*HUMPHREY FULLERTON, JOHN CARLISLE and JOHN WADDLE, Plaintiffs in error, *v.* The PRESIDENT, DIRECTORS and COMPANY OF THE BANK OF THE UNITED STATES, Defendants in error.

Practice.—Burden of proof.

The state of Ohio not having been admitted into the Union until 1802, the act of congress passed May 8th, 1792, which is expressly confined in its operations to the day of its passage, in adopting the practice of the state courts into the courts of the United States, could have no operation in that state; but the district court of the United States, established in that state, in 1803, was vested with all the powers and jurisdiction of the district court of Kentucky, which exercised full circuit court jurisdiction, with power to create a practice for its own government. The district court of Ohio did not create a system for itself, but finding one established in the state, in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the state courts, and by a single rule, adopted the state system of practice. When, in 1807, the seventh circuit was established, the judge assigned to that circuit found the practice of the state adopted, in fact, into the circuit court of the United States, and the same has since, so far as it was found practicable and convenient, by a uniform understanding, been pursued, without any positive rule upon the subject. p. 612.

The act of 18th February 1820, relative to proceedings against parties to promissory notes, was a very wise and benevolent law, and its salutary effects produced its immediate adoption into the practice of the courts of the United States, and the suits have, in many instances, been prosecuted under it. p. 613.

It will not be contended, that the practice of a court can only be sustained by written rules, nor that a party pursuing a form or mode of proceeding, sanctioned by the most solemn acts of the court, through the course of years, is to be surprised and turned out of court, upon a ground which has no bearing upon the merits. Written rules are unquestionably to be preferred, because of their certainty; but there can be no want of certainty, where long acquiescence has established it to be the law of the court, that the state practice shall be their practice, so far as they have the means of carrying it into effect, or until deviated from, by positive rules of their own making. p. 613.

The course of prudence and duty in judicial proceedings in the United States, when cases of difficult distribution as to power and right present themselves, is to yield rather than encroach; the duty is reciprocal, and will, no doubt, be met in the spirit of moderation and comity. In the conflicts of power and opinion, inseparable from our very peculiar relations, cases may occur, in which the maintenance of principles, and the administration of justice, according to its innate and inseparable attributes, may require a different course; and when such cases do occur, our courts must do their duty; but until then, it is administering justice in the spirit of the constitution, to conform as nearly as possible to the administration of justice in the courts of the several states. p. 614.

Although the act of the legislature of Ohio, regulating the mode of proceeding in actions on promissory notes, was passed after the making of * the note upon which this action [*605 was brought, yet the circuit court of the United States for the district of Ohio having incorporated the action under that statute, with all its incidents, into its course of practice, and having full power by law to adopt it, there does not appear any legal objection to its doing so, in the prosecution of the system under which it has always acted.[1] p. 615.

Modern decisions go to establish, that if a note be at the place where it is payable, on the day it falls due, the *onus* of proving payment falls upon the parties who are liable to pay it; and the instructions of the circuit court, in this case, were more favorable to the parties to the note, where the court said, upon the sufficiency of the demand, that on an article or a note made payable at a particular bank, it is sufficient to show, that the note had been discounted, and become the property of the bank, and that it was in the bank, and not paid when at maturity.[2] p. 616.

ERROR to the Circuit Court of Ohio. This was a writ of error brought to reverse a judgment rendered in the circuit court of the United States for

---

[1] S. P. Hiriart *v.* Ballou. 9 Pet. 156.

[2] United States Bank *v.* Carneal, 2 Pet. 543.

the district of Ohio, in favor of the Bank of the United States, the present defendants in error.

The declaration contained a common count for money lent and advanced. The plea is *non assumpserunt*. There is another plea of *non assumpsit*, filed by H. Fullerton alone, and under it, a notice, that he would set off a large sum of money, $3957.33⅓, due by the bank to the said Fullerton, being the avails of a certain note (the note on which the action was brought) which was discounted by the said Fullerton at the office of discount and deposit in Cincinnati, and the proceeds of which he had never checked out. There was another notice of set-off by all the defendants; that the plaintiffs were indebted to the defendant Fullerton, in a large sum of money, $5000, being the avails of a certain promissory note (the note on which plaintiff's action was founded) which had never been paid by the bank to Fullerton, or received by him, but retained by the plaintiffs; and Fullerton applied the same, by way of discharge and set-off, to the said note made to plaintiffs.

The cause was tried by a jury; and, on the trial, the plaintiff exhibited in evidence, a certain note, a copy of which follows:

$4000. Cincinnati, February 1, 1820.

Sixty days after date, I promise to pay John Carlisle, or order, at the office of discount and deposit of the Bank of the United States, at Cincinnati, four thousand dollars, for value received.

(Signed) ISAAC COOK.

Indorsed—John Carlisle, John Waddle, Humphrey Fullerton.

Isaac Cook, the maker of the note, died pending the suit, and before the trial. To the introduction of this note in evidence, the defendants objected, as evidence of a several contract of the maker and each one of the indorsers, and not of any *joint undertaking or liability of the defendants. [*606] This objection was overruled by the court, and the note permitted to be read in evidence, under the eighth section of the act of the general assembly of Ohio, entitled, "an act to regulate judicial proceedings, where banks and bankers are parties, and prohibit the issuing bank-bills of a certain description," passed 18th February 1820; to which decision of the court, the defendants excepted.

The eighth section of the act provides, "that when any sum of money due and owing to any bank or banker shall be secured by indorsements on the bill, note, or obligation for the same, it shall be lawful for such bank or banker, to bring a joint action against all the drawers and indorsers, in which action the plaintiff or plaintiffs may declare against the defendants jointly, for money lent and advanced, and may obtain a joint judgment and execution for the amount found to be due; and each defendant may make the same separate defence against such action, either by plea, or upon trial, that he could have made against a separate action; and if, in the case herein provided for, the bank or banker shall institute separate actions, against drawers and indorsers, such bank or bankers, shall recover no costs: Provided always, that in all suits or actions prosecuted by a bank or banker, or persons claiming as their assignees, or under them, in any way, for their use or benefit, the sheriff, upon any execution in his hands in favor of such bank or banker, their or his assignee as aforesaid, shall receive the note or notes

of such bank or banker, from the defendant, in discharge of the judgment; and if such bank or banker, their or his assignee, or other persons suing in trust for the use of such bank or banker, shall refuse to receive such notes from the sheriff, the sheriff shall not be liable to any proceedings whatever, at the suit, or upon the complaint, of the bank or banker, their or his assignee as aforesaid."

The facts of the case, so far as they were considered as important to the decision of the court, are fully stated in the opinion delivered by Mr. Justice Johnson.

The case was argued by *Leonard*, for the plaintiffs in error; and by *Sergeant*, for the defendants.

The counsel for the *plaintiff* made the following points:—1. The circuit court erred in admitting the note in evidence under the money counts in the declaration, for if the statute of Ohio could be used as authority for the form of action, the death of one of the parties, during the suit, determined the right to proceed under that statute. 2. The statute of Ohio, regulating the practice of the state, is not obligatory as to the practice of the courts of the *United States, and the statute of 18th February 1820, was passed after the making of the note on which this action is founded. [*607] 3. There was no proof of demand of payment of the note, and the indorsers on the note were discharged by this omission; and by the course the bank adopted in reference to the note, after its non-payment by the maker. 4. The notice of the non-payment was not given in time to the indorsers.

Leonard insisted, the court erred in admitting the note in evidence, under the money counts. The statute of Ohio authorizes joint actions against "all the drawers or indorsers." 22 Ohio Laws, p. 361. This action was instituted against the maker and indorsers, and the maker died before trial Although disjunctives are sometimes construed conjunctively, yet no case could be cited, in which it had been held, that a disjunctive might be construed conjunctively, at one time, and at another, agreeable to its literal signification. The statute being in derogation of the principles of the common law, authorizing a joint action against several persons, on several distinct and dissimilar contracts, was *strictissimi juris*, and after the death of the maker, no suit could be instituted or prosecuted under it. This construction was fortified by another law of Ohio, requiring the property of the principal to be exhausted, before that of the surety is made liable, which was held to apply as between makers and indorsers of accommodation notes.

2. The bill of exceptions distinctly raises the question, whether the statutes of Ohio, regulating the state practice, are obligatory, *vi proprio*, on the United States courts. There is no evidence in the record, that the state practice was ever adopted by the court, and "the note was permitted to be read in evidence, under the act of Ohio." See *Wayman and another* v. *Southard and another*, 10 Wheat. 1. Admitting the circuit court might, under the authority to establish its practice, adopt, by written rules or otherwise, the practice in existence at the time of the act of adoption in the state courts, the court was not empowered to incorprate into its practice, by one act of prospective regulation, whatever might be the future practice of the

state courts. This would be, not to exercise the judicial functions intrusted to the court, but to transfer them to the state authorities. An act of congress adopting the state practice in existence at the time of its passage, is valid ; but an act prescribing such rules of practice as the state legislatures might in future enact, would be unconstitutional, as it would transfer to the states, the powers vested by the constitution in congress. If, then, the court could not, in the active exercise of its powers, establish the future *608] *state practice, much less could the passive acquiescence of the court, in laws and rules of practice enacted from time to time by the state, establish it as a fundamental and constitutional rule, that future state regulations should thereby become a part of the circuit court practice. In the present instance, the statute had never received the express sanction of the court, was introduced and followed up by the United States Bank alone, had never been contested, and always used *sub silentio.*

The act of Ohio was not passed until after the note was discounted. The act established a rule of property, construction or evidence, rather than a rule of practice, and therefore, could not be applied to a contract entered into before its passage. It was such a rule, as is referred to in the 34th section of the judiciary act, ch. 20.

In general, a demand is necessary on the maker to charge the indorser. It may be dispensed with, when the note is payable at the holder's ; and its place supplied by proof, that the holder was present, ready to receive payment, and the account of the maker inspected, and no credit found in his favor. *United States Bank* v. *Smith*, and the cases there cited, 11 Wheat. 171. This is the English rule, 2 H. Bl. 509, and this court has strongly intimated an opinion in favor of its correctness. No case—not the cases in Mass., cited 11 Wheat. 171, go the length to waive proof that the holder was present at the time and place, ready to receive payment. The charge of the court did not come up to the rule. "If the jury were satisfied, from the evidence, the note was in bank, and not paid when it came to maturity," the record purports to contain all the evidence in the case, and none was exhibited of the non-payment of the note. Agreeable to the charge, it would be sufficient for the plaintiffs to prove the note in bank, at its maturity, without any proof that it was then unpaid : because there was no proof of non-payment of the note in the case, and besides, proof ought not to be required of a negative, that the note was unpaid. Indeed, it is impossible to give positive proof of non-payment. In this case, as in all other cases whatsoever, the jury must be satisfied, that the note was unpaid, when it came to maturity, or render a verdict for the defendant. Of this they would be satisfied, without positive proof. Non-payment is presumed, until payment is proved. If, therefore, the jury were satisfied, the note was in bank, unpaid, when it came to maturity, a verdict should not have been passed for the plaintiffs, unless they were also satisfied, a demand had been made, or excused or dispensed with. The non-payment might have grown out of the absence of the holder, at the time and place limited for the payment. To charge an indorser, *609] *affirmative proof must be exhibited of a demand, or of facts sufficient to excuse or dispense with it. All the books say this, and none assert that proof of a note's being in bank, and unpaid, at its maturity, is such excuse or dispensation ; much less, that the presumption of non-payment, from the absence of proof of payment, supersedes its necessity and supplies

its place. The doctrine of the charge, when analyzed to its last result, and applied to the evidence in the case, is, that proof the note was in bank, when it came to maturity, will charge the indorser ; and this without a demand, or the evidence of any facts supplying or excusing its want.

The jury should have been instructed, they must be satisfied by affirmative proof, the notice was put in the post-office, on the day after the demand, in season to go by the mail next succeeding the day of demand. Proof, barely, that it was put in the post-office on that day, without affirmative proof it was there in season to go by the next post, was insufficient. *Lenox* v. *Roberts*, 2 Wheat. 373. In *Darbyshire* v. *Parker*, 6 East 3, Lord Ellenborough says, the rule as laid down originally in Marius, is, the notice must be sent by the next post. In one word, it is the next post, and not the next day. Due diligence consists in placing the notice in the office, before the post next after the last day of grace leaves town ; and not in placing it there, on the day next after the last day of grace. This, although on the next day, might not be in time for the next mail ; and due diligence must be proven, affirmatively, by the plaintiffs. The record shows the plaintiffs did prove the notice was put in the office on the next day, but not whether in season for the next mail ; the record likewise shows they did not attempt to prove this, as it professes to contain all the evidence exhibited on the trial.

He then went into a minute examination of the instructions asked and charge given, comparing them with the testimony ; to show the court erred in the instructions refused, and those given, relative to the discount of the note, and the application of its proceeds, if a discount was made.

For the defendants in error, it was argued by *Sergeant*, upon the first bill of exceptions, that the provision of the act of the state of Ohio, must be regarded either as a "law of the state," furnishing a "rule of decision" under the 34th section of the judiciary act of 1789, or as a mere rule of practice. He would not say, it was of the former description, though that position would perhaps be supported by the authority of 3 Dall. 344, and Ibid. 425. It might be deemed, in effect, an enactment, that *quoad hoc*, the contract should be considered a joint contract, for the purpose of remedy. In Pennsylvania, where there is no court of chancery, ejectment may be maintained upon an *equitable title. Not that an equitable title is a legal title, in general, but only that it is a legal title, for the purpose of maintaining the action. This has been in part adopted in the federal court in that district, as the law of the state. Upon the same principle, the law of Ohio would seem to be a rule of decision. If so, it would be obligatory upon the circuit court. But this it was not necessary to affirm ; for, if it was a "rule of practice," the court had power to adopt it, and it is quite clear, that it had been adopted, though there was no written rule on the subject. So that, either way, it was properly applicable to the case, and there was no error in applying it. As a beneficial remedial law, it was well worthy of adoption. [*610

Upon the construction of the act, it was argued, that taking the whole of the section together, it was the obvious intention of the legislature, to give one action against the maker *and* indorsers. The latter part of the section was irreconcilable with any other intention. Besides, it is necessary

to make sense of the first part of the section itself. Otherwise construed, that is, disjunctively, the effect would be to give a joint action against drawees. But a joint action might be maintained against drawees, without the aid of an act of the legislature. The court would not incline to impute needless legislation.

If this was the true construction, and the act gave a joint action, or, *quoad* the remedy, considered the contract as joint, it would leave the action, when brought, upon the same footing and subject to the same rules as all other actions upon joint contracts, unless otherwise provided by the act. Does a joint action abate by the death of one of the defendants? Certainly not. Is there anything in the act which declares that this action shall abate in that event? It is clear, that there is no such provision; such a provision would have been inconsistent with the obvious design of the act; for how would the multiplication of suits be avoided, by declaring that the action should abate upon a contingency of no importance to the merits, and the plaintiff in that case be compelled to bring several suits? It would be derogatory to the intelligence of the legislature, to impute such an intention. There was nothing to warrant it, either in the words or spirit of the act.

Upon the second bill of exceptions, it was argued: 1. That the nature of the case was apparent from the record, and the effort of the defence appeared to have been, to give it technical complexion different from the reality. From a list in the record, it would be seen, that the note in question was one (the last) of a series of notes, beginning in the year 1817, with the same names, but not always in the same order, discounted by the office of the Bank of the United States, at Cincinnati. This note was put into *611] bank, as a renewal, for the precise purpose, *manifestly known to all the parties, of applying the proceeds to the payment of the next preceding note. It was discounted, on that condition, and on no other. The defendants below were interested in the condition, for their names were all upon the prior note, which must have been protested, but for the payment by means of this discount. Of the fourteen instructions required (most of them now abandoned), it will be seen, that the greater part, in some shape or other, aimed to work out a conclusion (contrary to the truth of the case), that the proceeds of the discount were to be placed to the credit of the last indorser, and the preceding note to remain unpaid. Upon that subject, the charge of the court was clear and satisfactory, and to the full as favorable to the defendants as they could reasonably ask, leaving it to the jury, as a matter of fact, to decide, whether, from the evidence in the case, it was not proved, that the application of the proceeds was made with the consent of the last indorser. The fact of his consent, the jury have, therefore, found. For this, the counsel referred to the charge.

2. As to proof of demand, the charge of the court (though there seems to have been no dispute on that point below) was in these words: "The jury ought to be satisfied, that the note had been discounted by, and become the property of, the bank; that it was in bank, and not paid, when it came to maturity." The note being payable at the bank, and the jury having found that it was in bank, and not paid, when it came to maturity, nothing more could be necessary.

3. Upon the point of notice, the charge of the court was, as it was under-

stood, in precise conformity with what the counsel for the plaintiff in error required. This was the natural and the grammatical interpretation of the language used by the learned judge—"succeeding" referred, as its antecedent, to "the last day of grace." Thus understood (and if there had been ambiguity, it was the duty of the counsel below to ask for a more precise instruction at the time), the charge is, that the notice was to be in the post-office, in time to go by the mail following the last day of grace; and this the plaintiff in error insists it ought to be. As to the fact, whether there was a mail on the following day, and at what hour, there was no evidence. It is unnecessary to state the arguments more at large, as the opinion of the court goes so fully into the case.

Johnson, Justice, delivered the opinion of the court.—This cause comes up from the circuit court of Ohio, on a writ of error. The record exhibits a judgment recovered by the defendants here, against the plaintiffs, in an action for money lent *and advanced, The plea was *non assumpsit*, with notice of a discount, and a verdict for plaintiff below. The errors assigned arise upon various bills of exception, the first of which was taken to the evidence offered to maintain an action, in these words: [*612

"The plaintiff in support of his action, offered in evidence the following promissory note made by Isaac Cook, and indorsed by Humphrey Fullerton, John Waddle and John Carlisle."

"$4000. Cincinnati, February 1st, 1820.

Sixty days after date, I promise to pay John Carlisle, or order, at the office of discount and deposit of the Bank of the United States, at Cincinnati, four thousand dollars, for value received.

(Signed) Isaac Cook.

Indorsed—John Carlisle, John Waddle, Humphrey Fullerton."

"To the introduction of this evidence the defendant, by his counsel, objected, as evidence of a several contract of the drawer and each of the indorsers on the note and not of any joint undertaking or liability of the defendants; which objection was overruled by the court, and the note permitted to be read in evidence, under the act of the general assembly of Ohio, entitled, 'an act to regulate judicial proceedings, where banks and bankers are parties, and to prohibit the issuing of bank-bills of certain descriptions,' passed 18th of February 1820; to which decision, the counsel excepted."

Cook, it appears, was originally made a party defendant to the action, but died pending the suit; the plaintiff suggested his death on the record, and went to trial against the remaining three defendants.

In order to understand the bearing which the instruction moved for has upon the cause, it is necessary to remark, that the state of Ohio was not received into the Union until 1802; so that the process act of 1792, which is expressly confined in its operation to the day of its passage, in adopting the practice of the state courts into the courts of the United States, could have no operation in that state. But the district court of the United States, established in the state, in 1803, was vested with all the powers and jurisdiction of the district court of Kentucky, which exercised full circuit court jurisdiction, with power to create a practice for its own government. The

district court of Ohio, it appears, did not create a system for itself, but finding one established in the state, in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the state courts ; or, in effect, adopted, by a single rule, the state system *613] *of practice, in the same mode in which this court, at an early period, adopted the practice of the king's bench in England. So that, when the seventh circuit was established, in the year 1807, the judge of this court, who was assigned to that circuit, found the practice of the state courts adopted, in fact, into the circuit court of the United States.

It has not been deemed necessary to make any material alterations since ; but so far as it was found practicable and convenient, the state practice has, by a uniform understanding, been pursued by that court, without having passed any positive rules upon the subject. The act of the 18th February 1820, alluded to in the bill of exceptions, was a very wise and benevolent law, calculated, principally, to relieve the parties to promissory notes from accumulated expenses ; its salutary effects produced its immediate adoption into the practice of the circuit court of the United States ; and from that time to the present, in innumerable instances, suits have been there prosecuted under it. The alteration in practice (properly so called) produced by the operation of this act, was very inconsiderable, since it only requires notice to be given of the cause of action, by indorsing it on the writ, and filing it with the declaration, after which the defendants were at liberty to manage their defence, as if the note had been formally declared upon in the usual manner.

It is not contended, that a practice, as such, can only be sustained by written rules ; such must be the extent to which the argument goes, or certainly, it would not be supposed, that a party pursuing a former mode of proceeding, sanctioned by the most solemn acts of the court, through the course of eight years, is now to be surprised and turned out of court, upon a ground which has no bearing upon the merits. But we are decidedly of opinion, the objection cannot be maintained. Written rules are, unquestionably, to be preferred, because their commencement, and their action, and their meaning, are most conveniently determined ; but what want of certainty can there be, where a court, by long acquiescence, has established it to be the law of that court, that the state practice shall be their practice, so far as they have the means of carrying it into effect, or until deviated from by positive rules of their own making. Such we understand has been the course of the United States court in Ohio, for twenty-five years past. The practice may have begun, and probably did begin, in a mistaken construction of the process act, and then it partakes of the authority of adjudication.

But there was a higher motive for adopting the provisions of this law into the practice of that court ; and this bill of exceptions brings up one of those difficult questions, which must often occur in a court in which *614] *the remedy is prescribed by one sovereign, and the law of the contract by another. It is not easy to draw the line between the remedy and the right, where the remedy constitutes so important a part of the right ; nor is it easy to reduce into practice, the exercise of a plenary power over contracts, without the right to declare by what evidence contracts shall be judicially established. Suppose, the state of Ohio had declared, that the

undertaking of the maker and indorser of a note, shall be joint, and not several or contingent ; and that such note shall be good evidence to maintain an action for money lent and advanced ; would not this become a law of the contract? where then would be the objection to its being acted upon in the courts of the United States? Would it have been prudent or respectful or even legal, to have excluded from all operation in the courts of the United States, an act which had so important a bearing upon the law of contracts, as that now under consideration? An act in its provisions so salutary to the citizen, and which, in the daily administration of justice in the state courts would not have been called upon otherwise than as a law of the particular contract ; a law, which as to promissory notes, introduced an exception into the law of evidence, and of actions. It is true, the act, in some of its provisions, has inseparably connected the mode of proceeding, with the right of recovery. But what is the course of prudence and duty, where the cases of difficult distribution as to power and right present themselves? It is to yield, rather than encroach ; the duty is reciprocal, and will, no doubt, be met in the spirit of moderation and comity. In the conflicts of power and opinion, inseparable from our very peculiar relations, cases may occur, in which the maintenance of principle, and the administration of justice, according to its innate and inseparable attributes, may require a different course ; and when such cases do occur, our courts must do their duty ; but until then, it is administering justice in the true spirit of the constitution and laws of the United States, to conform, as nearly as practicable, to the administration of justice in the courts of the state.

In the present instance, the act was conceived in the true spirit of distributive justice ; violated no principle ; was easily introduced into the practice of the courts of the United States ; has been there acted upon through a period of eight years ; and has been properly treated as a part of the law of that court. But it is contended, that it was improperly applied to the present case, because the note bears date prior to the passage of the law ; and this certainly presents a question which is always to be approached with due precaution, to wit, the extent of legislative power over existing contracts. But what right is violated, what hardship or injury *produced, by the operation of this act? It was passed for the relief of [*615 the defendant, and is effectual in relieving him from a weight of costs, since it gives to the plaintiff no more than the cost of a single suit, if he should elect to bring several actions against maker and indorser. Nor does it subject the defendants to any inconvenience from a joint action ; since it secures to each defendant, every privilege of pleading and defence of which he could avail himself, if severally sued. The circuit court has incorporated the action, with all its incidents, into its course of practice ; and having full power by law to adopt it, we see no legal objection to its doing so, in the prosecution of that system, upon which it has always acted. It cannot be contended, that the liabilities of the defendants under their contract, have been increased, or even varied ; and as to change in the mere form of the remedy, the doctrine cannot be maintained, that this is forbidden to the legislative power, or to the tribunal itself, when vested with full power to regulate its own practice.

The next bill of exceptions has relation exclusively to the discount. It sets out a great deal of evidence, and sixteen specifications, if they may be

so called, of the prayers asked of the court by the defendants' counsel; the whole making out this case. It appears, that in December 1817, Isaac Cook's note, with these indorsers upon it, was discounted at the bank of Cincinnati, and renewed, every sixty days, down to February 1st, 1820. It commenced at $6000, and in September 1818, was reduced to $4000, for which amount it was renewed uniformly down to the last date. In its origin, one McLaughlin's name was also on the paper, and sometimes he, and sometimes Cook, was the last indorser, until March 1819, when Cook was uniformly the last indorser, down to the date of the present note. The proceeds of the successive renewals, were, of course, credited to him, and passed to the payment of the preceding note. But on this note, Fullerton stands as the last indorser, and the proceeds were credited to him, and Cook's note of the proceding date was charged to Fullerton's account, without his check; thus balancing the credit which the discounting of the last renewal gave to Fullerton on the books of the bank. The note so charged was, of course, not protested, and thus Fullerton and his co-indorsers escaped payment of that note; and now they propose to escape the payment of this, by insisting that, without a check from Fullerton, authorizing the application of the proceeds as credited to him, to the payment of the previous note, the bank is still indebted to him to that amount. This is an ungracious defence, and one which no court of justice can feel disposed to sustain. To repel it, the plaintiffs introduced witnesses to prove, that this note was expressly discounted, in *order that the proceeds might be applied to the previ- *616] ous note; and would not have been discounted otherwise; and contend, that the bank, having the fund in hand to pay itself, had a right so to apply it, without a check, upon the ground of implied assent. With a view to that question, the defendants below have introduced thirteen out of sixteen of their prayers. They all go to maintain the single proposition, that Fullerton, as last indorser, was entitled to credit for the proceeds of this note, and is still entitled, if they have not been legally applied to the payment of the note which preceded it.

The remaining three prayers, to wit, the 13th, 14th and 15th, raise a question on the sufficiency of the demand on the maker, and of the notice of non-payment to the indorser, and the proof introduced to establish both facts. The entry in the record, on the subject of the charge to the jury, is in these terms: "But the court, instead of the foregoing instructions as asked, charged and instructed the jury, that to enable the plaintiffs to recover, the jury ought to be satisfied from the evidence, that the note had been discounted by, and become the property of, the bank; that it was in the bank and not paid, when it came to maturity; that due notice of the protest and non-payment had been given to the parties, and that such notice had been put into the post-office, the day after the last day of grace, in time to go by the succeeding mail; that every note discounted in bank, was *primâ facie* to be regarded as a business note, and that when such notes were discounted, generally and regularly, the proceeds of the note should be carried to the credit of the last indorser, and paid to his check; that the printed and published rules of the bank, ought, in the absence of other testimony, to be considered as regulating the course of business of the bank; but that if the jury were satisfied from the evidence, that a practice and course of business, in the office of discount and deposit in Cincinnati, had prevailed and was

known to defendants, and that the note in question had been discounted and treated in all respects, according to such practice and course of business, but not according to the printed rules, the plaintiffs had a right to recover. That the bank had not a right to apply the proceeds of the note, contrary to the understanding and directions of the last indorser, or to any other use than the use of the last indorser, without his consent; but that if the jury were satisfied from the evidence, that according to the custom and practice of the bank, in the case when a new note was put into the bank for the purpose of renewing and continuing a former loan or discount, the check of the last indorser was sometimes required, and sometimes dispensed with, and that in the latter case, it was the practice to file away the old note as a check; and that if the note sued upon had been *discounted and treated in the latter manner, with the consent of the parties to it, the plaintiffs had [*617 a right to recover, and that such consent may be inferred and found by the jury, from the facts and circumstances given in evidence, without direct or positive proof, if in the opinion of the jury, the facts and circumstances proved, warrant such inference. That if the jury find the note was not discounted, the plaintiff cannot recover; or if they find that it was discounted, but the proceeds remain in the bank, carried to the credit of the last indorser, and not drawn or applied, with his consent, to any other purpose, the money may and ought to be set off against the note; but if they find, that the note sued on was put into bank for the purpose of renewing a former note or loan, and for no other purpose, and with the understanding of all the parties, that if discounted, the preceeds could and would, by the course of business in the bank, be applied solely to the discharge of the former note, and that they had been so applied, and the old note retained, and written off as a check, by the bank; that the plaintiffs ought to recover."

The exception taken is, to refusing to give the instructions as asked, and to giving them in the form in which they were propounded, to the jury. And the question is, whether the instructions given covered the whole ground of the instructions prayed for, and were legally correct, in the form in which they were rendered? We are of opinion, they cover the whole ground taken by the defendants, or at least, so far as they had a right to require. This will be obvious, from a simple analysis of the charge; the propositions which it imports, will be examined in their order. The first is, upon the sufficiency of the demand, and the law laid down on this point is, "that on a note made payable at a particular bank, it is sufficient to show, that the note had been discounted and become the property of the bank, and that it was in the bank, not paid at maturity." Nothing more than this could have been required of the court; for the positive proof that the note was not paid, will certainly imply that there were no funds of the maker there to pay it. The fact could not have been made more positive by inspection of the books. The charge is perhaps too favorable to the defendants, since modern decisions go to establish, that if the note be at the place, on the day it is payable, this throws the *onus* of proof of payment upon the defendant. 4 Johns. 188. This is more reasonable than to require of the plaintiff the proof of a negative, and comports better with the general law of contracts.

The next instruction is, in the language of the court, "that notice of the

non-payment and protest, should have been given to the indorser through *618] the medium of the post-office, the day *after the last day of grace, in time to go by the succeeding mail." The defendant's counsel, in arguing on this part of the instruction, insisted much on the obligation on the plaintiff to establish, definitively and positively, that the notice given was in time to go by the next mail ; but has not adverted to his own omission, in not putting into the case evidence that there was a mail established from Cincinnati, to the place of the defendant's residence. Yet, if the jury might be left, on this point, to take that fact upon notoriety, or personal knowledge, it would be difficult to maintain, that they might not, on the same grounds, find the minor fact, that the notice deposited in any part of the business hours of that day, would be in time for the mail ensuing the third day of grace. It is argued, that the language used by the court on this point is equivocal, and may have led the jury to suppose, that sending the notice by the mail which succeeded the day after the last day of grace, was sufficient. But we think the construction is forced. The words are, "the day after the last day of grace, in time to go by the succeeding mail." Succeeding what? obviously the last day of grace, otherwise, there might be no necessity for putting it in the office, until the second day after the last day of grace, whereas, the necessity of putting it in on the first day after, is expressed in the charge. With this signification it was rather more favorable than need be given, since the mail of the next day may have gone out before early business hours, or no mail may have gone out for several days.

The residue of the charge relates to the application of the proceeds of this note, to the previous note, without the check of the last indorser ; and this also, we think, embraces all the defendants asked, and is as favorable as the law would sanction. It admits, that this should be regarded as a business note, that the proceeds should have been passed to the credit of the last indorser, and should not have been applied otherwise than by his assent ; but it then goes on to assert, what surely could not be controverted, that with the assent of the last indorser, the money, instead of being passed to his credit, might be otherwise applied ; that with his consent, it might be applied to the satisfaction of another note, for which he was indorser, without his checking for the amount ; and that his consent may be implied, from circumstances, as all other facts may be. The jury have found, then, that with his consent, it was so applied, and the evidence fully bore them out in their finding ; if competent, it was all the law requires.

It may be proper to observe, that every discount is in the nature of a *619] cross-action, and if the discount filed in this case were *thrown into the form of an action, it would be for money had and received to defendant's use.

The merits of this defence need only be tested by the law which governs that action, to make it clear, that the evidence would not sustain it. It goes in fact to show, that in what are called renewals of bank loans, the lending is qualified and not absolute ; that when credit is given and money advanced upon a note of that description, it is not an advance on general account, but only for the purpose of a specific application. Any act done by the bank, therefore, whatever be the mere form, if it have for its end the carrying of the contract into effect, in its true spirit and intent, must be binding upon

all the parties to the contract. Nothing more is affirmed in this charge or verdict.

One general objection was taken in argument to the instruction given, importing a charge of inconsistency, inasmuch as although it admits the note to be a business note, as it is called, and therefore, to be passed to the credit of the last indorser, it permits it to be treated as an accommodation note, in allowing it to be passed to the credit of the maker. But if this were strictly the fact, what defence does it afford to the action, if such were the agreement, and the real understanding, of the parties ? In strictness, however, it was not passed to the credit of the maker alone, for in the progress of the ruinous system of loans which prevails over the country, the note discounted as the renewal of an accommodation note, cannot be called a business note, nor can it, in correctness, be predicated of such a note, that it is passed to the credit of the maker alone, when the last indorser has, in effect, an equal relief from the application of the proceeds.

We do not deem it necessary to consider a question commented upon in argument, by the counsel for the bank, and perhaps glanced at by the opposite counsel, whether this note was not void as an accommodation note, under the rules of the bank, because not secured by a deposit of stock. No one of the exceptions raises the question, and we should think it injustice to the counsel for the plaintiffs here, to suppose that he intended to raise it.

Judgment affirmed, with costs.

---

*620] *James McDonald, Appellant, *v.* Freeman Smalley and others (in all forty).

Jurisdiction.

Where the record of the court below contained the whole proceedings in the case, and exhibited all the matters either party required for a final disposition of the case, and the counsel for both the appellants and the appellees, were willing to submit, upon argument, the whole case to the final decision of the court; but it appeared, that the circuit court of Ohio had not decided any question but that which had been raised upon the jurisdiction of the court, the counsel were directed by this court to argue the point of jurisdiction only. p. 621.

It cannot be alleged, that a citizen of one state, having title to lands in another state, is disabled from suing for those lands in the courts of the United States, by the fact that he derives his title from a citizen of the state in which the lands lie. p. 623.

M., a citizen of Ohio, apprehensive his title to lands in that state could not be maintained in the state court, and being indebted to the plaintiff, a citizen of Alabama, to the amount of $1110, offered to sell and convey to him the land, in payment of the debt, stating in the letter by which the offer was made, that the title would most probably be maintained in the courts of the United States, but would fail in the courts of the state ; the property was estimated at more than the debt, but in consequence of the difficulties attending the title, he was willing to convey it for the debt, which was done; the plaintiff in error, after the land was conveyed to him, gave his bond to make a quit-claim title to the land, on condition of receiving $1100 : *Held*, that the title acquired by the purchase, gave jurisdiction to the court of the United States.[1] p. 623.

The motives which induced M. to make the contract for the purchase of the land, can have no influence on its validity ; a court cannot enter into the consideration of those motives, when deciding on its jurisdiction. p. 624.

---

[1] s. p. Smith *v.* Kernochan, 7 How. 198 ; Jones *v.* League, 18 Id. 76 ; Briggs *v.* French, 2 Sumn. 252 ; Newby *v.* Oregon Central Railway Co., 1 Sawyer 63. But a mere colorable transfer will not confer jurisdiction. Barney *v.* Baltimore, 6 Wall. 280.