plea and replication named, did not violate his duty as cashier aforesaid, and break the said condition of the said writing obligatory, in the instances by the said Mechanics' Bank of Alexandria, in their said replication above

pleaded and alleged, nor in any of them, with or by means of any fraud, or deceit, or wilful default whatsoever ; and this they pray may be inquired of by the country. And the said Mechanics' Bank of Alexandria in like manner."

At the same term, the demurrer to the first and second pleas, and the issues on the remaining seven, between the plaintiffs and the four sureties, were respectively argued and tried ; the first and second pleas were adjudged insufficient, on general demurrer ; the issues were found for the plaintiffs, and damages, in gross, upon all the issues and breaches, assessed against the four sureties, at $8607.30 ; and upon the motion of the plaintiffs, a rule was then laid on the principal obligor and co-defendant, Philip H. Minor, to plead to issue on the morrow. In compliance with which rule, he did, within the time prescribed, plead five several matters in bar ; the same, *mutatis mutandis* as the third, fourth, fifth, seventh and ninth of the aforesaid pleas, put in by the co-defendants, his sureties. A day was given at the next ensuing term, to the plaintiffs, to reply ; at which term, the plaintiffs took a judgment on the verdict against the four defendants, with whom the several issues had been tried as aforesaid ; and then entered a *nolle prosequi* as against the co-defendant, Philip H. Minor, who thereupon recovered judgment for costs against the plaintiffs.

On the trial of the cause in the circuit court, a bill of exceptions was taken to the opinion of this court, upon certain *instructions which *55] the court was requested to give to the jury. The court instructed the jury, according to the expressed desire of the plaintiffs below, except as hereafter stated, but refused to charge the jury, as requested by the counsel of the defendants. The instructions given by the court, on the motion of the plaintiffs' counsel, and on the evidence given in the cause, were :

1. If the jury, from the evidence aforesaid, should be of opinion, that the said Philip H. Minor, upon his leaving the Mechanics' Bank of Alexandria, that is to say, on the 9th day of March 1819, failed to pay over, or to account to the said bank for, any portion of the moneys of the said bank, received by him as cashier of the said bank, while he acted as cashier of the said bank, under the writing obligatory in the declaration mentioned, then, the jury may and ought to infer, that the said moneys, so unaccounted for, were wilfully wasted by the said Philip H. Minor, or applied to his own use ; and that, under such circumstances, the defendants are liable to the bank, for the moneys which he so failed to pay over, or account for, to the said bank.

2. And the said plaintiffs requested the court further to instruct the jury, that if, from the evidence aforesaid, they should be of opinion, that the said Philip H. Minor, while he acted as cashier aforesaid, under the writing obligatory aforesaid, did wilfully pay or apply, or did, knowingly and wilfully, suffer or permit to be paid away or applied to the use of Thomas J. Minor and himself jointly, or to himself individually, any portion of the funds or moneys of the said bank, without the authority of the board of directors of the said bank, so that the said sums, or any part thereof, were lost to the said bank ; that the said defendants are liable for the said moneys or funds so paid away, or applied and lost.

3. And the said plaintiffs prayed the court further to instruct the jury, that if, from the evidence aforesaid, they should be of opinion, that the said

Philip H. Minor, while he acted as cashier aforesaid, under the writing obligatory aforesaid, wilfully paid away or appropriated, or knowingly suffered or permitted to be paid away, or appropriated to the use of Jabez B. Rooker, William F. Thornton, Benjamin G. Thornton, Lewis Hipkins and Francis Adams, or to either of them, the moneys and funds of the said bank, without the authority of the board of directors of the said bank, so that the said moneys or funds, or any part thereof, were entirely lost to the said bank; then the said defendants are liable for the said moneys so paid away, or appropriated, and lost.

Upon the first and second issues, being the issues under the *third and fourth pleas—and upon the third, being the issue joined on the [*56 fifth plea, the court gave the instructions as prayed for, by the counsel for the bank. Upon the third issue, being the issue joined in the fifth plea, the court gave the first instruction, with the addition of the following words—"unless such failure to pay over, or account for, the money so received, by the said Philip H. Minor, was in obedience to, and in pursuance of, the directions, rules, orders, usages and customs of trade and business, ordained, established and practised, in the said bank, by the authority of the said president and directors."

Upon the fourth issue, being the issue joined under the sixth plea, the court gave the instructions prayed for, adding in each instruction, after the words "directors of the said bank," the words "and without the wrong, connivance or permission of the said president and directors."

Upon the fifth issue, being the issue joined in the seventh plea, the court gave the first instruction, adding the words, "if the jury should be also satisfied, by the evidence, that moneys, which the said Philip H. Minor so failed to pay over, or account for, were thereby lost to the bank;" and upon this issue also, the court gave the second and third instructions.

Upon the sixth and seventh issues, the court gave the second and third instructions, adding the words, to make them applicable, to the fourth issue; and upon the sixth issue, the court also gave the second and third instructions, adding, in each instruction, after the words "directors of the said bank," the words, "and without the wrong, connivance or permission of the said president and directors."

The counsel for the defendants, then moved the court to instruct the jury: 1. That if it were the established usage and practice of the said bank, that the cashier might, in his discretion, permit customers to overdraw, and to have checks and notes charged up, without present funds in bank; and for the cashier to receive and pass, as cash, checks and drafts upon other banks; and if the said balances, so appearing against the several persons above charged on the books of said bank, arose out of the exercise of such discretion, by the said cashier, and in the course of the ordinary transactions of the said bank, and pursuant to established usage and course of business there adopted, and personally known to the said president and directors, and practised and continued, with their knowledge, for a series of years, from the commencement of the bank, to the termination of the said Philip H. Minor's cashiership; though the existence of such balances, or the particular circumstances attending them, were not formally communicated to the board of directors, *the jury may infer the appro- [*57

bation, assent and acquiescence of the said president and directors, as to such usage and the course of business.

2. That if the said balances, appearing against the several persons above charged on the books of said bank, arose in the course of the ordinary transactions of said bank, pursuant to the established usage and course of business there adopted, and known to the president and directors, and expressly and tacitly acquiesced in, and approved by them; or if the said president and a majority of the directors, were personally acquainted with such usage and course of business, purposely connived at the same, and declined investigation, then, the jury may infer, that the same were approved and permitted by the said president and directors, though no formal communications of the same were made, by the said cashier, to the board of directors, at their official meeting; and upon finding such to be the fact, the jury, as to such balances, should find for the defendants, under the issues joined on the replications to the sixth, eighth and ninth pleas. Which instructions, the court altogether overruled, and refused to give to the jury.

3. If the jury find, from the evidence, that the several officers of the said bank, annually appointed by the said president and directors as aforesaid, each gave separate bond and security, for the faithful performance of the duties of his office; that the said William Patton, so being cashier as aforesaid, died on or about the 28th of August, next ensuing his last appointment, on the 9th of March 1817; and that on the 3d day of September following, the said Philip H. Minor, having all along acted as teller, under his said appointment, as such, for one year, from March 1817, was duly appointed cashier, in the place of said Patton, and gave bond and security in the usual form, for the faithful performance of his duties as such cashier; being at the same time under bond and security for the faithful performance of his duties, as teller, for the year ending in March 1818, as above stated; that he continued to be such cashier, under his said appointment, till the 9th of March 1818, when he was again appointed cashier for one year; and on the 19th of the same month, gave the bond now in suit; that on the said 3d of September 1817, the said president and directors duly passed the said orders, of that date, appointing the said Philip H. Minor cashier as aforesaid, and directing the then officers of the bank to do the whole duties of the bank; and did not then, or any time after the said 9th day of March 1817, make any new appointment of teller; that the said Philip H. Minor, from the time of his first appointment as cashier, usually *performed
*58] the duties of teller; which duties, as well as those of cashier, were, occasionally, and frequently, during the continuance of said Minor in the office of cashier, performed by the other officers of the said bank, whilst the said Minor was absent, and otherwise occupied with the business and affairs of said bank; that the separate office of teller was established at the first institution of said bank, by the written laws and ordinances of the president and directors, as above given in evidence; that after the said president and directors ceased to appoint a distinct person as teller, as aforesaid, all the distinct functions and duties of teller, and the forms of keeping the accounts and transacting the business by the cashier, or some other officer of said bank, in the name aud capacity of teller, were pursued, the same as when the office of teller was filled by a distinct person; the practice being still continued, of placing the money of the bank, intended to answer the cur-

rent demands of each day, in the hands of the officer as teller, of keeping separate accounts of such moneys, and of all deposits, and of all payments upon checks or otherwise, in the name and capacity of teller; such accounts being distinct and separate, and in distinct and separate books from those kept in the name and capacity of cashier; and that the said board of directors, and the proper committees of the same, in their quarterly and other examinations and reports of the state and condition of said bank, and of the accounts of its officers, still kept up the distinction between the teller's and the cashier's accounts, and the teller's and cashier's money; then, that the defendants are not chargeable in this action for the conduct of said Philip H. Minor, in the execution of the duties distinctly appertaining to the office of teller, whilst he was cashier as aforesaid. Which instruction the court refused to give, the plaintiffs having offered in evidence to the jury, the following by-law of the said president and directors, to wit:—

Article fifth, in section second, of the by-laws above given in evidence; and having also offered evidence, to prove, that, after the appointment of the said Philip H. Minor to the office of cashier, on the 9th of March 1818, he did, in fact, generally perform the duties of teller, with the knowledge of the president of the said bank; from which it was competent for the jury to infer, that he, the said Philip H. Minor, as cashier as aforesaid, was required by the president of the said bank, or by the board of directors of the said bank, to perform the duties appertaining to the office of teller.

Taylor and *Jones*, for the plaintiffs in error.—1. The plaintiffs below sue in their corporate capacity, under the act of congress of May 16th, 1812, and no such corporation ever existed; it was to exist only, on the happening *of a future event. The law does not incorporate a company already formed, but provides for the erection of the corporation, upon certain conditions, and on certain forms being complied with. The demurrer admits the facts stated in the first and second pleas, and the corrupt evasions of the act prevented the corporation ever coming into existence. The obligors in the bond were not, thereupon, estopped, as the bond was given to supposed or fictitious persons, and not to an existing corporation; and there was not one *in esse* to take the bond. An estoppel cannot be alleged against an act of parliament. 1 Chit. Pl. 435; Com. Dig., Abatement, 16; 3 Instructor Clericalis 89; Story's Pl. 24. Dealing with a pretended corporation, does not preclude a party from denying its existence; it must have existed *de jure*. It is no objection to the matter in the first and second pleas, that they are not pleaded in bar; a plea that goes to show that there never was such a person as the plaintiff, is a plea in bar. 1 Bos. & Pul. 44; 1 Chitty 425. The general rule that sealed instruments cannot be opened, has exceptions, and in cases of illegal and fraudulent considerations, and considerations *ex turpe causâ;* a fraud which is injurious to the public, cannot be precluded by any shield of law. 2 Wils. 347; 2 T. R. 171. It is not necessary to resort to a *quo warranto*, to determine the existence of the corporation. The defendant in an action on a promissory note, may call upon a corporation, if plaintiff, to show its charter, and the same principle will apply in this case. A *quo warranto*, or *mandamus*, would be proper, if the corporation had ever existed, but that was not the [*59

fact in this case; and it is not an answer to the course of proceedings, here, that it would multiply actions, for such would not be the fact.

2. As to the effect of the *nolle prosequi*. The action is upon a joint and several bond, and the obligors are sued jointly. The sureties appeared, and took a separate defence, and a verdict was obtained against them. The principal pleaded, after being ruled; and at the subsequent term, a *nolle prosequi* was entered against him, and a judgment was taken against the sureties. The proceeding was erroneous. Upon a joint and several bond, all the parties must be sued together, or each must be sued separately; and it is error, to sue less than all, unless the suit be against one only. 3 T. R. 782; 1 Hen. & Munf. 62; 3 Munf. 187; 2 Maule & Selw. 23; 2 Rand. 446, 478, 174, 313; 2 Day 387; 5 Munf. 556; 1 Wms. *Saund. 291; vol. 4, 207, n. 2; 91, note 4; 1 H. Bl. 108; 1 Bos. & Pul. 670; 1 Chitty 32, 33, 546. If a judgment could not be obtained against four obligors, on a bond given by five, in a suit so instituted, it cannot be obtained by the entry of a *nolle prosequi* against one. 1 Saund. 207; 1 Chit. Pl. 35, 38, 546; *Jaffray* v. *Frebain*, 5 Esp. 47; *Chandler* v. *Parkes*, 3 Ibid. 76. The cases which impugn the doctrine contended for, are *Noke* v. *Ingham*, 1 Wils. 89; 5 Johns. 160. If the parties to a joint and several bond are joined in an action, they never can be separated; and if one is discharged, all are discharged, except in cases of infancy and bankruptcy. 1 H. Bl. 108; 1 Bos. & Pul. 630. The *rationale* of the rule is, that the party having made it a joint contract by his suit, cannot afterwards make it a several contract. 3 Taunt. 307; 4 Ibid. 468.

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The most important inquiry in this case, is, upon the instructions given by the court.

Swann and *Wirt*, Attorney-General, for the defendants.—The instructions first given, sustain the action, and sweep away the defence, taking it entirely from the jury. The words "well and truly" in the condition of the bond, mean only integrity, not capacity (10 Johns. 271); and the instruction given considers the words as requiring skill. The cashier acted according to the instructions of the president and directors, and to the usage of the bank. The instruction given precludes mistake, and denies that it constitutes a defence.

The demurrers to the first and second pleas, were not on the ground of an admission of the facts, but the pleas were considered invalid. It was not obligatory on the bank, that the capital should be $500,000, as the expression that it "may" consist of $500,000, authorizes it to be less, if it shall be deemed proper; and even admitting the collusion charged, as to the creation of a false capital, to the amount of $180,000, the remaining capital of $320,000 was sufficient, under the charter. The pleas are also insufficient, as, although collusion is set up, there is no certainty in the charge or allegation of the persons concerned in it, or the place of the same. The whole purpose of the law is, to limit the amount of trading by the bank; and it is not a fair construction of the act of incorporation, to interpret the terms "may consist" into "must consist." The company went into existence in 1812, and the cashier was appointed in 1817, after many successive years of business by the bank, which could not be affected by the proceedings of 1812.

2. The plaintiffs in error are estopped, by having executed this *bond to the bank, from denying the existence of the corporation. [*61
Willes 11, 12; 14 Johns. 238. Where the matter which constitutes the ground of an alleged estoppel is new, it is necessary to state it by plea, but not so, when it is contained in the declaration. 1 Chit. Pl. 575.

The proper mode of contesting the existence of the corporation, would have been by an information, in the nature of a *quo warranto;* and it does not rest with every one dealing with a corporation, to inquire, when called upon to comply with his contract, whether it exists? It was not necessary to set out breaches, until the defendants, the obligors in the bond, had alleged performance, and then the pleas are insufficient; no breaches need be set out. 1 Chit. 598; 1 Saund. 103; Archb. 262; 2 Chit. 481. But if there are any omissions or defects in the pleadings, they are cured by the verdict, according to the laws of Virginia.

The instructions given by the court, upon the replication, and on the evidence, were such as the court were bound to give, and were in strict conformity to the facts; and if the court refused to give the instructions asked for by the plaintiffs in error, they did so upon the authority of the by-laws of the bank, and the orders of the board of directors relative to the duties of the officers of the bank. Because the custom and practice might have been to overdraw the bank, and for its officers to abuse their trust, was this custom to excuse the conduct of the cashier?

As to the effect of the *nolle prosequi*, all the cases referred to by the plaintiffs in error, are cases of joint contract, and where the trial was joint. But in this, the four sureties severed from the principal, and, on their own choice, went to trial alone, upon pleas put in separate from the principal. The verdict has been given against the plaintiffs in error, on a trial of their own selection; and they suffered judgment to be entered against them, without any objection, before the principal in the bond had appeared and pleaded. The entry of a *nolle prosequi*, does not admit that the plaintiff had no cause of action, it is not a *retraxit* or a release, and does not preclude the commencement of another suit. 1 Wms. Saund. 207; Arch. Pract. 87; 1 Saund. 291; 2 Maule & Selwyn 444; 1 Wils. 89; 5 Johns. 160.

Although the law is well stated to be, that a suit on a joint and several bond must be brought against all, or against one, and that you cannot sue four, when there are five joint obligors, yet the objection must be taken by plea in abatement; and if there is no such plea, and judgment, the consent of the defendants will be inferred. The following cases were also cited *in the argument: *Walsh* v. *Bishop*, Cro. Car. 239; Ibid. 243; [*62
Carth. 98.

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Columbia, sitting at Alexandria. The plaintiffs in error were the original defendants in the cause, and the suit is now before this court, upon the judgment of the court below, upon certain pleas of the defendants, to which there was a demurrer, and also, upon the instructions given and refused by the court, upon the trial of certain issues of fact, joined by the parties.

The action is debt upon an official bond, given by Philip H. Minor, cashier of the bank, and by four other persons, as his sureties, upon condition, that Minor "shall well and truly execute the duties of cashier" of the bank; and was originally brought against all the parties to the bond. The declaration proceeds for the penalty of the bond, without any notice of the condition, and avers, by way of breach, the non-payment of the penalty. The sureties, after *oyer* of the bond and condition (which thereby became part of the declaration), severed themselves from the principal, and pleaded nine several pleas. To the first two of these pleas, demurrers were put in; and the court below, upon consideration, gave judgment upon the demurrers in favor of the bank; and the correctness of this decision constitutes the first subject of inquiry.

Exceptions have been taken both to the matter and the form of these pleas; and if the matter of them, or either of them, might constitute a good bar to the action, it may then be necessary to consider, whether that matter is pleaded with due propriety and certainty, according to the established rules of pleading, so as to escape objection upon the general demurrer. Both of them are, in effect, though not in form, special pleas of *nul tiel corporation*. The first plea, in substance, avers, that, by the charter granted by the act of congress, of the 16th of May 1812, ch. 87, the capital stock of the bank was, by the charter, fixed and limited, to consist of $500,000 *bonâ fide;* that the whole capital stock was not *bonâ fide* filled up and subscribed for, but on the contrary, by a collusion between the commissioners, under whose direction the subscriptions were taken, and the subscribers, a large portion of the capital stock, to wit, 18,000 shares, amounting to $180,000, were filled up, by false and colorable subscriptions; the ostensible subscribers, after payment of the first instalments, were fraudulently permitted to withdraw the same; and future payments by them were dispensed with, while they were still rated and held out as stockholders, for
*63] the purpose of *colorably filling up the subscription of the whole capital stock, and electing a board of directors; and that, in this manner, and by these means, and by no other, the bank was put into operation. This plea is meant to rest upon two grounds, to sustain its legal propriety. First, that the subscription of the whole capital stock of $500,000, was a condition precedent to the putting of the bank into operation as a corporation. Secondly, that the collusion between the commissioners and the subscribers, for the 18,000 shares, being fraudulent, made their subscriptions a mere nullity.

Various answers have been given at the bar, to the legal sufficiency of the matters thus pleaded. In the first place, it is said, that the defendants are estopped, by the bond, to deny the legal existence of the corporation; in the next place, that the charter does not make the subscription of the whole capital stock, a condition precedent to the establishment of the bank; in the next place, that the question, whether the bank was regularly, and *bonâ fide*, put into operation, is matter not inquirable into, in a suit of this nature, but only upon a *quo warranto*, instituted by the government; and in the last place, that the whole stock being, in fact, subscribed, the fraudulent intention and acts of the parties, did not make the subscription of the 18,000 shares a nullity. Let us, then, consider what is the true construction of the charter itself, upon the points raised at the argument, supposing it to

have been (which in terms it is not) incorporated into the plea, and therefore, judicially before us. The first section of the act of the 16th of May 1812, ch. 87, provides, "that the subscribers to the Mechanics' Bank of Alexandria, their successors and assigns, shall be, and hereby are created, and made a body politic, by the name and style of the Mechanics' Bank of Alexandria; and by such name and style, shall be, and are hereby made able and capable in law, to have, purchase, &c., lands, &c., and the same to sell, &c., to sue and be sued, &c.; subject to the rules, regulations, restrictions, limitations and provisions, hereinafter prescribed and declared." In this section, there is no limitation as to the number of the subscribers necessary to constitute the corporation. The subscribers, whether many or few, are declared to be incorporated; and unless there be some restriction or limitation elsewhere in the act, it is most manifest, that the court cannot intend that any particular amount of subscriptions is indispensable.

The second section provides, "that the capital stock of said corporation, *may* consist of $500,000, divided into shares of $10 each, and *shall* be paid in the following manner, *that is to say: one dollar on each share, at the time of subscribing, one dollar on each share, at sixty days, and one dollar on each share, ninety days after the time of subscribing; the remainder to be called for, as the president and directors may deem proper; provided they do not call for any payment in less than thirty days, nor for more than one dollar on each share, at any one time." The argument of the defendants is, that "may," in this section, means "must;" and reliance is placed upon a well-known rule in the construction of public statutes, where the word "may," is often construed as imperative. Without question, such a construction is proper, in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject, further than that that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the legislature in the enactment. The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions. Now, we cannot say, that there is any leading object in this charter, which will be defeated by construing the word "may" in its common sense, as importing a power to extend the capital stock to $500,000, and not an obligation, that it shall be that sum and none other. It is by no means clear, from this section, that the legislature contemplated that there should be a capital of $500,000, on which the bank was to commence, or carry on its operations. On the contrary, three instalments only are required to be absolutely paid in, and the residue of the capital stock is to be paid in, only when the president and directors may deem it proper. So that the capital stock, except at the discretion of the board, may never extend beyond the amount of $150,000, for any practical purposes, either as security to the public, or as the basis of discounts. Now, the plea itself does not attempt to deny that all but 18,000 shares of the stock were, *bonâ fide*, subscribed for; so that, for aught that appears, the capital stock, on which the bank carried on its operations, may have far exceeded that sum. It has been urged, that public policy requires such an imperative construction of the clause, for the public security. But it is a sufficient answer to that suggestion, that no such public policy is avowed, or can be inferred, from the general terms of the act. When the legislature [*64

intends to restrict the capital stock of a bank, or to require any portion of stock or stockholders to be indispensable for its legal existence and operations, it is not uncommon to incorporate such a restriction into the charter. The omission to do so, is quite as *significant, that the legislature did not deem such a restriction subservient to any manifest public policy. The legislature might well presume, after prescribing the maximum to which the capital stock should extend, that the actual capital to be employed might safely be left to the discretion of the stockholders, or its agents. The 13th section of the charter contains provisions for the security of the public against over-issues by the bank, and if any such restriction had been intended, as the argument supposes, it would naturally there have found a place. It declares, that no stockholder shall be answerable for any losses, deficiencies or failure of the capital stock, for any larger sum than the amount of the stock belonging to him ; excepting, that if the total amount of the debt of the bank shall exceed twice the amount of its capital stock, over and above deposits, then the directors shall, in their private capacities, be liable for the excess ; and if the directors shall not have property to pay the amount of excess, then every stockholder shall be liable for their deficiencies, in proportion to their shares in the bank. Whether, therefore, the capital stock be great or small, if there be debts due from the bank, exceeding twice the amount of the capital stock ; which may fairly be construed to mean the capital stock actually paid in ; the stockholders become ultimately liable for the excess ; and this liability furnishes, if not an ample, at least a reasonable security against the public evils, which the argument supposes might result from not requiring the whole capital to be subscribed for. At all events, we cannot perceive any clear legislative intention to make the subscription of the whole capital stock, a condition precedent to the corporate existence of the bank, and unless it is so made by the charter, the matter of the plea falls, and cannot sustain the defence.

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If, however, this interpretation of the charter could not be supported, and the subscription of the whole capital stock were a condition precedent, the result, so far as the first plea goes, would not be varied. The fraud and collusion asserted in that plea, if admitted in its fullest manner, does not lead to the conclusion which it seeks to establish. If the subscription were fraudulently made, with a view to evade the provisions of the charter, the law will hold the parties bound by their subscriptions, and compellable to comply with all the terms and responsibilities imposed upon them, in the same manner as if they were *bonâ fide* subscribers. It will not make the subscription itself a nullity, but it will deprive the subscribers of the power of availing themselves of the same. The third section of the act manifestly contemplates cases of fraudulent subscription, and provides, "that all the subscriptions and shares obtained in consequence thereof, shall be *deemed and held to be for the sole and exclusive use and benefit of the persons subscribing, or in whose behalf the subscriptions respectively shall be declared to be made, at the time of making the same ; and all bargains, contracts, promises, agreements and engagements, in any wise contravening this provision, shall be void ; and the person, &c., subscribing, &c., shall have, enjoy and receive the share or shares respectively, &c., and all the interest and emoluments thence arising, as freely, fully and absolutely, as if they had severally and respectively paid the consideration therefor ;

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any such bargain, &c., to the contrary notwithstanding." This section seems to us conclusive upon the point. It avoids all bargains contravening the provisions in respect to subscriptions, and gives to the subscriptions the same effect as if they were *bona fide* made for the real use and benefit of the subscribers; and independently of this provision, it would be extremely difficult to maintain, upon general principles of law, that a private fraud, between the original subscribers and commissioners, could be permitted to be set up, to the injury of subsequent purchasers of the stock, who became *bonâ fide* holders, without any participation or notice of the fraud. For these reasons, we are of opinion, that the matter of the first plea, even if it had been well pleaded, would constitute no bar to the action.

The second plea is disposed of, by the construction of the charter already intimated, and is further open to fatal objections, from its deficiency of proper averments, and want of legal certainty. It makes no averment of the amount of the capital stock, or of the necessity of the whole being subscribed for, before the bank is to be put in operation. It asserts no fraudulent combination or subscription; but in the most general terms, without any certainty as to facts and circumstances, alleges, that the capital stock was not filled up by any subscription, opened and conducted in pursuance of the act, so as to entitle the subscribers to bring the action; and that the subscribers did, unjustly and unlawfully, arrogate to themselves the corporate name, style and privileges, without the capital stock having been filled up by subscription, or the corporation having been constituted and composed of actual subscribers, pursuant to the direction of the act. In point of substance, as well as form, it is bad, upon the established rules of pleading. This view of the case renders it wholly unnecessary to consider the point made as to the estoppel, and the necessity of a *quo warranto;* on which, therefore, we give no opinion.

The third and fourth pleas are intended to be pleas of general performance. The third is so, in fact, and pursues the *condition of the bond. [*67
The fourth is argumentative, and assumes a particular legal interpretation of the condition, that is to say, that the condition covers only wilful defaults, and breaches of duty, and is no security for competent skill and reasonable diligence in the discharge of duty, but only for honesty. To these pleas, special replications were filed, assigning special breaches of duty, upon which the parties were at issue, and upon this, and all the other issues in the cause, the jury returned a verdict for the plaintiffs. No exception has been taken to the sufficiency of these replications.

The fifth plea states a general performance of duty, in obedience to, and in pursuance of, the "directions, rules, orders, usages and customs of trade and business, ordained, established and practised in the said bank, by the authority of the said president and directors." It is, therefore, argumentative, and supposes that compliance with the rules, orders, usages, &c., established and practised by the president and directors, whatever they may be, whether within the scope of their power or not, would be a good and true discharge of duty. To this plea, a general replication was put in, "that the said cause of action, in the declaration mentioned, did accrue, as in the said declaration and breaches are set forth, without this, that the matters set forth in the said plea, are true," and this the plaintiffs pray may be inquired of by the country; and the defendants joined in the issue; upon

which a verdict was found in favor of the plaintiffs. An exception has been taken at the argument to this replication, upon the ground, that it ought to have assigned a special breach, and that the omission is not cured by the verdict. There is no question that the replication is not drawn with technical accuracy and correctness; and if the plea be a good plea of general performance, it is clear, both upon principle and authority, that a special breach ought to have been assigned in the replication; and the objection, if insisted upon by way of demurrer, for that cause, would have been insuperable. The reason is, that 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. A covenant or condition for general performance is broken, by any single omission of duty, and no inconvenience can arise from stating the particular breach with suitable certainty. But it does not follow, that if not so stated, the objection may be taken in any stage of the suit. The rule as to certainty in pleadings, is framed for the benefit of the parties, and may be waived by them, and in many cases, both at common law, and by the statute of *jeofails*, defects in this particular are cured by a verdict. It is true, that in *a declaration upon a covenant for general performance of duty, if no breach be assigned, or a breach which is bad, as not being in point of law within the scope of the covenant, the defect is fatal, even after verdict. Com. Dig. Plead. p. 14. But that is not the present case. Here, the declaration does assign a good breach, by the non-payment of the penal sum stated in the bond. The defendants disclose the condition of the bond upon *oyer*, and set up a general performance of it; and the replication, though inartificially drawn, puts in issue the whole matter of the defence, and denies the performance of it. The verdict has found that the condition was not performed, and consequently, upon the whole record, the non-payment of the penal sum is admitted, and the excuse for it is negatived; the replication, then, does assert a breach, though in too general a form. It ought to have assigned a special breach; but the general breach includes it, and the verdict having found the general breach, there is, upon principle, no reason shown against the plaintiff's right of recovery. It is exactly like the case of a declaration upon a general covenant of the like nature, where a particular breach ought to be assigned; and yet, if a general breach be assigned, the defect is cured, by a verdict for the plaintiff. Com. Dig. Plead. 48. The objection, then, to the replication to the fifth plea, cannot now be sustained.

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It is not necessary to notice the remaining pleas, upon which issues were joined, because a verdict has been found in all of them in favor of the plaintiffs, however liable to objection some of them may be, and particularly the seventh plea of *non damnificatus*, as an answer to the declaration. They set up special defences, and the plaintiffs were not bound to do more than traverse them.

The instructions of the court, given and refused at the trial, constitute the next subject of inquiry. It is conceded, that if the instructions given on the prayer of the plaintiffs were correct, as to the issues on the third and fourth pleas, the qualifications annexed to them by the court, in their applications to the other issues, were perfectly proper. The first instruction is, in substance, that if Minor, upon his leaving the bank, failed to pay over or

to account to the bank for any portion of the moneys of the bank, received by him as cashier, then the jury may, and ought to infer that the moneys so unaccounted for, were wilfully wasted by Minor, or applied to his own use; and under such circumstances, the defendants are liable for the same. We can perceive no error in this instruction; the presumption of a wilful waste or misapplication of the funds of the bank by the cashier, was a natural conclusion, from his failure to pay over *or account for the same. It was not put to the jury as a presumption incapable of being rebutted [*69 by evidence showing a loss by negligence or accident. If such a loss actually occurred, it was incumbent on the cashier to prove it, and his total omission to offer any such proof, which, from the nature of the case, must be more within his own power, than that of the bank, ought to lead the jury to the presumption of the non-existence of any such negligence, or accidental loss. It has been argued, that this instruction is the more material and injurious to the defendants, because it proceeds, in the latter part, upon a misconstruction of the true import of the condition of the bond. The condition, that Minor shall "well and truly execute the duties of cashier" of the bank, is said to be merely a stipulation for honesty, in the discharge of the duties, and not for skill, capacity or diligence. We are of a different opinion. "Well and truly to execute the duties of the 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 be "well and truly executed." The operations of a bank require diligence, with fitness and capacity, as well as honesty, in its cashier; and the security for the faithful discharge of his duties, would be utterly illusory, if we were to narrow down its import, to a guarantee against personal fraud only.

The remarks already made, dispose of the second and third instructions prayed for by the plaintiffs. These instructions, in substance, declare, that the sureties are liable upon the bond, for any wilful or permissive misapplication of the moneys of the bank, which the cashier knowingly made, or suffered, without authority, whereby the same moneys have been lost to the bank. There seems no ground, upon which to rest any reasonable objection to such a direction to the jury.

We may now proceed to the consideration of the three instructions prayed for, in behalf of the defendants. The first is, in substance, that if it were the established usage and practice of the bank, that the cashier might, in his discretion, permit customers to overdraw, and to have checks and notes charged up, without present funds in the bank; and for the cashier to receive and pass, as cash, checks and drafts upon other banks; and if the balances appearing against such persons charged in the books of the bank, arose out of the exercise of such discretion by the cashier, in the course of the ordinary transactions of the bank, and pursuant to the established usage and course of business there adopted, and generally known to the president and directors, practised and continued with their knowledge, for a series of years, from the commencement of the bank, to the the termination *of Minor's cashiership, though the existence of such balances, or the [*70 particular circumstances attending them, were not formally communicated to the board of directors; the jury may infer the approbation, assent and acquiescence of the president and directors, as to such usage and course of

business. The refusal of this instruction, is matter of no small embarrassment and difficulty to this court, from the terms in which it is couched, and the issues on the sixth, eight and ninth pleas, to which alone it can be properly applied. Those issues put to the jury the question, whether the acts of the cashier, whatever might be their character or kind, were, or were not, done by the wrong, connivance and permission of the president and directors of the bank. The point of the instruction is, that the established usage and practice of the bank, for a long period, known to the president and directors, does afford a presumption of the approbation, assent and acquiescence of the president and directors, as to such usage and practice; though the balances resulting therefrom, were not formally communicated to the directors. From the shape of the prayer, it is undoubtedly meant, that such usage and practice was known to the president and directors, as a board, and in their official character, and received their approbation as such. In a general view, with reference to the principles of the law of evidence, we are not prepared to admit, that such a presumption would not ordinarily arise. The ordinary usage and practice of a bank, in the absence of counter-proof, must be supposed to result from the regulations prescribed by the board of directors; to whom, the charter and by-laws submit the general management of the bank, and the control and direction of its officers. It would be not only inconvenient, but perilous, for the customers, or any other persons dealing with the bank, to transact their business with the officers, upon any other presumption. The officers of the bank are held out to the public as having authority to act, according to the general usage, practice and course of their business; and their acts, within the scope of such usage, practice and course of business, would, in general, bind the bank, in favor of third persons possessing no other knowledge. In the case of the *Bank of the United States* v. *Dandridge*, 12 Wheat. 64, the subject was under the consideration of this court; and circumstances, far less cogent than the present, to found a presumption of the official acts of the board, were yet deemed sufficient to justify their being laid before the jury, to raise such a presumption. If, therefore, the usage and practice alluded to, in the instruction, were within the legitimate authority of the board, and such as its written vote might justify, there would be no question, in this court, that it ought to have been given.

*71] *The pertinency of such a presumption, to these issues, cannot admit of dispute. But the real difficulty remains to be stated. Assuming, that the court, upon these issues, ought to have given the instruction prayed for, the question is, whether, upon the whole record, that is such an error as now justifies this court in a reversal of the judgment. If the instruction had been given, and thereupon, a verdict upon these issues had been found for the defendants, could any judgment have been given upon these issues, in favor of the defendants; or ought the judgment, *non obstante veredicto*, to have been for the plaintiffs? If it ought, then the error becomes wholly immaterial; since, in no event, could the instruction, in point of law, have benefited the defendants. Upon deliberate consideration, we are of opinion, that the pleas, on which these issues are founded, are substantially bad. They set up a defence for the cashier, that his omission "well and truly to perform" the duties of cashier, was, by the wrong, connivance and permission of the board of directors. The question then

comes to this, whether any act or vote of the board of directors, in violation of their own duties, and in fraud of the rights and interest of the stockholders of the bank, could amount to a justification of the cashier, who was a *particeps criminis*. We are of opinion, that it could not. However broad and general the powers of the directors may be, for the government and management of the concerns of the bank, by the general language of the charter and by-laws, those powers are not unlimited, but must receive a rational exposition. It cannot be pretended, that the board could, by a vote, authorize the cashier to plunder the funds of the bank, or to cheat the stockholders of their interest therein. No vote could authorize the directors to divide among themselves the capital stock, or justify the officers of the bank in an avowed embezzlement of its funds. The cases put are strong, but they demonstrate the principle only in a more forcible manner. Every act of fraud, every known departure from duty, by the board, in connivance with the cashier, for the plain purpose of sacrificing the interests of the stockholders, though less reprehensible in morals, or less pernicious in its effects, than the cases supposed, would still be an excess of power, from its illegality, and, as such, void, as an authority to protect the cashier, in his wrongful compliance. Now, the very form of these pleas, sets up the wrong and connivance of the board as a justification ; and such wrong and connivance cannot, for a moment, be admitted as an excuse for the misapplication of the funds of the bank, by the cashier.

The instruction prayed for, proceeds upon the same principle, as the pleas. It supposes, that the usage and practice of *the cashier, under the sanction of the board, would justify a known misapplication of [*72 the funds of the bank. What is that usage and practice, as put in the case? It is a usage to allow customers to overdraw, and to have their checks and notes charged up, without present funds in the bank—stripped of all technical disguise, the usage and practice, thus attempted to be sanctioned, is a usage and practice to misapply the funds of the bank ; and to connive at the withdrawal of the same, without any security, in favor of certain privileged persons. Such a usage and practice is surely a manifest departure from the duty, both of the directors and the cashier, as cannot receive any countenance in a court of justice. It could not be supported by any vote of the directors, however formal ; and therefore, whenever done by the cashier, is at his own peril, and upon the responsibility of himself and his sureties. It is anything but "well and truly executing his duties, as cashier." This view of the matter disposes of this embarrassing point, and also of the second instruction prayed for by the defendants ; which substantially turns upon the like considerations.

The third instruction prayed for, in effect, was, that the court would instruct the jury, that the defendants are not chargeable in this action for the conduct of Minor, in the duties distinctly appertaining to the office of teller, whilst he was cashier in the bank, although those duties were duly assigned to him ; because it constituted a distinct office, and the accounts and proceedings of the teller, were at all times kept distinct, and in separate books, from those of the cashier. In our judgment, this instruction was properly refused. By the fifth article of the second section of the by-laws of the bank, the duties of the cashier are generally pointed out ; and among other things, it is provided, that he shall "do and perform all other duties

that may, from time to time, be required of him by the president or board of directors, relative to the affairs of the institution." On the appointment of Minor as cashier, who had previously acted as teller, the directors passed a vote, "that the present officers of the bank, do the whole duties of the bank." From the other circumstances of the case, the inference is irresistible, that the duties of teller were, under this vote, assigned to the cashier. If so, then, the performance of these duties constituted thenceforth a part of the duties of the cashier, as such ; and as much so, as if they had been originally affixed to the office of cashier. There is nothing in the nature of the duties of teller, incompatible with those of cashier ; on the contrary, as is well known, cashiers often perform the functions of both. The circumstance, that the office of teller, and distinct accounts and books, were still kept up,

*73] does *not vary the legal result. It was a matter of mere convenience and regularity, for the government of the bank, in its own business; and probably, had no higher or other origin, than to preserve the same forms and series of accounts, which the bank had adopted at its first institution. The office of teller had a nominal, but not a real, existence ; and from the time of the union of the duties in the cashier, as such, there was a legal extinguishment of the separate official character. If the cashier had originally had the duties of book-keeper and accountant assigned to him, and in consequence thereof, had kept distinct account-books in the bank, no one would have imagined, because he kept separate account-books, as cashier, for his own convenience, or, according to the ordinary usage of banks, that he would not, under his bond, have been responsible for malconduct, in keeping the general account-books of the bank, to its loss or injury. The bond of the cashier must be construed to cover all defaults in duty, which are annexed to the office, from time to time, by those who are authorized to control the affairs of the bank ; and sureties are presumed to enter into the contract, with reference to the rights and authorities of the president and directors, under the charter and by-laws.

The remaining inquiry is, as to the effect of the *nolle prosequi*, which the plaintiffs entered against Minor, after he had pleaded, and after judgment was given against the sureties, in favor of the plaintiffs, upon all the pleadings interposed by the sureties. The pleas of Minor were, *mutatis mutandis*, the same as the third, fourth, fifth, seventh and ninth pleas, put in by the sureties ; and the question arises, whether under such circumstances (no objection to the judgment appearing to have been made by the sureties), this proceeding is an error, for which that judgment ought to be reversed. It is material to state, that the bond on which the suit is brought is a joint and several bond. Under such circumstances, the plaintiff might have commenced suit against each of the obligors, severally, or a joint suit against them all. But in strictness of law, he has no right to commence a suit against any intermediate number ; he must sue all, or one. The objection, however, is not fatal to the merits, but is pleadable in abatement only; and if not so pleaded, it is waived, by pleading to the merits. The reason is, that the obligation is still the deed of all the obligors who are sued, though not solely their deed ; and therefore, there is no variance in point of law, between the deed declared on, and that proved. It is still the joint deed of the parties sued, although others have joined in it. This doctrine is laid down, and very clearly illustrated, in Mr. Serjeant Williams's note

to the case of *Cabell* v. *Vaughan* (1 Saund. *291, note 2), where all the leading authorities are collected. If, therefore, the present suit had been brought against the four sureties only, and they had omitted to take the exception, by a plea in abatement, the judgment in this case would have been unimpeachable. Is the legal predicament of the plaintiffs changed, by having sued all the parties, and subsequently, entered a *nolle prosequi*, against one of the obligors? If not, in general, then, is there any legal difference, where the party in whose favor the *nolle prosequi* is entered, is not a surety, but a principal in the bond? not indeed, so named in the bond, but the suretyship resulting as a necessary inference from the nature and terms of the condition.

These questions must be decided by authority, if any such exist; if none can be found, then, they must be decided by analogy and principle. It may be proper, in this view, again to notice the fact, that this suit is on a joint and several bond; that the defendants severed in their pleas from the principal; that the trial of the issues (which undoubtedly ought to have been, by the regular course of practice, deferred, until the cause was at issue as to all the parties, or the steps of the law taken to bring them into default) does not appear upon the record to have been opposed, and that no motion was made in arrest of judgment, or for a postponement, until a trial of the issues upon the pleas of the principal might have been had. What would have been the proper proceedings, under such circumstances, whether to try all the issues by the same jury, and have damages assessed at the same time against all the defendants; or whether there might have been several trials, and several assessments of damages; and whether, if such several assessments had been made, and differed in amount, any, and what judgment, ought to have been entered; are points upon which the court does not think it necessary to give any opinion.

The nature and effect of a *nolle prosequi* was not well defined or understood, in early times; and the older authorities involve contradictory conclusions. In some cases, it was considered in the nature of a *retraxit*, operating as a full release and discharge of the action, and, of course, as a bar to any future suit. In other cases, it was held not to amount to a *retraxit*, but simply to an agreement not to proceed further in that suit, as to the particular person, or cause of action, to which it was applied. And this latter doctrine has been constantly adhered to, in modern times, and constitutes the received law. In cases of tort against several defendants, though they all join in the same plea, and are found jointly guilty, yet the plaintiff may, after verdict, enter a *nolle prosequi*, as to some of them, and take judgment against the rest. The reason is said to be, that the *action is in its nature joint and several; and as the plaintiff might originally [*75 have commenced his suit against one only, and proceeded to judgment and execution against him alone, so he might, after the verdict against several, elect to take his damages against either of them: *à fortiori*, the same doctrine applies where the defendants sever in their pleas. Indeed, in tort, as we shall hereafter see, it does not seem to have been denied, that cases might exist, in which, if the defendants severed in their pleas, the plaintiff might, after judgment against one, have entered a *nolle prosequi* as to the others. The doubt was, whether he could do so, before judgment, which was finally settled in favor of the right, and in such cases, where several

damages were assessed against the different defendants, the difficulty was afterwards cured, by entering a *nolle prosequi* as to all but one defendant. And in the same manner, a misjoinder of improper parties is sometimes aided. The authorities on this subject, will be found summed up with great accuracy, in a note of Mr. Sergeant Williams, to the case of *Salmon* v. *Smith*, 1 Saund. 207, note 2. In the same note, the learned editor adds, "If an action is brought upon any contract, against several defendants, who join in their pleas, and a verdict is found against them, it is apprehended, the plaintiff cannot enter a *nolle prosequi* against any of them; because the contract being joint, the plaintiff is compellable to bring his action against all the parties thereto; and he shall not, by entering a *nolle prosequi*, prevent the defendants against whom the recovery has been had, from calling upon the other defendants for a ratable contribution."

So far as this reason goes, it is inapplicable to the present case; for the defendants are entitled not only to a ratable, but a full, contribution over, for the entire sum, against the party in whose favor the *nolle prosequi* has been entered; and consequently, the *nolle prosequi* does not touch their rights. It is observable also, that the language is qualified by the words "*who join in their pleas*," which are printed in italics, and may, therefore, fairly be presumed to have been inserted, by the learned editor, *ex industriâ*, with a view to point out an implied distinction between cases, where there is a severance, and where there is a joinder in the pleas. If there be any such distinction, it is favorable to the present case; for the sureties severed in their pleas from their principal. The learned editor proceeds to state, that "If, in such actions, the defendants sever in their pleas, as, where one pleads some plea which goes to his personal discharge, such as bankruptcy, *ne unques executor*, and the like, not to the action of the writ, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others; for, with respect to the bankruptcy, the statute of 10 Ann., c. 5, makes the *other defendant, who is not a bankrupt, liable for the whole debt; and therefore, in that particular instance, the case is exactly the same, as where an action is joint and several. So, the plea of *ne unques executor*, does not deny the cause of action; but only that he is one of the representatives of the testator. When the defendants sever in their pleas, with this limitation as to the extent of the pleas, in action upon contracts, it is immaterial what is the form of the action; for the plaintiff may enter a *nolle prosequi* against any of them, before verdict, and proceed against the rest."

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The learned editor is fully borne out, in the general position here stated, by the case of *Noke* v. *Ingham*, 1 Wils. 89, to which he refers. The only question is, whether there is any such qualification upon it, as that the plea should be one going exclusively in personal discharge, and not to the merits? That is the point of real difficulty. The case in 1 Wils. 89, was upon several promises made by the defendants, as partners. One of them pleaded a former judgment; and issue being taken upon the replication of *nul tiel record*, judgment was given against him, and a writ of inquiry of damages awarded, and final judgment. The other defendant pleaded his bankruptcy, and upon this, issue was joined; and afterwards, the plaintiff entered a *nolle prosequi* as to him. Upon error brought, the principal objection was, that the *nolle prosequi*, upon a joint contract of two, was a discharge of both.

Mr. Chief Justice LEE said, "it is agreed, on all hands, that in trespass against several, the plaintiff may enter a *nolle prosequi*, as to one, and that will not discharge the other; and therefore, I cannot see, why it may no be done in this case; and I do not see, how so proper an advantage can be taken upon the statute of Anne, as to the bankrupt, as is now taken by the entry of this *nolle prosequi*." WRIGHT, Justice, was of the same opinion, and so was DENISON, Justice; and the latter added, that "the plea of the bankrupt is not a plea to the action, but only a personal discharge; but that if one defendant was to plead a plea that was to go to the action of the writ, he thought it might then have a different consideration, but that this is not the case here. This case is exactly the same, as when an action is joint and several; for the statute 10 Ann., c. 15, has made the partner, not a bankrupt, liable for the whole. This case is the very same, as to this matter of entering a *nolle prosequi*, as if it had been trespass against several defendants."

It is apparent, from this summary of the reasoning of the court, that the case turned upon the consideration, that the contract, by the operation of the statute of Anne, was several as well as joint; and all the court concurred, that under such circumstances, the *nolle prosequi* would be good, being governed, *in the analogy, to trespass, where the cause of action was several as well as joint. What was stated by DENISON, Justice, was [*77 not the exclusive ground of his particular opinion, but on a suggestion, that the case might be (not would be) different, upon a plea to the merits. Now, the general reasoning comes very close to the case at bar; for here the bond is several, as well as joint, and an action might have been maintained severally against the defendants; and what is not immaterial to be considered, all the parties were retained, who had joined in their pleas, and between whom there existed a right of mutual contribution. Even in the case of bankruptcy, the practice is in England, to require all the joint contractors to be sued, as is proved by the case of *Bevil* v. *Wood*, 2 Maule & Selw. 23, which makes it really less strong than a joint and several contract.

The case of *Moravia and another* v. *Hunter & Glass*, 2 Maule & Selw. 444, which has been relied on at the bar, was *assumpsit* against four defendants, two of whom were not served; D., one the other defendants, pleaded: 1. *Non assumpsit:* 2. A special plea of bankruptcy: 3. A general plea of bankruptcy; as to whom the plaintiff entered a *nolle prosequi*. The other defendant pleaded *non assumpsit*, and a verdict was found against him. The form of the *nolle prosequi* was, that the plaintiffs, inasmuch as they "cannot deny the several matters above pleaded by the said D., freely here in court confess, that they will not further prosecute their suit against him." It was moved, in arrest of judgment, that the *nolle prosequi*, so entered, had confessed the *non assumpsit*, as well as the other pleas; and therefore, the other defendant was also discharged, and the distinction of DENISON, J., in *Noke* v. *Ingham*, 1 Wils. 89, was relied on. But the court held, that the *nolle prosequi* was, in effect, only a confession, that as far so regards D., he had a defence in the matters pleaded by him. This case does not, in terms, overrule the distinction; but it does establish, that the court upheld the *nolle prosequi*, notwithstanding the pleadings did set up a plea to the merits, and not merely a personal discharge. The contract does not appear to have been joint and several; and to have arrived at its conclusion, the court must have considered, that the confession of the plaintiffs, that they could not

deny the several matters above pleaded, ought not to be deemed an admission of the truth of the pleas, except so far as to waive further proceedings in the suit, against the party who sets them up as a defence. This conforms to the definition given in the book, of a *nolle prosequi*: "It is," as Serjeant Williams states, 1 Saund. 207, note 2, "a partial forbearance by the plaintiff to proceed *any further as to some of the defendants, or to part of the suit, but still he is at liberty to go on as to the rest." *78]

These are the only cases in England, which the researches of counsel have brought to our notice, bearing directly on the point before the court; and upon looking into the elementary treatises and books of practice, we have not been able to find any more general doctrine. Indeed, the latter confine themselves exclusively to the enunciation of the principles above stated, with the qualifications annexed to them in these authorities. (See 1 Chit. Pl. 32, 33, 546; Com. Dig. Pleader, X. 2, 3, 5; 2 Tidd's Pract. 630; 2 Arch. Pract. 219, 220; 2 Lilly's Pr. Reg. 280.) In America, the cases have gone a step further. In *Hartness* v. *Thompson*, 5 Johns. 160, where an action was brought against three, upon a joint and several promissory note, and there was a joint plea of *non assumpsit*, and the infancy of the defendants was set up at the trial; it was held no ground for a nonsuit; but the plaintiff, upon a verdict found in his favor against the other two defendants, might enter a *nolle prosequi* as to the infant, and take judgment upon the verdict against the others. In *Woodward* v. *Marshall*, 1 Pick. 500, in the supreme court of Massachusetts, upon a joint contract, and suit against two persons, one of whom pleaded infancy, it was held, that a *nolle prosequi* might be entered as to the infant, and the suit prosecuted against the other defendant. These decisions were admitted to be against the cases of *Chandler* v. *Parke*, 3 Esp. 76, and *Jaffray* v. *Frebain*, 5 Ibid. 47, but the court thought the practice adopted by themselves was most convenient, and therefore, gave it a judicial sanction. These cases were distinguishable from that in 1 Wils. 89, in the fact, that the plea went, not only in personal discharge, but proceeded upon a matter which established an original defect in the joint contract; whereas, the plea of bankruptcy was for matter arising afterwards. The distinction was not thought to be sound. Indeed, the court seem to have considered the question rather as a matter of practice, to be decided upon convenience and policy, than as a matter of principle.

Hitherto, the question has been discussed, as if the *nolle prosequi* had been entered *before*, when in fact it was entered *after* judgment against the defendants. The next inquiry is, whether this creates any substantial difference in the case. In *Lover* v. *Salkeld*, 2 Salk. 455, in trespass against two defendants, and verdict for the plaintiff, one being an infant, the plaintiff took judgment against the other, and entered a *non pros.*, after the judgment against the infants, and took out execution upon the judgment; upon error brought, it was objected, that *a *non pros.* could not be entered after judgment, for the judgment could not vary from the demand of the writ. *79] It was argued on the other side, that *torts* were several, and that a *non pros.* might be entered after, as well as before judgment, and cases to this effect were cited. Lord Holt is reported to have said, that he supposed there were interlocutory judgments, wherein it might well be; but a final judgment differed, for that being once wrong, a subsequent entry would not set it right. The case was however adjourned, and nothing more appears of

it. This case is not very accurately reported, and it may have been, that the judgment was joint, and the *nolle prosequi* afterwards, which would remove the objection to its authority. The circumstance of its being adjourned, shows that the doctrine thrown out by Lord HOLT, was not deliberately considered by him, and was deemed not clear. In truth, it is directly against the case of *Parker* v. *Lawrence*, decided in the Exchequer chamber, and reported in Hobart 70. That was trespass against three; one pleaded not guilty, and the other two, a justification, to which the plaintiff replied, and there was a demurrer to the replication. Pending the demurrer, the issue was tried, and damages and judgment given against him. After judgment, the plaintiff entered a *nolle prosequi* against the other two, and a writ of error was afterwards brought by all three; and it was alleged for error, that the *nolle prosequi* discharged all three. It was agreed by the court (in conformity with the doctrine then prevailing), that if the *nolle prosequi* had been before judgment, it would have discharged the whole action; and so it would, if the judgment had been against them all, and then the plaintiff had entered a *nolle prosequi* against the other two; for a nonsuit, or release, or other discharge of one, discharges the rest. But here the action was at an end as to the one, by the judgment against him, and no judgment was had against the others, so that they were divided from him, and are not subject to the damages found against him. It was adjudged, that he was not discharged, and there was no error. This case is of great authority, having been deliberately decided by a very high court. It is cited as authority, by Chief Baron COMYN, in his digest (Pleader, X. 5), who also cites (Pleader, X. 3) the case in Salkeld, as one in which there was a final judgment against all the defendants. The reason of the thing would seem entirely in favor of the judgment in Hobart, and it stands supported by a much earlier case, in the Year Books. (14 Edw. IV.; Bro. Abr. Trespass, pl. 331.) If the plaintiff may, in any case, recover a judgment against one, on a joint action against two, who sever in their pleadings, it is wholly immaterial to the regularity and effect of that judgment, in what stage of the cause the suit has ceased to be *prosecuted against the other. It is sufficient, that in the event, the judgment is consistent with the general principles of the action. [*80
If a *nolle prosequi* may be entered, after verdict, and before judgment, without discharging the other party, there is no good reason, why it may not be done after judgment, when there has been no proceeding, which binds the plaintiff to consummate a judgment against the party whom he wishes to dismiss. In each case, the judgment upon the whole record is consistent with the writ.

The result of this examination into authorities is, that there is no decision exactly in point to the present case; that there is no distinction between entry of a *nolle prosequi* before, and the entry after judgment, applicable to the present facts. That the authorities, and particularly the American, proceed upon the ground, that the question is matter of practice, to be decided upon considerations of policy and convenience, rather than matter of absolute principle; and that, therefore, this court is left at full liberty to entertain such a decision as its own notions of general convenience, and legal analogies, would lead it to adopt. We are of opinion, that where the defendants sever in their pleadings, a *nolle prosequi* ought to be allowed. It is a practice which violates no rules of pleading, and will generally subserve

the public convenience. In the administration of justice, matter of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice.

JOHNSON, Justice. (*Dissenting.*)—The facts appearing upon the record, from the count, pleas and replications, are these: This action was on a bond given for the faithful discharge of the office of the cashier, by Philip H. Minor. It was joint and several. The defendants craved *oyer* jointly, and pleaded performance, to which plaintiff replied. They afterwards had leave to withdraw the joint pleas; and the four sureties jointly filed various pleas, to which plaintiff replied; and issue being taken, proceeded to trial, and obtained this verdict. After the verdict, the principal to the bond was ruled to plead, and he then filed a variety of pleas, similar in effect to those pleaded by the sureties. The court then gave judgment upon the verdict, and the plaintiff's attorney enters this *nolle prosequi;* and judgment is given for the principal, on the bond, that the plaintiffs take nothing by their bill, but for their false clamor, be in mercy, and that the defendant go thereof, without day, and receive his costs.

It was insisted by the defendants, that, in this state of the pleadings and record, the plaintiffs ought not to have had *judgment below—that there is error, and the judgment should be reversed. What further order this court would be bound to render upon a reversal, it is not material to inquire. I readily assent to the doctrine, that in adjudicating upon questions of practice, a court should have regard to public convenience; but it would be extending this principle to the violation of its own spirit and intent, if carried to the extent of overturning known established rules, both of law and practice. To this extent, it appears to me, the present decision goes; and that this judgment cannot be affirmed, without shaking as well established principles, as adjudged cases; and opening a door to inconveniences, which must soon compel this court to retrace its steps.

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The judgment, as it stands below, is against four out of five joint and several co obligors; and the obligor omitted, or rather who has judgment in his favor, is the cashier, for whose good conduct in office, the other three became bound. Now, this judgment is either a bar to a future suit against the principal, or it is not. If a bar, then the record exhibits the inconsistent case of four being made liable for one, who was not liable himself. And if it is not a bar, then, by possibility, it may be established by the verdict of a future jury, that the co-obligor, for whose misfeasance alone these defendants have had judgment against them, had, in fact, committed no misfeasance. A rule of practice, that may be lead to such consequences, cannot rest upon public convenience.

Nor is it more easy to reconcile it to principle. No authority need be cited, to establish, that wherever judgment ought to have been arrested below, this court is bound to reverse for error. Now, this judgment is against one of the canons of the law of contracts. It was at the option of the plaintiff, whether to treat the bond as a joint or several contract. He has elected to treat it as joint; and must, therefore, abide by the law of joint contracts as to both right and remedy; and, upon these, when under seal, it is an invariable rule, that all must be sued, if all have sealed the instrument, and are in life. It is true, that, in general, the nonjoinder of co-obli-

gors must be pleaded in abatement; but it would be oppressive and inconsistent to apply this rule to a case, in which it was impossible to plead in abatement, and that was precisely this case; since the discharge of the principal from the action, was produced by the act of the plaintiff, after judgment, at a time when it was impossible, by any form of pleadings, for the defendants to avail themselves of this right. But this case comes within an exception to the general rule on the subject of pleas in abatement; since, by the plaintiff's own showing, in his declaration *and replication, all the co-obligors named in the instrument, sealed it, and were in life at the commencement and close of the suit. [*82

This distinction, if it be necessary to cite authority for it, clearly appears from comparing the case of *Rice* v. *Shute*, 5 Burr. 2611, with the case of *Horner* v. *Moor*, noticed in the report of that case. In the one, it was necessary to plead in abatement, because the facts did not appear on record, which were necessary to maintain the defence. In the other, the judgment was arrested, because the facts, of the plaintiff's own showing, made out that he ought not to have judgment, which were—all had sealed the instrument, and all were alive. It cannot be questioned, that in a joint contract by five, where all remain equally bound, all in life, and all within reach of the process—more especially, where they have been all actually arrested—the plaintiff must recover against all or none. This is that case; and yet the plaintiff is allowed here to take judgment against four, and discharge the fifth, the principal, by *nolle prosequi*, after judgment.

It cannot be doubted, that had this *nolle prosequi* been entered before trial, the defendants must have been permitted to plead it, *puis darrien continuance*, and that the plea must have been sustained. And what reason is there, for placing them in a worse situation, by suffering the *nolle prosequi* to be entered after judgment? It is said, they severed in pleading, and suffered the cause to go to trial, without objection. But was it in the power of these defendants, to compel their co-obligors to join them in pleading? or if the plaintiff chose to proceed erroneously to trial, were the defendants under any obligation to arrest him, and set him right? It was his own folly, if he ruled them to trial, or consented to go to trial, or committed any other error, in proceeding to judgment. I have stated it to be not indispensable, in my view of the subject, that the *nolle prosequi* should be a bar in this case to a new suit against the principal. The derangement of the rights and liabilities of the parties, produced by it, appears a sufficient objection both to the principle and practice. For, certainly, it goes to enable a plaintiff to recover, by this device, against parties, who otherwise could have defeated his action by suitably pleading. By a novel practice, as it relates to joint contracts, he is here permitted to evade an important legal principle. But if this *nolle prosequi* can be shown to be a bar to his action against the principal co-obligor, it would seem to be incontestable, that this judgment ought to be reversed. And I am yet to learn, that, in a joint action in contract against several, a *nolle prosequi* as to the whole action, against one, is not a bar as to him. *The cases are very few in the books, in which the effect of a *nolle prosequi*, in such a case, has been tried by the only sufficient test—a plea in bar, to a suit upon the same contract. But so far as they have gone, they maintain the bar. [*83

If a bar, in cases in which the suit is against a single defendant, there

can be no reason assigned why it should not be a bar as against one of the several defendants. And to this point, *Beecher's Case*, reported in 9 Co. 58, Cro. Jac. 211, is direct and positive. That was a suit upon a bond, and the judgment there is nearly in the words of the judgment in this case. On a second action, upon the same contract, this was held to be a bar; and it became necessary to remove the judgment, by a writ of error, for some technical informalities, before this obligee could recover in the original contract. It is true, that Serjeant Williams has said, in his note to 1 Saund. 207 *a*, "that a *nolle prosequi* is now held to be no bar to a future action for the same cause, except in those cases where, from the nature of the action, judgment and execution against one, is a satisfaction of all the damages sustained by the plaintiff." And by reference to the next page of his note, it appears, that he exception here introduced, is intended to embrace actions for torts; and therefore, his rule is intended to apply to actions on contracts. But the authorities he cites are far from bearing him out in his doctrine. The case of *Cooper* v. *Tiffin*, 3 T. R. 511, upon which he relies, decides nothing but a question of costs; and the position, that a *nolle prosequi* is no more than a discontinuance, and the party may sue again, is only an *obiter dictum* in case where the point was not presented. So also, of his other case, in 1 Wils. 89. The facts did not raise the question on the effect of the *nolle prosequi*, as to the defendant who was discharged by it; and the judges, in considering whether the plaintiff could have judgment against some of the joint contractors, where the other was discharged by bankruptcy, expressly decide upon the ground, that he being discharged by law, leaving the other bound for the debt, produced an analogy between that case and the case of a suit in trespass, where one only might be sued separately. But it is said, and so Serjeant Williams asserts, "that the true nature and extent of a *nolle prosequi*, in civil cases, was not accurately defined and ascertained, until modern times."

My own opinion is, from all the investigation I have been able to make, that it was much better understood, in former times, than it is at this day. That if it were now better understood, we should perceive fewer of those
*84] inconsistencies which *are supposed to exist in the decisions on this subject. Thus, Serjeant Williams has mixed up the cases on torts, with those on contracts. in such a manner as could only produce confusion. To sustain the doctrine that a *nolle prosequi*, in an action of debt, is a bar to another suit on the same bond, he quotes *Green* v. *Charnock*, Cro. Eliz. 762, which was trespass *quare clausam fregit*. And for other cases which he says establish the principle "that a *nolle prosequi* is not of the nature of a *retraxit*, or a release; but an agreement only, not to proceed as to some of the defendants, or a part of the suit," without restricting the doctrine to any class of cases, he cites a string of authorities, in every one of which the decisions were in actions of trespass or tort. Yet it cannot be contended, that the use of the *nolle prosequi* in cases of tort, in which the defendants may be joined and disjoined, at the pleasure of the plaintiff, can afford precedent or authority for the use of it, in cases of joint contract; in which, the law, regarding the nature of the contract, and the rights of the parties, imposes on the plaintiff the obligation to sue them jointly.

To me it appears, that there is abundant authority to prove that the *nolle prosequi*, though entered by attorney, with the judgment that defendant

"*eat sine die*," has the effect of a *retraxit*. Lord COKE certainly places them on the same foot, both in his Institutes (1 Inst. 139), and his comment upon *Beecher's Case* (8 Co. 58), and in both instances, he describes the *nolle prosequi* as one of two kinds of *retraxit*, appropriate to different cases, but both producing a bar. And yet in one only is the term *retraxit* introduced into the entry of judgment. (See also 2 Roll. Abr., Nolle Prosequi.) In *Green* v. *Charnock*, Cro. Eliz. 762, they are certainly treated as synonymous and equivalent. That was trespass *quare clausum fregit*, against C. & S.; S. made default, and judgment of *nil dicit* was then taken against him; C. pleaded in bar, plaintiff replied, &c., and judgment on demurrer for plaintiff; a *nolle prosequi* was then entered against S., and writ of inquiry, and judgment against C. And the case proceeds, "thereupon, they brought error, and the error assigned was, because this *nolle prosequi* is against one, when judgment is taken against both; being that a *retraxit* against one is as strong as a release against the one, the which being to one defendant, is a good discharge to both." So again, in the case of *Dennis* v. *Payn*, Cro. Car. 551, P. & P. gave their joint and several bond to D., who sued the one severally, and after plea, entered a *retraxit;* he afterwards brought suit upon the bond, against the other P. who plead the *retraxit* to the first in bar. There was no question made upon its being a bar, either direct *or by estoppel; as to the obligor first sued, it is, in terms admitted. But the bene- [*85
fit of that discharge was claimed by the second P., and on this the judges divided, one maintaining that its effect was that of a release, and the other, that of an estoppel, only to be taken advantage of by him in whose favor it was rendered; and CROKE, who held it to be an estoppel, identifies it with a *nolle prosequi*, by observing that it is "*quasi* an agreement that he will no further prosecute; "*non vult ulterius prosequi*." So that both admit it to be a bar against the one discharged. So, in Hobart 70, and in 2 Keb. 332, p. 31, in the year 1674, *nolle prosequi* and *retraxit* are considered as synonymous. So, in Lilly's Practical Register, 1719, a *nolle prosequi* is defined thus: "that is, that the plaintiff will proceed no further in his action, and may be as well before as after verdict; and is stronger against the plaintiff than a nonsuit, for a nonsuit is a default for non-appearance, but this is a voluntary acknowledgment that he hath no cause of action." (Title Nolle Pros.)

So, Sergeant Salkeld, who comes down to the time of Queen Anne, refers to *Beecher's Case* for the law of *retraxit*, and gives the definition of *retraxit* in the words of the entry of a *nolle prosequi*. (3 Salk. 244.) So, in 4 Wooddes. 87, in the year 1691, it is distinctly asserted, that an entry "of *venit hic in curia, et fatitur hic in curia*, with a judgment that defendant *eat unde sine die*," is equivalent to a *retraxit*. At what period a different idea begun to prevail, I have not been able to discover; certainly, I can find no adjudged case to support it. In the case of *Walsh* v. *Bishop*, in Cro. Car. 239, 243, referred to by Serjeant Williams, as introducing a different doctrine, is directly against him. That was an action of trespass and battery against two; they severed in pleading, and after verdict against both, a *nolle prosequi* was entered against one, and the other moved in arrest of judgment. In that case, it is admitted, in terms, by the court, that as to the one, the *nolle prosequi* was an absolute bar. And by reference to the

same case, in page 239, it will be seen, that the argument rested upon the might of a plaintiff to proceed against one of several defendants in trespass.

If this plaintiff ever had a right to proceed against these four defendants, in originating this suit, I should have felt no doubt. That is the case in trespass, that is the case where one defendant is bankrupt, or an infant, or pleads *ne unques executor*. 1 Wils. 89; 3 Esp. 76. There is a modern book of practice of great respectability (I mean Sellon, tit. Nolle Prosequi), in which this doctrine is summed up to my entire satisfaction. The form of the entry is there given in words, and conforms entirely to the entry in this case, except that the words are here added, that "the plaintiffs take nothing by their *bill, but for their 'false clamors be in mercy;'" which can at least detract nothing from the effects of the judgment. Yet it is there laid down, as the law of his day, that such a judgment, when it goes to the whole cause of action, operates, in effect, as a *retraxit*. The judgment in this case goes to the whole cause of action, and as between the plaintiff and the cashier, is of the same effect, as if there had been no other defendant to the action. In a subsequent part of the article, the same author (Sellon) recognises the distinction between cases of trespass or tort, and cases of contract; and lays down the rights of the parties in each, in accordance with the views I entertain on the subject, to wit, that if the *nolle prosequi* be entered, so as to produce any derangement in the rights of the defendant, to deprive them of a legal defence, or subject them to increased difficulties or liabilities, it is error.

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The case in Maule & Selwyn, which was supposed to have overruled the previous decisions, is in perfect accordance with them; for, although the defendant had pleaded *non assumpsit*, he had also pleaded his discharge as a bankrupt. On the contrary, if the language of the court in that case be considered as affording the true *rationale* of the entry of the *nolle prosequi*, it would be fatal to the plaintiffs in this cause. The court say, it amounts to an acknowledgment that the one defendant had a defence. But what defence did this co-obligor set up, that the other defendants ought to have the benefit of? His pleas, were, in terms, those which had been pleaded by these co-obligors. If this confession of plaintiffs went to those pleas, then were these defendants discharged, since they could not be liable if he was not guilty.

It is a question of no importance—one of no influence upon the law of the case—whether a *nolle prosequi* may be entered before, or after judgment, or when it may be entered; otherwise than as it affects the legal relations of the parties, and the rules which govern suits at law. And here, I think, I may very confidently maintain, that in no case can a *nolle prosequi* be legally entered, as to one of the defendants, unless the suit might originally have been maintained against those who remain; nor, unless, the remaining defendants might have availed themselves of pleading the non-joinder of their co-obligor, if their rights were affected by his exclusion from the action. In the first class, are comprised all actions of tort, in which no prejudice is done to the defendants, since their co-defendant need not originally have been made a party. And I may add also, the case of bankrupts and infants, both of whom, when joint contractors, may be omitted as defendants, upon declaring against their co-obligors, according to the truth of the *case. They may also, without prejudice to their

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co-defendants, be discharged by *nolle prosequi;* but even as to them, it seems, the precedents imposed a restriction; for, it is not permitted, if they have blended their fate with that of their co-defendants, by joining in their pleas. They have then waived their privilege. If their pleas import no waiver of their privilege, the right of the plaintiff to his *nolle prosequi*, as to them, is conceded; because the relations of the parties are not altered, nor their rights in any way prejudiced. But I conceive the *nolle prosequi* cannot be entered at any point of time, when it would place the defendants in a worse situation, or deprive them of any advantage of making their defence.

Surely, the precedents for entering the *nolle prosequi*, after judgment in actions of trespass, against some defendants, and going on to levy satisfaction from the rest, can afford no precedent here; since it is, in the one case, what the law enjoins; in the other, what it forbids. Nor are the precedents of cases in which the one defendant never was bound, or is discharged by operation of law, without discharging the other, any better authority. In all these cases, the relative rights and liabilities of the parties remain the same. No legal absurdities can ensue, and no more is given against them, by the judgment, than what could have been legally claimed of them by the action.

There is one curious result produced by this decision, which is not among the least of the objections to rendering a judgment for the defendant in error. It cannot be contested, and the whole argument is admitted, that if the discharge of the principal produce a bar in his favor, this judgment should be reversed for error. But the conclusion, that it is no bar, is now to be deduced from a string of decisions, in every one of which, Serjeant Williams himself admits, that no recovery could be had against the defendant who has been discharged by the *nolle prosequi.* It is true, he attributes this bar to the nature of the action; by this, at least, acknowledging that the material question, in the trespass cases, never could arise in the present case. In the only case, however, even in trespass, in which the question in this case came distinctly before the court, I mean the case of *Green* v. *Charnock* (Cro. Eliz. 762), in which there was an interlocutory judgment against S., and judgment pronounced against C., and a *nolle prosequi* as to S.; it was adjudged, that the *nolle prosequi* as to S. was a release to him, and therefore to C.; and the judgment against C. was reversed on error brought, and yet there they did not join in pleading. If, in the present case, the defendants had all pleaded, whether jointly or severally, and verdict had been for the one defendant, on any plea to the merits, it is clear, that *notwithstanding a verdict had passed for the plaintiff against the remaining four, he could not have had judgment. (1 [*88
Saund. 217.) And the distinction between the actions of debt and trespass on this point, has been, until now, considered as known and established, (1 Plowd. 66 *b;* 8 Co. 120, 133; 2 Lilly Abr. 210, 107.) Upon the whole, I am very clear, that this judgment ought to be reversed, and judgment below entered for defendants.

Judgment affirmed, with costs.