

De Wolf v. Rabaud.

do it. But until then, I can never know what is the practice of my own circuit, until I come here to learn it.

*JAMES DE WOLF, junior, Plaintiff in error, v. DAVID JACQUES RABAUD, JEAN PHILLIPPE FREDERICK RABAUD, ALPHONSE MARC RABAUD, aliens and subjects of the king of France, and ANDREW E. BELKNAP, a citizen of the state of Massachusetts, Defendants in error. [*476]

Nonsuit.—Citizenship.—Statute of frauds.—Promise to pay the debt of another.

A nonsuit may not be ordered by the court, in any case, without the consent and acquiescence of the plaintiff.¹ p. 497.

A question of a citizenship of the party to a cause, cannot constitute a part of the issue, on the merits; it must be brought forward by a proper plea in abatement, in an earlier stage of the cause, than the trial on the merits.² p. 498.

The statute of frauds of New York, is a transcript, on this subject, of the statute 29 Charles II., ch. 3; it declares, that no action shall be brought to charge a defendant on a special promise for the debt, default or miscarriage of another, unless the agreement, or some memorandum or note thereof, be in writing and signed by the party, or by some one by him authorized. The words "collateral" or "original" promise, do not occur in the statute, and have been introduced by courts, to explain its objects, and expound its true interpretation. p. 499.

Whether, by the true intent of the statute of frauds, it was to extend to cases where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration, moving at the same time, between the parties; or whether it was confined to cases where there was already a subsisting debt or demand, and the promise was merely founded upon a subsequent and distinct understanding, might, if the point were entirely new, deserve very great deliberation; but it has been closed within very narrow limits, by the course of the authorities, and seems scarcely open for general examination; at least, in those states, where the English authorities have been fully recognised and adopted in practice. p. 499.

If A. agree to advance B. a sum of money, for which B. is to be answerable, but at the same time, it is expressly upon the understanding, that C. will do some act for the security of A. and enter into an agreement with A. for that purpose, it would scarcely seem a case of mere collateral undertaking, but rather a tripartite contract; the contract of B. to repay the money, is not coincident with, nor the same contract with C. to do the act; each is an original promise; though the one may be deemed subsidiary or secondary to the other; the original consideration flows from A. not solely upon the promise of either B. or C. but upon the promise of both *diverso intuitu*, and each becomes liable to A., not upon a joint, but a several original undertaking; each is a direct original promise, founded upon the same consideration.³ p. 500.

The case of *Wain v. Walters*, 5 East 10, was the first case which settled the point, that it was necessary, in order to escape from the statute of frauds, that the agreement should contain the consideration for the promise, as well as the promise, itself; if it contain it, it has since been determined, that it is wholly immaterial, whether the consideration be stated in express terms, or by necessary implication. That case has been adopted, to a limited extent, by the courts of New York, into its jurisprudence, as a sound construction of the statute.⁴ p. 501.

¹ *Elmore v. Grymes*, ante, p. 469, and cases cited in the note.

² *Wickliffe v. Owings*, 17 How. 47, *Jones v. League*, 18 Id. 76; *Rateau v. Bernard*, 3 Bl. C. C. 244; *Bobysshall v. Oppenheimer*, 4 W. C. C. 482; *Hilliard v. Brevoort*, 4 McLean 24; *Morgan v. Curtenius*, Id. 266; *Evans v. Davenport*, Id. 574. An objection to the apparent jurisdiction of the court must be taken by plea. *Sheppard v. Graves*, 14 How. 505, 512; *Pond v. Vermont Valley Railroad Co.*, 12 Bl. C. C. 281.

³ This is a mere *dictum* of the learned judge; he admits, that he is not following the construction of the statute, but merely suggests what might be the better construction, were it *res nova*; he admits, that the authorities are against his views. *Carville v. Crane*, 5 Hill 485, per COWEN, J. And see *Hetfield v. Dow*, 3 Dutcher, 440, 451.

⁴ *Townslley v. Sumrall*, 2 Pet. 174. See *Castle v. Beardslley*, 10 Hun 343, and note to *Castle v. Brown*, 21 N. Y. 336 (Banks' ed.) In

De Wolf v. Rabaud.

*The decisions in the courts of New York, on the construction of its own statute, and the extent of the rules deduced from it, present to this court, a guide in its decisions upon the construction of their statute. p. 501.

Rabaud v. De Wolf, 1 Paine 580, affirmed.

ERROR to the Circuit Court of New York, for the Southern District. The defendants in error brought an action of *assumpsit*, in the circuit court of the United States for the southern district of New York, against the plaintiff in error, to recover damages for the breach of his contract, to ship to them, at Marseilles, five hundred boxes of white Havana sugar. The declaration contained several special counts ; of which, the first and second only were relied upon at the trial.

The first count stated, that at the time of making the respective promises and undertakings of the defendant, the plaintiffs were copartners in trade, carrying on business at Marseilles, in France, under the firm of Rabaud, Brothers & Company. That one George De Wolf, of Bristol, Rhode Island, being desirous of drawing upon the plaintiffs at Marseilles, for 100,000 francs; on the 15th March 1825, at New York, in consideration that the plaintiffs, at the special instance and request of the defendant, would authorize the said George De Wolf to draw bills of exchange upon the plaintiffs for the said sum of 100,000 francs, the defendant undertook, and promised, that he would ship, for the account of George De Wolf, on board of such vessel as George De Wolf should direct, five hundred boxes of white Havana sugars, consigned to the plaintiffs, at Marseilles; and the plaintiffs afterwards did duly authorize George De Wolf to draw bills of exchange upon them, at Marseilles, for the said sum of 100,000 francs, which bills were drawn by him on the 16th of November 1825, and paid by the plaintiffs on the 3d day of March 1826. That on the 4th day of January 1825, at the city of New York, George De Wolf did direct and name a vessel, the brig Quito, then lying in the port of New York, and ready to receive the said sugars, on board of which vessel the sugar should and ought to have been shipped by the defendant, on account of George De Wolf, and consigned to the plaintiffs, at Marseilles, according to his said promise and undertaking ; of all which promises, the defendant had notice ; and although he was then and there requested to ship the sugar on board the said vessel, yet he did wholly refuse the same.

The second count differed from the first only in stating the contract to have been, that, "in consideration that the plaintiffs, at the request of the defendant, would authorize George De Wolf to draw bills of exchange upon them, at Marseilles, for another sum of 100,000 francs, on account of other *478] five hundred *boxes of white Havana sugar, to be shipped by the defendant, for account of George De Wolf, on board of such vessel as George De Wolf should direct, and consigned to them, the plaintiffs, at Marseilles, the defendant undertook, &c.," and averring, that relying on the promise and undertaking of the defendant so made, they, the plaintiffs, after the making thereof, did duly authorize George De Wolf to draw bills of exchange upon them for another sum of 100,000 francs, on account of the last-mentioned five hundred boxes of white Havana sugars, to be shipped by

Pennsylvania, under a similar statute, it has been determined, that the consideration of an agreement to answer for the debt of another need not be expressed upon the face of the in-

strument, but may be shown by parol. *Shively v. Black*, 45 Penn. 345 ; *Giltinan v. Strong*, 64 Id. 242.

De Wolf v. Rabaud.

the defendant, on account of George De Wolf, and consigned to the plaintiffs, at Marseilles.

The cause was tried at the October term of the circuit court of the United States for the southern district of New York, in 1826, when the jury, under the charge of the court, found a verdict for the plaintiffs below for \$19,950.85. The opinion of the court, in the charge to the jury, was excepted to by the counsel for the defendant, and a bill of exceptions sealed by Mr. Justice THOMPSON, sitting as judge of the circuit court; and the opinion delivered by him stated the evidence adduced in the cause.

On the trial of the cause in the circuit court, the plaintiffs below gave evidence, by the testimony of George De Wolf, who was examined under a commission, at Havana, that he, George De Wolf, had several transactions with the plaintiffs, previous to that which gave rise to this suit, and had at various times drawn bills on them. That he had three interviews with Mr. Belknap, on the subject of the shipment of the sugars; which interviews were had, first in Wall street, in the city of New York; secondly, at the counting-house of James De Wolf, jun., the plaintiff in error; and thirdly, at the boarding-house of Mr. Belknap. James De Wolf, jun., was present at the first interview, and he, with a certain Frederick G. Bull, was present at the second, at his counting-house. Mr. George De Wolf stated, that the transactions relative to the shipment of the sugars were, that, in Wall street, he proposed to Mr. Belknap to address him five hundred boxes of sugars to the house at Marseilles, on receiving authority to draw on account of the same, to the extent of 100,000 francs. Mr. Belknap, being engaged, an interview was proposed at the counting-house of Mr. James De Wolf, jun., which took place, and at which Mr. Belknap observed, that the advance was heavy; and a calculation was made by F. G. Bull, the confidential clerk of Mr. James De Wolf, jun., and by Mr. James De Wolf himself, of the value of the sugar, compared with the proposed advance; the conclusion of which was, an agreement that the sugars should be shipped, and the authority to draw granted to George De Wolf; Mr. James De Wolf engaging, by *letter, to ship the sugars in behalf of George De Wolf; which form [*479 of letter was afterwards carried by George De Wolf to Mr. Belknap, was assented to by him; was signed by Mr. James De Wolf, jun., and the authority to draw granted and used accordingly. This letter, and the authority to draw, were in the following terms:—

New York, 15th November 1825.

MR. JAMES DE WOLF, JUN.

Dear Sir:—You will please ship, for my account, on board of such a vessel as I shall direct, five hundred boxes white Havana sugar, consigned to Messrs. Rabaud, Brother & Co., Marseilles, and oblige your friend and obedient servant,

GEORGE DE WOLF.

Agreed to—JAMES DE WOLF, JUN.

New York, 15th November 1825.

Messrs. RABAUD, BROTHERS & Co., Marseilles.

I have this day authorized George De Wolf, Esq., to draw on you for — thousand francs, and I request you to honor his bills to that amount.

Your obedient servant,

A. E. BELKNAP.

De Wolf v. Rabaud.

Mr. George De Wolf also stated, that his object was to ship the sugars in one of his own vessels; that he was then indebted to the house in Marseilles, about thirty thousand francs, but could not say that Mr. James De Wolf knew of the debt. The sugars were shipped, to obtain the usual advance, and the consignees were to have the usual commissions in the transaction. Bills, to the amount of the advance, were afterwards drawn and negotiated in Boston, and the proceeds of the same applied as follows: \$13,000 remitted to Mr. James De Wolf, in checks on the bank, and in an acceptance of Isaac Clapp, a broker in Boston; and the residue of the proceeds of the transaction passed to the account of George De Wolf by Mr. Clapp. It was admitted, that the bills were regularly paid at Marseilles, by the defendants in error.

It was also in evidence, by the testimony of Mr. George De Wolf, that at the time of the negotiation for the bills, George De Wolf had in the hands of the plaintiff in error, from three to four hundred boxes of sugar; of which, sixty had been remitted from Rhode Island, on account of which he drew the sum of \$4000, and the remainder were purchased for his account by James De Wolf, jun.; and at the same time, he was indebted to James De Wolf *480] jun., a considerable amount. *Mr. George De Wolf also testified, that the sugars to be shipped, were to be on his own account, and not on that of the plaintiff in error; that the agreement with James De Wolf was, that the proceeds of the negotiation of the advance should be remitted to him, and upon this verbal agreement, Mr. James De Wolf granted his signature to the letter of the 15th of November 1825. Mr. James De Wolf afterwards wrote to the witness, that he should decline to make the shipment in question, until he should receive the remittances agreed upon. When the letter was first presented, James De Wolf declined signing it, deferring it to the next morning, when he should see Mr. Bull; and it was signed the next morning. That the letter or memorandum of agreement had for its sole object the shipment of the sugars to Marseilles, that market being preferred to New York; and to place in the hands of James De Wolf, jun., the proceeds of the bills, in order to further the shipment; and not with reference to accounts existing between him and the plaintiff in error; and that the plaintiff in error knew the defendants, and particularly Mr. Belknap, in the transaction, as stated. Mr. George De Wolf also stated in his evidence, that he did not know that Mr. Belknap was acquainted with the circumstance that the proceeds of the bills were to go to the plaintiff in error; or with the state of accounts between him and James De Wolf, junior.

Evidence was also given, to show, that the plaintiffs below carried on business in Marseilles, in France, and that all of the said parties, with the exception of Mr. Belknap, were native subjects of France; and that Mr. Belknap was a native citizen of the United States, had resided some years in France, and now, always considering Boston as his home, resided in Boston; where he lodged in a boarding-house, in which he hired rooms by the year; and was understood to pay taxes in Boston; his letters of business were addressed to Boston; and he was absent from there, in the United States, occasionally, for the purposes of transacting business for the firm in Marseilles.

Soon after the negotiation of the 15th November, Mr. George De Wolf became insolvent, and at the time of his failure, he was largely indebted

De Wolf v. Rabaud.

to the plaintiff in error. Being thus embarrassed he addressed to Mr. Belknap the following letter :

Bristol, R. I., 27th December 1825.

MR. A. E. BELKNAP.

Dear Sir :—I am in receipt of yours of the 23d instant, and note its contents. Owing to my embarrassments, the Magnet, which I *had [*481 wrote you would proceed to New York to take the sugars, which Mr. James De Wolf, junior, was to ship to your house in Marseilles, will not go on. You are, therefore, at liberty to make any arrangements with him you may think proper, for the interest of all concerned. I am extremely sorry that you met with an accident to prevent your visiting me, as it would have afforded me much pleasure in seeing you. Believe me, very truly, your friend,

GEORGE DE WOLF.

Which letter was, upon the 27th day of December 1825, shown to the plaintiff in error, by Mr. Belknap ; and a copy of the same was, upon the 3d of January 1826, delivered to him, inclosed in the following letter :—

New York, January 3d, 1826.

MR. JAMES DE WOLF, Junior, New York.

Sir :—I inclose you a copy of a letter which I yesterday received from Mr. George DeWolf, of Bristol, Rhode Island. In pursuance of the authority given me by him, I shall, without delay, engage and provide a vessel, on board of which I shall require you (according to your contract of the 15th November last) to ship for account of Mr. George De Wolf, five hundred boxes white Havana sugar, consigned to Messrs. Rabaud, Brothers & Co., Marseilles. Your obedient servant,

A. E. BELKNAP.

On the 4th January 1826, Mr. Belknap addressed the plaintiff in error, in the following terms :

New York, January 4th, 1826.

MR. JAMES DE WOLF, Junior, New York.

Sir :—In pursuance of the notice I gave you in my letter of yesterday, I have engaged the American brig Quito, Captain Wink, now lying at Fly Market wharf, in this city, for the purpose of receiving, on freight, for Marseilles, five hundred boxes of white Havana sugar. The Quito is a good staunch vessel, and is now ready to receive the sugar. I, therefore, require you to ship on board of her, for account of Mr. George De Wolf, of Bristol, R. I., five hundred boxes of white Havana sugar, consigned to Messrs. Rabaud, Brothers & Co., of Marseilles, according to your contract of 15th November last. Herewith, is a copy of a letter I addressed to Mr. George De Wolf, on the 23d of December last, his answer to which I showed you yesterday ; at the same time, I gave you a copy of it. If you prefer to ship the sugar in any vessel other than the Quito, I have no *objec- [*482 tion, provided you will designate the vessel, and give notice to me immediately, and make the shipment without delay. Your obedient servant,

A. E. BELKNAP.

To this letter, the plaintiff replied as follows :

De Wolf v. Rabaud.

New York, January 5th, 1826.

MR. A. E. BELKNAP.

Sir:—In answer to your letter of the 4th instant, I have merely to say, that whenever Mr. George De Wolf, or any person authorized by him, will pay me for five hundred boxes of Havana sugar, I will ship the same, consigned to Messrs. Rabaud, Brothers & Co., at Marseilles. Your obedient servant,

JAMES DE WOLF, JUN.

Evidence was also given, that the brig Quito was engaged early in January 1826, by Mr. Belknap, to carry the sugar to Marseilles, that she was a competent vessel for the purpose, and that the freight to be paid for the transportation of the sugar was the usual and customary charge for the same.

The plaintiffs in error objected, at the trial, to the reading of the letter of 27th December 1825, from George De Wolf to Mr. Belknap, which objection was overruled by the court.

On the part of the plaintiffs in error, at the trial of the cause before the circuit court, Frederick G. Bull was introduced as a witness, whose testimony is stated in the bill of exceptions to have been given as follows :

That he is, and for nine years past has been, a confidential clerk in the employment of the said James De Wolf, junior ; that he was present at the counting-room of the said defendant, on the 15th day of November 1825, when the interview mentioned and described in the said deposition of the said George De Wolf took place, between the said George De Wolf, the said Andrew E. Belknap, and the said James De Wolf, junior ; that the said George De Wolf and Andrew E. Belknap came into the counting-room, on said 15th day of November, in company, and were conversing together ; that they there found the said James De Wolf, junior, and the witness ; that after some little time had elapsed, the said James De Wolf, junior, and the witness, withdrew into an inner apartment or adjoining room, and were in a few minutes followed by the said George De Wolf, and the said Andrew E. Belknap ; that while the said Andrew E. Belknap and the said George De Wolf were in conversation, the latter addressed a question to the said James De Wolf, junior, and asked him, how much five hundred *boxes of sugar would bring, *483] or amount to, at some specified price ; that the said James De Wolf, junior, turned to the witness, and asked him to make the calculation ; that the witness did make a hasty calculation, and gave for answer, " about seventeen thousand dollars ;" that he heard no proposition made by the said James De Wolf, junior, to the said Andrew E. Belknap, nor by the said Andrew E. Belknap to the said James De Wolf, junior, nor any conversation between the said Belknap and the said defendant of any importance, although he thinks that the said defendant did speak to the said Belknap once or twice during the said interview ; that the said James De Wolf, junior, appeared, so far as the witness observed, to take little or no interest in the conversation or business which was going forward and taking place between the said George De Wolf and the said Andrew E. Belknap ; that during the time of said conversation and interview (which occupied not more than ten or fifteen minutes), the said James De Wolf, junior, left the counting-room for a short time and returned ; that the said James De Wolf, junior, is in the habit

De Wolf v. Rabaud.

of communicating all matters of business to the witness, and consulting him concerning the same, and the witness does not think it at all probable, that the said James De Wolf, junior, would have made any contract or agreement with the said Andrew E. Belknap, either at that time or any other, without the knowledge of the witness ; that the said James De Wolf, junior, during part of the time of the said interview, was walking about his counting-room, while the said George De Wolf and the said Andrew E. Belknap were conversing together, and at one time, came up to the witness, and addressed some remarks to him ; that the witness was writing at the desk, and occupied in his own affairs of business, and did not pay very particular attention to the conversation of the said parties ; that the defendant and Belknap might have conversed on the subject of the sugar, without the witness knowing it ; and the witness would not undertake to say, that an agreement by the said defendant with the said plaintiff might not have been made, without the knowledge of the witness ; that the witness does not know, that the said Andrew E. Belknap knew that the proceeds of said bills were to have been remitted to the said defendant, by the said George De Wolf, before the said defendant was bound to ship the said sugar ; that the said George De Wolf was, on the 15th day of November 1825, and for a long period anterior thereto, and ever since has been, largely indebted to the said James De Wolf, junior ; that the sum of \$13,000, for and on account of the 500 boxes of sugar mentioned in the said deposition of George De Wolf, was never paid by the said George to the said defendant, and never came into his hands : *that George De Wolf did, on or about the 23d day of November 1825, remit to the defendant, his, George De Wolf's, draft [*484 for \$6000, on Isaac Clapp, of Boston, at three days' sight, and a check upon the United States branch bank, at New York, for \$1000 ; which said draft and check were both paid, and the amount thereof received by the said James De Wolf, junior : that the said George De Wolf did also, shortly after, transmit to the defendant, his, the said George De Wolf's draft upon the said Isaac Clapp, at thirty days' sight, for \$7000, which was received by the defendant, but was never paid, either by the acceptor, the said Isaac Clapp, or the drawer, the said George De Wolf ; but the same was protested for non-payment, and still remains due and unpaid.

The counsel for the defendant below, then offered to prove by Mr. Bull, that there was an express understanding and agreement between the defendant and George De Wolf, at the time the said letter of the 15th of November was signed by the defendant, that the latter should furnish the defendant with the funds necessary for the purchase of said sugar, before the said defendant would be under any obligation to ship the same. This testimony was not permitted to go to the jury ; the court stating, that " the defendant below could offer no testimony to the jury, of any arrangement between him and George De Wolf, relating to the funds for the payment for the sugar, unless it should also appear that Mr. Belknap was party thereto, or that the same was brought to his knowledge." The counsel for the defendant below excepted to this opinion.

The defendant below also gave in evidence on the trial, the following letter, containing matter contradictory to the testimony of George De Wolf.

De Wolf v. Rabaud.

Boston, November 28th, 1825.

Mr. JAMES DE WOLF, Junior.

Dear Sir :—I send you my draft on Mr. Clapp for \$6000, at three days' sight, as he cannot get any draft or checks on New York, having tried all the banks and brokers ; he has not sold the exchange, or any part of it as yet, but thinks he can in three or four days. Last sales, 19½ cents ; money very scarce ; the New Yorkers have sent on a great deal of paper ; banks stopt discounting. He will remit you the balance as soon as he sells, then, if a draft can be procured ; or otherwise will authorize you to draw on him for the balance. I inclose a check on the branch for \$1000, making \$7000, which credit this account. I am, your friend and obedient servant.

GEORGE DE WOLF.

*The case was argued by *Ogden* and *Jonathan Prescott Hall*, for *485] the plaintiff in error ; and by *Webster* and *Charles C. King*, for the defendants(a).

(a) The following charge was delivered by Mr. Justice THOMPSON to the jury.—This case is of considerable importance in point of amount, and may be considered as a struggle between two innocent parties to throw off from their own shoulders a loss which must fall upon one or the other, by reason of the failure of George De Wolf. In such cases, it is reasonable to expect, that each party will urge with great zeal the points relied on to effect his object. It has been distinctly stated by the counsel, that situated as this cause is, it is not probable that a decision here will put an end to the controversy, but that it will be carried to the supreme court of the United States ; and to enable the parties to avail themselves of their rights in this respect, and to take exceptions to the opinion I may express, it may be necessary for me not only to be explicit, but to repeat in some measure what I have already had occasion to say in disposing of the motion for a nonsuit. The result in the present case will depend principally upon the questions of law which are involved, and with which you have no concern. Some of these questions are, however, so connected with facts, which it is your province to decide ; and for the purpose of enabling the parties to avail themselves of whatever exceptions they may have to take, many remarks may be made in the course of my charge to you, which, in strictness, are not to be addressed to a jury.

The first question arising is, whether the plaintiffs have shown themselves entitled, under the constitution and laws of the United States, to come into this court to prosecute their action. It has not been denied, but that all the plaintiffs, except Belknap, are aliens, and have a right to bring their suit in this court. The declaration avers, that Belknap is a citizen of the state of Massachusetts, and it is contended on the part of the defendant, that this averment has not been proved. From the evidence, it appears, that Belknap was either born in Boston, or removed there, with his father, at a very early age, from New Hampshire, and continued to live in Boston, until he went to France, where he remained ten or twelve years, when he returned to Boston. That he is an unmarried man, having no family ; lives at lodgings ; has rooms, as one of the witnesses understood, hired by the year, and is there about two-thirds of the time. The residue of the time he is absent on business of the firm of which he is a partner, principally in New York and Philadelphia, and other cities of the United States. One of the witnesses testified, that, on one occasion, he went with him to town-meeting, to vote at an election, he did not see him vote, but understood he went there for that purpose. All the witnesses, in answer to the general question, where was the home of Belknap, say it was at Boston, that they should address him at that place, as his place of residence, if they did not know of his absence ; that letters from abroad are addressed to him at that place. These are the leading and principal facts in evidence as to Belknap's being a citizen of Massachusetts. That he is a citizen of

De Wolf v. Rabaud.

**Hall* and *Ogden*, for the plaintiff in error.—The defendants in error brought an action of *assumpsit* in the court below, against the plaintiff in error, founded upon a *special agreement; they are, therefore, bound to prove the contract stated in the declaration expressly [*487

the United States cannot be questioned; and if a citizen of any particular state, within the sense of the meaning of the constitution and law, it must be of Massachusetts. No evidence has been offered, to raise a doubt on this point. Whenever absent from Boston, it was temporarily, and on the business of the plaintiffs; and to deprive an American citizen of the right of suing in this court, on the ground of his not being a citizen of any particular state, there ought to be very strong evidence of his being a mere wanderer without a home. Belknap does not appear to stand in this situation. His domicile, his home, and permanent residence, may, with the greatest propriety, be said to be in Boston. There is no pretence, that it was merely colorable, for the purpose of qualifying himself to bring this action; and to deprive him of that privilege, would be extending this disability beyond the reason and policy of the law. The facts in relation to Belknap do not appear to be in dispute, so far as I have understood them; and if, according to your understanding of the evidence, they are as I have stated, the averment that he is a citizen of the state of Massachusetts is sufficiently proved.

2. The next inquiry relates to the merits of the cause, and embraces the main question upon which the rights of the parties must be decided. The action is founded on a special contract, alleged to have been entered into by the defendant, and which he has not complied with. The declaration contains several counts, in which the cause of action is in some respects laid in different ways, but is substantially, that the defendant, in consideration that Belknap would authorize George De Wolf to draw on the plaintiffs for 100,000 francs, undertook and promised to ship for account of George De Wolf, on board such vessel as he should direct, 500 boxes of white Havana sugar, consigned to the plaintiffs in this cause, accompanied with the necessary averments and allegations of breaches. And the great question is, whether this contract has been proved by such evidence as to make it legally binding on the defendant.

The letter of the 15th of November, 1825, from George De Wolf to the defendant, requesting him to ship for his account 500 boxes of white Havana sugar, consigned to the plaintiffs, and underwritten by the defendant, "*agreed to*," is the principal evidence in this cause, to establish the contract. It is said, that this letter, under the statute of frauds, does not, on its face, contain any binding contract on the part of the defendant, and that the defects cannot be supplied by parol evidence. This objection, I think, cannot be sustained. The first question to be settled, and which is matter of fact for your determination, is, whether the arrangement between Belknap and George De Wolf, as to the authority to draw on the house in Marseilles, on the shipment and consignment of 500 boxes of sugar, and the undertaking of the defendant, were made and entered into at one and the same time, so as to form one entire transaction. The evidence on this point rests principally on the deposition of George De Wolf. For although Mr. Bull did not hear the defendant assent to the arrangement, yet, from his own statement, such an arrangement or contract might have been entered by the defendant, without his hearing it; it is, therefore, at most, but a negative kind of evidence, and ought not to outweigh the positive testimony of George De Wolf, unless he is discredited in some way, of which you will judge. His testimony is in writing, and will be submitted to the jury, when they withdraw to make up their verdict. They will read and judge for themselves. I understood him to say, that the defendant was with him, when they first met in Wall street, and had some conversation about the authority to draw, and the shipment of the sugar, he, George De Wolf, then stating to Belknap, that he had between three and four hundred boxes of the sugar then in the defendant's possession; that a time was appointed to meet at the defendant's counting-house to negotiate further on the subject; that such

DeWolf v. Rabaud.

as laid. This is a cardinal rule in pleading. *Anon.*, 1 Ld. Raym. 735 ;
 *488] *Hockin v. Cooke*, *4 T. R. 314. The plaintiffs must, in the first
 place, prove a promise from the defendant to the plaintiffs, and then,

meeting did take place, and the agreement then concluded, as contained in the letter of the 15th of November 1825. The consideration for this undertaking was the authority given by Belknap to George De Wolf, to draw on the plaintiffs for 100,000 francs. This consideration, it is true, although fully proved, is not expressed in the written contract. And one question is, whether it can be supplied by parol evidence; and I think it may, if the undertaking of the defendant was entered into at the same time with that between Belknap and George De Wolf, so as to form one entire transaction. This evidence does not in any manner contradict the written agreement, but is perfectly consistent with it. As between the plaintiffs and George De Wolf, the consideration might be clearly be supplied by parol proof; and if the undertaking of the defendant was, at the same time, it required no consideration moving from the plaintiffs to him; the consideration to George De Wolf was sufficient to uphold and support the contract of the defendant. The undertaking of the defendant to make the shipment, was certainly the principal, if not the sole consideration, upon which Belknap authorized the drafts on the plaintiffs; for George De Wolf says expressly, that he does not believe, the authority would have been given, without such undertaking by the defendant; so that it might be urged with great force, that the whole credit was given and rested on the engagement of the defendant to make the shipment. If the contract of the defendant was entered into at the counting-house, at the time mentioned, it is of no consequence, that the letter was not signed, until the day after. This was only reducing to form, and putting into the shape agreed upon, and consummating the arrangement, and would have relation, as between these parties, to the time when the agreement was, in point of fact, entered into.

But if I should be mistaken in this view of the evidence, and the jury should be of opinion, that the contract between Belknap and George De Wolf was completed, and unconnected with the engagement of the defendant, before he undertook to make the shipment and consignment, then the evidence is not sufficient to maintain the present action. It would then be a collateral undertaking, made subsequent to the principal contract, and would require some other consideration than that which supported the principal contract. Whether it is indispensable that such consideration should be expressed in the written agreement or not, it is unnecessary to decide, because no such consideration has been proved, if it was admissible to supply it by parol evidence.

3. It is said, in the next place, that the plaintiffs have failed in establishing a right to recover in this action, by reason of a variance between the allegation in the declaration, and the proof in support of it, in relation to the letter of advice from Belknap to his copartners, apprising them of his having authorized the drafts of George De Wolf. The declaration alleges, "that in consideration that the plaintiffs would authorize George De Wolf to draw upon them for 100,000 francs, the defendant undertook and promised, &c." But that the written authority shown in evidence was in blank, as to the sum to be drawn, and that in this consisted the variance. This letter being in blank, cannot be set up as a variance between the allegation and the proof. The declaration does not state that the authority was in writing, nor refer in any way to the letter in question; and George De Wolf swears, that he was authorized to draw on the plaintiffs for 100,000 francs. That in pursuance of such authority, he did draw upon them for that sum, and his bills were accepted and paid. The drafts which accompanied the letter of advice showed the amount, and the bills having been paid, the blank is of no importance in the present action.

4. The next inquiry is, whether any vessel was designated to receive the sugars, according to the terms of the agreement. By the contract, the sugars were to be shipped on board such vessel as George De Wolf should direct. He, having become insolvent, wrote a letter to Belknap, authorizing him to make arrangement with the

DeWolf v. Rabaud.

any consideration of benefit to the defendant, or of injury to the plaintiffs, moving between the parties, will sustain the promise. 1 Roll. Abr. 6.

It is admitted by the learned judge, in his charge to the jury, *that "the letter" from Geo. De Wolf to the defendant, dated November 15th, 1825, and upon which the latter subscribed the words "agreed to," is the principal evidence in the cause. This letter, we say, neither proves, nor conduces to prove, the promise laid in the declaration. In the first place, the plaintiffs are not parties to the contract contained in the writing; and it is a general rule, that no person can maintain an action of *assumpsit*, upon an agreement to which he is not a party; for in such case, there can be no contract express or implied. *Jordan v. Jordan*, Cro. Eliz. 339; *Crow v. Rogers*, 1 Str. 592; *Bourne v. Mason*, 1 Vent. 6. The construction to be put upon this letter is matter of law, and it ought not to pass to the jury without explanation from the court. 1 T. R. 172. This agreement, upon its face, clearly purports to be a contract between George De Wolf upon the one part, and James De Wolf, jr., upon the other. The words of the letter are to be explained according to their natural import; and we are not to go in search of conjectures, in order to extend them, when the meaning conveyed by the terms of the agreement is evident, and leads to no absurd conclusion. 3 Chitty on Com. & Mer. 107; Powell on Cont. tit. "Interpretation;" Vattel's Law of Nations 224. An express contract is gathered

defendant on this subject, and to designate the vessel; which he accordingly did, and gave notice thereof to the defendant, and demanded the shipment of the sugars; this was amply sufficient. The authority reserved to George De Wolf, to direct in what vessel the shipment should be made, was for his benefit, which he might waive. He was not bound personally to designate such vessel; he might do this by his agent, and the authority given to Belknap was constituting him such agent for that purpose; and the act of Belknap in this respect, was, in judgment of law, the act of George De Wolf; and it is proof, that the vessel designated was in every respect fitted for the purpose. Nor was any objection made by the defendant, at the time, on this ground; but he declined making the shipment, because George De Wolf had not furnished him with funds to purchase the sugars; and the objection that the vessel was not designated by George De Wolf cannot now be set up. The act of his agent was his act, and the evidence, therefore, fully supports the contract as laid in the declaration.

5. The only remaining question is, as to the rule by which the damages are to be ascertained. Upon this subject much of the evidence which has been introduced on the part of the plaintiffs, and the various estimates and calculations which have been submitted to the jury, may be entirely laid aside, according to the view which I have taken of the question. I concur with the defendant's counsel on this point, that the measure of damages must be the value of the sugars in New York, at the time of the breach of the contract by the defendant, in refusing to make the shipment according to his contract. If this was a question between George De Wolf and the plaintiffs, for settling the account of the proceeds of the sugars, had they been shipped, it might have required the application of different principles. But the breach of the contract on the part of the defendant, consists in not making the shipment and consignment, according to his undertaking. He did not undertake to deliver the sugars to the plaintiffs at Marseilles. He had no concern with the transportation, or the expenses incident thereto. If he had shipped the sugars on board the vessel designated, consigned to the plaintiffs, his contract would have been complied with. The plaintiffs are accordingly entitled to recover the value of the sugars in New York, at the time when the defendant was bound by his contract to make the shipment. This amount the jury will ascertain from the evidence that has been offered them on that subject.

De Wolf v. Rabaud.

merely from the words of the parties themselves, who are bound to know the meaning which the law will attach to express words. It rests on no uncertain inferences of the probable meaning of the parties; but on the actual declaration of intention, made in direct terms. 3 Chitty on Com. & Mer. 3-4.

"The letter," judged by these rules, is plainly a contract between the defendant and George DeWolf, resting upon a consideration passing between them, and the insertion of the names of the plaintiffs was a mere direction, as to whose care the sugar when shipped should be committed. The plaintiffs are the mere agents or intended bailees of George De Wolf, and have no apparent interest in the subject-matter of the contract. The agreement is placed, by the terms made use of, entirely under the control of George DeWolf, who has the power of designating a vessel to receive the sugar. He is a party in fact, and a party in interest, and by complying with the terms of the agreement imposed upon him, he would have the right, and the sole right to seek an enforcement of the contract. The words "for my account," contained in the letter, prove that the agreement was not made with nor for the plaintiffs, and they have no authority for bringing an action in their own name, for a violation of the contract. This position may be supported by an analogy drawn from bills of lading. A bill of lading, expressed in *490] the ordinary *form, transfers the property absolutely to the consignee, and he becomes, in legal contemplation, the owner of the goods. But if words are made use of, in the bill of lading, which show that the property of the shipment remains in the consignor, and that the consignee is the mere agent or factor of the consignor; then no action for a violation of the contract contained in the bill of lading, will lie in the name of the consignee; it must be brought in the name of the consignor. If the rights of the consignee, arising from advances made in expectation of the consignment, are violated, he has no remedy upon the contract, but must bring trover, or go into a court of equity. *Evans v. Martell*, 12 Mod. 156; 3 Chitty on Com. & Mer. 401, n. 2, n. 5; *Potter v. Lansing*, 1 Johns. 215; *Davis v. James*, 5 Burr. 2680; *Sargent v. Morris*, 3 B. & Ald. 277. The action must be brought in the name of the party who has the legal interest in the subject-matter of the contract; and a mere equitable right, if any exist, will not support an action upon an express agreement, to which the plaintiffs are not parties. If this sugar had been shipped, it would have been shipped as the property of George De Wolf, who would have been liable for freight, insurance and commissions. The property would have been at his risk; and in case of the bankruptcy of the plaintiffs, George De Wolf would have had the right to repay to them the advance received, and to stop the goods *in transitu*. "This not being an action for deceit and imposition, but on a written contract, the right of the plaintiffs to recover is measured precisely by that contract." *Tayloe v. Riggs* (*post*, p. 591).

2. The letter, upon its face, is plainly a contract between the defendant and George De Wolf. It is not negotiable, and the delivery of it, therefore, to the plaintiffs by George De Wolf, gives them no authority to maintain an action upon the agreement, in their own names. This instrument bears no analogy to a bill of exchange; not being made payable in money, and containing no operative words of transfer. It is a mere executory agreement to ship merchandise, and if valid, would only subject the defendant to dam

De Wolf v. Rabaud.

ages for its violation, as between the original parties. *Smith v. Smith*, 2 Johns. 240; *Jerome v. Whitney*, 7 Ibid. 321; *Coolidge v. Ruggles*, 15 Mass. 387. If this letter or order had been for the payment of money, but drawn in its present restricted form, it would not have entitled the plaintiffs to maintain an action, in their own names, upon the acceptance or special contract. No instrument in the form of a bill of exchange, was ever held to be negotiable, unless in some substantial form made payable to order on the face of it. The law, as laid down in the case of *Hill v. Lewis*, 1 Salk. 133, has always been adhered to. (See *Gerard v. La Coste et al.*, 1 Dall. 194; **Downing v. Backenstoos*, 3 Caines 137; *Stevens v. Hill*, 5 Esp. [*491 247.]

3. This letter being a contract being between George De Wolf and the defendant, is, as between the original parties, *nudum pactum*, for the want of mutuality and void. George De Wolf was not bound to designate a vessel, nor to receive the sugar; and it is a universal rule, that a contract cannot bind one party and not the other. "A promise may be voluntary, but an agreement, to be binding, must contain a mutual engagement." *Lyon v. Lamb*, Fell on Mer. Guar. 336; 1 Roll. Abr. 23; Co. Litt. 55 a; *Doe v. Smith*, 2 T. R. 438; *Clayton v. Jennings*, 2 W. Bl. 706; *Puine v. Cave*, 3 T. R. 148; *Cooke v. Oxley*, Ibid.; *Wain v. Warters*, 5 East 16; *Kingston v. Phelps*, Peake's Cas. 227; *Tucker v. Wood*, 12 Johns. 190; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 282; *Jennings v. Reynolds*, 3 Brod. & B. 13; *Wood v. Edwards*, 19 Johns. 211; *McLemore v. Powell*, 12 Wheat. 557; 2 Bl. Com. 447; 1 Fonbl. Eq. 383, note a, vol. 3, 129; 4 T. R. 784-5; 7 Ibid. 129-31; 7 Bro. P. C. 184.

4. But if the agreement be not void for want of mutuality; still, payment of the value of the sugar to the defendant, is a condition precedent to his undertaking to ship, clearly implied from the face of the instrument, and should have been averred in the declaration. Chit. Pl. 314-15; 1 Wms. Saund. 320, note 4, at the end; Com. Dig. tit. Pleader, C. 51; 1 T. R. 645; 7 Ibid. 121; 1 Saund. 319, 320; 1 East 203, 208, 619; *Cowper v. Andrews*, Hob. 41; 1 H. Bl. 363.

5. The contract of the defendant, relative to the shipment of the sugar, was entirely in writing, and is contained in the letter of November 15th, 1825. If this agreement is free from ambiguity, so as to be capable of a sensible exposition, from its own terms, without reference to extrinsic matters, *dehors* the instrument itself; then, no parol evidence can be introduced, to vary the terms of the agreement, or to change the parties thereto. *Clarke v. Russell*, 3 Dall. 421; *Gunnis v. Erhart*, 1 H. Bl. 289; *Coker v. Guy*, 2 Bos. & Pul. 565; *Thompson v. Ketcham*, 8 Johns. 189; *Gilpins v. Consequa*, Pet. C. C. 87; *Dean v. Mason*, 4 Conn. 428; *N. Y. Ins. Co. v. Thomas*, 3 Johns. Cas. 1; *Jackson v. Troy*, 12 Johns. 427; 11 Mass. 27; 2 Bro. C. C. 219; Peake's Ev. 117; *Vandervoort v. Columbia Ins. Co.*, 2 Caines 155; *Mumford v. McPherson*. 1 Johns. 418; *Brigham v. Rodgers*, 17 Mass. 571; *Powell v. Edmunds*, 12 East 10; *Jackson v. Sill*, 11 Johns. 216; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 283; *Hampshire v. Pierce*, 2 Ves. 216; *Jackson v. Hart*, 12 Johns. 77; *Grant v. Naylor*, 4 Cranch 224.

6. But if there be any doubt upon this subject, and the parol evidence be admitted to explain the agreement, then we say, that neither the parol proof, nor "the letter" taken in connection *with the parol [*492

De Wolf v. Rabaud.

proof, can sustain the plaintiff's declaration. (1.) Because there is no proof upon the record, that the defendant ever made the promise set forth in the declaration, either to or for the plaintiffs; but on the contrary, the evidence is conclusive, that the very promise, claimed by the plaintiffs to have been made to them and for their benefit, was made by the defendant to George De Wolf, and for his benefit. The defendant having moved for a nonsuit at the trial, has a right to examine the testimony upon this point, at this time, in the same manner as upon the original motion. If the testimony offered in evidence by the plaintiff, be insufficient, in point of law, to sustain his declaration, the defendant has a right to call upon the court to nonsuit the plaintiff. *Swift v. Livingston*, 2 Johns. Cas. 112; *Clements v. Benjamin*, 12 Johns. 298; *Pratt v. Hull*, 13 Ibid. 298; *Crookshank v. Gray*, 20 Ibid. 350.

(2.) The consideration upon which the defendant's promise was made, is entirely different from that set forth in the declaration, and this is a fatal variance. *King v. Robinson*, Cro. Eliz. 79; 1 Com. Dig. 334, tit. Action upon the Case upon Assumpsit.

(3.) Were there any doubt upon these points, the defendant ought to have been permitted to remove them by the testimony of Mr. Bull. If it be contended, that this promise, although not made directly to the plaintiffs, was nevertheless made to George De Wolf, for their benefit; then, the testimony offered by the defendant at the trial, ought to have been received to contradict this assertion.

(4.) But the promise contained in the letter, if made to George De Wolf, for the benefit of the plaintiffs, will not sustain the declaration, unless he can be considered as the mere agent of the plaintiffs; and this supposition is contradicted, not only by the words of the instrument itself, but by the plaintiffs' own witness. [The counsel here referred to and commented on the following cases: *Dutton v. Poole*, 2 Lev. 210; *Schemerhorn v. Vanderheyden*, 1 Johns. 139; *Felton v. Dickinson*, 10 Mass. 28; *Piggott v. Thompson*, 3 Bos. & Pul. 149, and the note; *Martin v. Hynd*, Cowp. 437; *Com. of Felt-makers v. Davis*, 1 Bos. & Pul. 102; 3 Salk. 234; Comb. 450; 3 T. R. 757; 1 Chit. on Pl. 4; 1 Com. Dig. 309, and note *p*, tit. Action upon the Case upon Assumpsit.] Indeed, in the case of a written contract *inter partes*, no other than an immediate party to the instrument itself, can maintain an action upon it. *Offley v. Ward*, 1 Lev. 235; *Gilbey v. Copley*, 3 Ibid. 139; *Salter v. Kingsley*, Carth. 77.

If George De Wolf was the agent of the plaintiffs, then they are bound by his acts, and must place the proceeds of the bills of exchange in the hands of the defendant, according to George De Wolf's express promise, before he will be under any obligation to ship the sugar.

7. No vessel has ever been designated by George De Wolf, on board of which the defendant has been required, by George De Wolf, to ship the sugar; and until such designation, no right of action will accrue in favor of any person against the defendant. The letter of George De Wolf, dated December 27th, 1825, and addressed to A. E. Belknap (relied upon by the counsel for the plaintiffs, to prove an authority in Belknap to designate a vessel, as the agent of George De Wolf), is insufficient for that purpose. It gives Belknap no such authority; and besides, George De Wolf had no right, legal or moral, after his bankruptcy, and after failing to place funds in the hands

De Wolf v. Rabaud.

of the defendants, either for the purchase or payment of the sugar, to call upon him to ship the same, consigned to the plaintiffs at Marseilles.

8. The agreement of the defendant relative to the shipment of the sugar, if made with the plaintiffs at all, was collateral to an undertaking on the part of George De Wolf, that he would cause the sugar to be shipped by the defendant, in consideration of an authority to be given to him to draw bills of exchange upon the plaintiffs, for his own benefit. For the non-fulfilment of this promise, George De Wolf was and is liable, and the defendant's undertaking is essentially a guarantee, given in aid of George De Wolf's credit, or for the performance of an act which he was bound by a promise, confessedly original, to perform. From the performance of this promise, George De Wolf has never been exonerated, and the defendant's undertaking is collateral to that of George De Wolf. (a) The testimony of the plaintiffs is, therefore, inadmissible, under the statute of frauds, to prove their declaration, for the want of a sufficient memorandum of the agreement in writing. Whatever doubts may have existed upon this subject, it is now well settled, that in cases under the statute of 29 Car. II., c. 3, § 4 (1 N. Y. Rev. Laws 78, ch. 44, § 11), the consideration upon which the agreement rests as well as the promise itself, must appear upon the writing. *Wain v. Warlters*, 5 East 16; *Lyon v. Lamb*, Fell on Guar. 336; *Saunders v. Wakefield*, 4 B. & Ald. 595; *Jenkins v. Reynolds*, 3 B. & Bing. 14; *Sears v. Brink*, 3 Johns. 211; *Leonard v. Vredenburg*, 8 Ibid. 27; *Stewart v. McGuin*, 1 Cow. 99; *Sloan v. Wilson*, 4 Har. & Johns. 322; *Stephens, Ramsay & Co. v. Winn*, 2 Nott & McCord 372.

* *Webster and King*, for the defendants.—1. As this cause is brought here by a writ of error, we apprehend, that the court will not go into an examination of the weight of testimony. The verdict of the jury is conclusive, that the defendant made the agreement stated in the plaintiffs' declaration. It is unnecessary now to inquire, what was the agreement between the defendant and George De Wolf, or whether that agreement could be enforced; and it was equally so, at the trial, unless that agreement was brought home to the knowledge of Belknap, so as to become a part of the defendant's contract with the plaintiffs. [*494

2. But aside from the verdict, the testimony proved the contract as laid in the declaration. If we put the case upon the verbal agreement between the parties, if we contend that we may (3 Dall. 300), then, the testimony of George De Wolf clearly made out our case. The letter is only corroborative of the verbal agreement. If we go upon the written contract, as contained in the letter of the 15th November 1825, then, we contend, that the written agreement is, in its terms, as much an agreement with the plaintiffs as with George De Wolf, and may inure to their benefit. If the letter had not expressed, that the sugars were to be shipped for the account of George De Wolf, the agreement of the defendant would have been a mere undertaking with the plaintiffs.

But for the purpose of this action, it is sufficient, that the agreement

(a) *Buckmyn v. Darnall*, 2 Ld. Raym. 1085; *Anderson v. Hayman*, 1 H. Bl. 120; *Gordon v. Martin*, Fitzg. 302; *Matson v. Wharam*, 2 T. R. 80; *Jones v. Ballard*, *Chase v. Day*, 17 Johns. 114; *Buller's N. P.* 280, 281; *Jackson v. Rayner*, 12 Johns 291.

De Wolf v. Rabaud.

contained in the letter of the 15th November, was in fact made and entered into by the defendant, for the use and benefit of the plaintiffs. That it was so, was fully proved. They advanced the consideration of the undertaking, on the faith of its being performed; and the defendant, at the time when he signed the letter, knew, that it was to be delivered to Mr. Belknap, who, on its credit, would authorize George De Wolf to draw the bills. It was not necessary, in order to entitle the plaintiffs to maintain their action, that George De Wolf should have been a mere agent without interest. The cases cited do not support the position of the counsel. The rule is, that if the promise is made to A. for the benefit of B., from whom that consideration moves, the law will intend that A. is the mere agent of B. (1 Com. Dig. Action on the Case, Assumpsit, E. and note; *Weston v. Barker*, 12 Johns. 276; *Lawrason v. Mason*, 3 Cranch 492.)

3. The main question, and that which involves the merits of this cause, arises upon that part of the charge of the learned judge, in which he instructs the jury, "that if the undertaking of the defendant was entered into, at the same time with that between Belknap and George De Wolf, so as to form *495] one entire *transaction, then, the consideration of the defendant's undertaking might be proved by parol." It is conceded, that if the undertaking of the defendant was original, and not within the statute of frauds, parol evidence of the consideration was admissible. If the consideration be stated in connection with the written agreement, the undertaking is in its terms direct to the plaintiffs, and nothing more remains to be supplied by parol evidence. But if it were necessary, parol evidence was admissible to prove the *res gestæ*, and purpose of that letter and agreement. *Bateman v. Phillips*, 15 East 272; 7 Taunt. 295; 5 Wheat. 326.

But it is contended, that the undertaking of the defendant (if an undertaking to the plaintiffs) was a collateral agreement, within the statute of frauds; and that the consideration as well as the promise, must be in writing, in order to be binding upon the defendant. Admitting the law to be now settled by the English cases, as we say it ought not to be, we contend, that if the general proposition which was first laid down by Lord ELLENBOROUGH in the case of *Wain v. Warlters*, can be maintained, still our case cannot, in any view of it, be brought within the principle of that case. In *Wain v. Warlters*, the defendant undertook to pay the previously subsisting debt of another person, upon a new consideration—that the plaintiff would forbear to sue. In the present case, the jury have expressly found that the arrangement between Mr. Belknap and George De Wolf, as to the authority to draw on the house in Marseilles, on the shipment and consignment of the sugar, and the undertaking of the defendant to make that shipment, were made and entered into at one and the same time, so as to form one entire transaction; and that the authority given by Mr. Belknap to George De Wolf to draw on the plaintiffs for 100,000 francs, was the consideration of the entire agreement. If, then, the undertaking of the defendant was collateral, and within the statute of frauds, it was simultaneous with the original undertaking, and supported by the same consideration; and upon the authority of *Leonard v. Vredenburg*, 8 Johns. 29, the parol evidence of the consideration was admissible. *Leonard v. Vredenburg* was decided upon deliberate consideration, and has been followed and confirmed in the subsequent cases (*Bailey v. Freeman*, 11 Johns. 221. *Nelson v.*

De Wolf v. Rabaud.

Dubois, 13 *Ibid.* 175), and it is regarded as settled law, in the state of New York.

4. The undertaking of the defendant was not collateral in any sense ; but was an original undertaking, exclusively his, and need not have been in writing. By agreeing to ship the sugars and to consign them to the *plaintiffs, on the account of George De Wolf, the defendant did not under- [*496 take to pay any debt of George De Wolf, then existing, or about to be created. The defendant was the only person who undertook or was bound to make the shipment. He did not engage that George De Wolf should ship the sugars, or that he would ship, on the default of George ; but he assumed the entire and exclusive responsibility of providing and shipping the five hundred boxes, according to the terms of the letter.

5. The letter from George De Wolf to Mr. Belknap, dated at Bristol, on the 27th December 1828, constituted Mr. Belknap the agent of George De Wolf for the purpose of naming the vessel, on board of which the defendant was to make the shipment. It was intended as an authorization for that purpose, and was regarded as such, both by Mr. Belknap and the defendant. But whatever objection might have been made by the defendant, either to the sufficiency of that authority, or to the right of George De Wolf, after his bankruptcy, either to name the vessel, or to authorize Mr. Belknap, or any other person to do so, they were waived by the defendant, in his letter to Mr. Belknap, under the date of the 6th of January 1828, wherein he puts his refusal to ship the sugars, on the single ground, that they had not been paid for.

STORY, Justice, delivered the opinion of the court.—Messrs. Rabaud, Brothers & Co., of Marseilles, brought a suit in the circuit court of the southern district of New York, against James De Wolf, jun. (the plaintiff in error), to recover damages, for not shipping them 500 boxes of sugar, on account of one George De Wolf, according to an agreement entered into by him with them. The declaration contained four counts, and in each of them the substance of the contract stated, is, that the defendant, in consideration that one Belknap (one of the partners in the house of Rabaud, Brothers & Co.) would authorize George De Wolf to draw on the plaintiffs for 100,000 francs, undertook and promised, that he would ship, for the account of George De Wolf, on board such vessel as he, George De Wolf, should direct, five hundred boxes of white Havana sugar, consigned to the plaintiffs, at Marseilles. The declaration then proceeds with the proper averments and breaches necessary to maintain the action. Upon the trial, under the general issue, the jury found a verdict for the plaintiffs, and judgment was given for them accordingly. The cause now comes before this court upon a writ of error, and bill of exceptions taken at the trial.

The bill of exceptions is voluminous, and contains, at large, the evidence admitted at the trial, as well as the charge of the *learned judge who presided at the trial. It is unnecessary to refer to that evidence, or [*497 to consider its nature, bearing and extent, upon which so ample a comment has been made at the bar, except so far as it applies to some question of law decided by the court, to which an exception has been taken. The whole facts were left open to the jury, and so far as they were imperfect or incon-

De Wolf v. Rabaud.

clusive, the defendant has had the full opportunity of addressing his views to the jury, and they have found their verdict against him.

In the progress of the trial, a letter of the 27th December 1825, written by George De Wolf to Belknap, was offered by the defendant in evidence, for the purpose of showing an authority from George De Wolf to Belknap, to direct or name a vessel to the defendant, on board of which the sugars might be shipped. The defendant objected to its admission, and the objection was overruled; this constitutes the first ground of error, now insisted on by the defendant. We are of opinion, that the letter was rightly admitted, for both of the reasons stated in the charge. It was evidence of such an authority; and the defendant made no objection to it, at the time, on account of any insufficiency in this respect: but put his defence, by his letter of the 5th of January 1826, on an entirely distinct ground.

After the evidence for the plaintiffs was closed, the defendant moved for a nonsuit, which motion was overruled. This refusal certainly constitutes no ground for reversal in this court. A nonsuit may not be ordered by the court, upon the application of the defendant, and cannot, as we have had occasion to decide, at the present term, be ordered in any case, without the consent and acquiescence of the plaintiff. *Elmore v. Grymes* (ante, p. 469).

In the further progress of the trial, upon the examination of one Frederick G. Bull, a witness for the defendant, the counsel for the defendant offered to prove, by Bull, that it was an express understanding and agreement between the defendant and George De Wolf, at the time the letter of the 15th November 1825 (which will be hereafter more particularly noted) was signed by the defendant, that the latter should furnish the defendant with the funds necessary for the purchase of the sugar, before the defendant would be under any obligation to ship the same. This testimony was rejected by the court, unless it should also appear that Belknap was party thereto, or that the same was brought home to his knowledge. We can perceive no error in this decision. If the defendant had entered into the contract with the plaintiffs, stated in the declaration, and the private arrangement made between the defendant and George De Wolf, constituted no part of that contract, and was unknown to them, it certainly ought not to prejudice their rights. It was *res inter alios acta*; and had no

*498] legal tendency either to disprove the plaintiffs' case, or to exonerate the defendant from his liability.

The other exceptions are exclusively confined to the charge given to the jury, upon the summoning of the court, upon points of law. The first objection was to the sufficiency of the evidence to establish the citizenship of Belknap, as averred in the declaration. This is now waived by the counsel, and, indeed, could not now be maintained, because it has been recently decided by this court, upon full consideration, that the question of such citizenship constitutes no part of the issue upon the merits, and must be brought forward by a proper plea in abatement, in an earlier stage of the cause.

The great question upon the merits, arises upon that part of the charge, which relates to the agreement contained in the letter of the 15th of November 1825, from George De Wolf to the defendant, and the accompany-

De Wolf v. Rabaud.

ing assent of the letter, with reference to the statute of frauds. That letter is in the following terms :

New York, 15th November 1825.

MR. JAMES DE WOLF, JUN.

Dear Sir :—You will please ship for my account, on board such vessel as I shall direct, five hundred boxes white Havana sugar, consigned to Messrs. Rabaud, Brothers & Co., Marseilles, and oblige your friend and obedient servant,

(Signed)

GEORGÉ DE WOLF.

Agreed to—(Signed) JAMES DE WOLF, JUN.

Upon this part of the case, the charge was as follows : “ It is said, that this letter, under the statute of frauds, does not purport on its face to contain any binding contract on the part of the defendant, and that the defects cannot be supplied by parol evidence. This objection I think cannot be sustained. The first question to be settled, and which is matter of fact for your determination is, whether the arrangement between Belknap and George De Wolf, as to the authority to draw on the house in Marseilles, on the shipment and consignment of five hundred boxes of sugar, and the undertaking of the defendant, were made and entered into at one and the same time, so as to form one entire transaction.” The judge then proceeded to sum up the evidence on this point, and added, “ the consideration for this undertaking was the authority given by Belknap to George De Wolf, to draw on the plaintiffs for one hundred thousand francs. This consideration, it is true, although fully proved, is not expressed in the written contract. And one question is, whether it can be supplied by parol evidence ; and I think it may, if the undertaking of the defendant was entered into at the same time, with that between Belknap and George De Wolf, so as to form one entire transaction. The evidence does not, in any manner, contradict the written agreement, and is perfectly consistent with it. As between the plaintiffs and George De Wolf, the consideration might be clearly supplied by parol proof ; and if the undertaking of the defendant was at the same time, it required no consideration from the plaintiffs to him, the consideration to George De Wolf was sufficient to uphold and support the contract of the defendant.” And he finally stated, that if he was mistaken in this view of the evidence, “ and the jury should be of opinion, that the contract between Belknap and George De Wolf was completed, and unconnected with the engagement of the defendant, before he undertook to make the shipment and consignment, then the evidence was not sufficient to maintain the present action. It will then be a collateral undertaking, made subsequent to the principal contract, and would require some other consideration than that which supported the principal contract.”

The question, then, so far as it was a question of fact, whether the defendant did enter into the asserted agreement with the plaintiffs, and whether it was a part of the original arrangement with George De Wolf, and upon the original consideration moving from the plaintiffs, was before the jury, and they have found in the affirmative. The question of law remains, whether this was a case within the statute of frauds, so as to prevent parol evidence from being admissible, to charge the defendant ?

The statute of frauds of New York is a transcript, on this subject, of the statute of 29 Car. II., c. 3 : it declares, “ that no action shall be brought

De Wolf v. Rabaud.

to charge a defendant on a special promise for the debt, default or miscarriage of another, unless the agreement, or some memorandum or note thereof, be in writing, and signed by the party, or by any one by him authorized." The terms "collateral" or "original" promise, do not occur in the statute, and have been introduced by courts of law, to explain its objects and expound its true interpretation. Whether, by the true intent of the statute, it was to extend to cases where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration, moving at the same time between the parties, or, whether it was confined to cases, where there was already a subsisting debt and demand, and the promise was merely founded upon a subsequent and distinct undertaking, might, if the point were entirely new, deserve very grave deliberation. But it has been closed within very narrow limits, by the course of the authorities, and seems scarcely open for general examination; at least, in those states where *500] the English authorities have been fully *recognised and adopted in practice. If A. agree to advance B. a sum of money, for which B. is to be answerable, but at the same time, it is expressed upon the undertaking, that C. will do some act for the security of A., and enter into an agreement with A. for that purpose; it would scarcely seem a case of a mere collateral undertaking; but rather, if one might use the phrase, a trilateral contract. The contract of B. to repay the money, is not coincident with, nor the same contract with C. to do the act. Each is an original promise, though the one may be deemed subsidiary, or secondary to the other. The original consideration flows from A., not solely upon the promise of B. or C., but upon the promise of both, *diverso intuitu*, and each becomes liable to A., not upon a joint but a several original undertaking. Each is a direct, original promise, founded upon the same consideration. The credit is not given solely to either, but to both; not as joint contractors, on the same contract, but as separate contractors, upon co-existing contracts, forming parts of the same general transaction. Of that very nature is the contract now before the court; and if the intention of all the parties was, that the letter of the 15th of November should be delivered to Belknap, as evidence of the original agreement between all the parties, and indeed, as part execution of it, to bind the defendant, not merely to George De Wolf, but to the plaintiffs (and so it has been established by the verdict), then it is not very easy to distinguish the case from that which was put.

But assuming that the true construction of the statute of frauds is, as the authorities seem to support, and that such a promise would be within its purview; it remains to consider, whether the arguments at the bar do establish any error in the opinion of the circuit court. In the first place, there is no repugnance between the terms of that letter and the parol evidence introduced. The object of the letter was to establish the fact, that there was a sufficient consideration for the agreement; and what that consideration was, and also the circumstances under which it was written, as explanatory of its nature and objects. Its terms do not necessarily import, that it was an agreement exclusively between George De Wolf and the defendant. If the paper was so drawn up and executed, by the assent of all the parties, for the purpose of being delivered to Belknap, as a voucher, and evidence to him of an absolute agreement by the defendant to make the shipment, and so was, in fact, understood by all the parties at the time;

De Wolf v. Rabaud.

there is nothing in its terms inconsistent with such an interpretation. The defendant agrees to the shipment. But with whom? It is said, with George De Wolf alone; but that does not necessarily follow, because it is not an instrument in its terms *inter partes*. If the parties intended that it should express the joint assent *of George De Wolf and the defendant, to the shipment, and it was deliverable to Belknap accordingly, as [*501 evidence of their joint assent that it should be made upon the terms and in the manner stated in it, there is nothing which contradicts its proper purport; and it is then, precisely, what the parties require it to be. It was for the jury to say, whether the evidence disclosed that as the true object of it; and to give it effect accordingly, as proof of an agreement in support of the declaration. The case of *Sargent v. Morris*, 3 Barn. & Ald. 277, furnishes no un instructive analogy for its admission.

In the next place, was the parol evidence inadmissible, to supply the defect of the written instrument, as to the consideration, and *res gestæ*, between the parties? The case of *Wain v. Warlters*, 5 East 10, was the first case which settled the point, that it was necessary, to escape from the statute of frauds, that the agreement should contain the consideration for the promise, as well as the promise itself. If it contained it, it has since been determined, that it is wholly immaterial, whether the consideration be stated in express terms, or by necessary implication. That case has, from its origin, encountered many difficulties, and been matter of serious observation, both at the bar, and on the bench, in England and America. After many doubts, it seems, at last, in England, by the recent decisions of *Saunders v. Wakefield*, 4 Barn. & Ald. 595, and *Jenkins v. Reynolds*, 3 Brod. & Bing. 14, to have settled down into an approved authority. It has not, however, received a uniform recognition in America; although in several of the states, and particularly in New York, it has, to a limited extent, been adopted into its jurisprudence, as a sound construction of the statute. On the other hand, there is a very elaborate opinion of the supreme court of Massachusetts, in *Packard v. Richardson*, 17 Mass. 122, where its authority was directly overruled. What might be our own view of the question, unaffected by any local decision, it is unnecessary to suggest; because the decisions in New York, upon the construction of its own statute, and the extent of the rules deduced from it, furnish, in the present case, a clear guide for this court. In the case of *Leonard v. Vredenburg*, 8 Johns. 29, Mr. Chief Justice KENT, in delivering the opinion of the court, adverting to the fact, that that case was one of a guarantee, or promise collateral to the principal contract, but made at the same time, and becoming an essential ground of the credit given to the principal or direct debtor; added, "and if there was no consideration other than the original transaction, the plaintiff ought to have been permitted to show that fact, if necessary, by parol proof; and the decision in *Wain v. Warlters* did not stand in the way." One of the points in that case was, whether the parol proof *of the consideration was not improperly rejected at the trial; and the decision of the court [*502 was, that it ought to have been admitted. It is not, therefore, as was suggested, at the argument, a mere *obiter dictum*, uncalled for by the case. It was one, though not the only one, of the points in judgment before the court. The same doctrine has been subsequently recognised by the same court in *Bailey v. Freeman* 11 Johns. 221, and in *Nelson v. Dubois*, 13 Ibid. 175.

Davis v. Mason.

It does not seem necessary to pursue this subject further, because here is a clear authority, justifying the admission of the parol evidence, upon the principle of the local jurisprudence. It seems to us a reasonable doctrine, founded in good sense and convenience, and tending rather to suppress than encourage fraud. But whether so, or not, it sustains the opinion of the circuit court, in a manner entirely free from exception.

The next objection to the charge, founded on the variance between the declaration and proofs, has been abandoned at the argument, and need not be dwelt upon. And the last objection, to wit, to the designation of a vessel for the shipment as ineffectually made, has been already in part answered; and we entirely coincide with the views expressed on this point, by the circuit court.

Without, therefore, going more at large into the points of the case, or commenting upon the various authorities and principles so elaborately brought out in the discussions at the bar, it is sufficient to say, that we perceive no error in the judgment of the circuit court, and it is, therefore, to be affirmed, with costs.

Judgment affirmed.

*503] *JOHN DAVIS and others, Plaintiffs in error, v. RICHARD B. MASON,
Lessee.

Lex loci rei sitæ.—Tenancy by the curtesy.—Execution of will.

In an action of ejectment to recover land in Kentucky, the law of real estate in Kentucky, is the law of this court, in deciding the rights of the parties. p. 505.

It seems, that the rigid rules of the common law do not require, that the husband shall have had actual seisin of the lands of the wife, to entitle himself to a tenancy by curtesy, in waste, or what is sometimes styled, "wild lands."¹ p. 505.

If a right of entry on lands exists, it ought to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists. p. 508.

At present, it is fully settled in equity, that the husband shall have curtesy of trust, as well as of legal, estates; of an equity of redemption, of a contingent use, or money to be laid out in lands.² p. 508.

Under the law of the state of Kentucky, and the decisions of their courts upon it, a will, with two witnesses, is sufficient to pass real estate; and a copy of such will, duly proved, and recorded in another state, is good evidence of the execution thereof. p. 508.

It is a settled rule, in Kentucky, that although more than one witness is required to subscribe a will, disposing of lands, the evidence of one may be sufficient to prove it. p. 502.

ERROR to the Circuit Court of Kentucky. The lessee of Richard B. Mason commenced an action of ejectment, in the circuit court for the district of Kentucky, against John Davis and others, tenants in possession, for the recovery of 8000 acres of land, claiming to recover the same under a right of entry, under and by virtue of, a grant from the state of Virginia to George Mason, of Fairfax, dated 19th of March 1817.

William Mason and others conveyed, by deed, their interest in and to the land in contest (they being children of the patentee), to George Mason, of Lexington, the eldest son of George Mason the patentee. George Mason, the grantee, and the father of the lessor, died the — day of December

¹ Beekman v. Sellick, 8 Johns. 262; Buchanan v. Duncan, 40 Penn. St. 82.

² See Dubs v. Dubs, 31 Penn. St. 149; Van Rensselaer v. Dunkin, 24 Id. 252.