damages and costs, and calculate interest on a promissory note or bill of exchange, after judgment by default. H. Bl. 252, 541, 559, 4 T. R. 275. Bailey on B. of Ex. 66, 67, app. 5; Kyd on B. of Ex. 155. But, after all, when judgment has been entered by default, *the want of a writ of inquiry is aided by the statutes of *jeoffaile*. Fitzg. 162–3; 7 Vin. p. 308, pl. 24; 2 Str. 878. s. c. 2 Ld. Raym. 397. [*356

On the 13th of February 1797, WILSON, Justice, delivered the opinion of the court.

BY THE COURT.—We are unanimously of opinion, that under the laws and the practical construction of the courts of Rhode Island, the judgment of the circuit court ought to be affirmed.(*a*)

With respect to the entry of this affirmance, interest is to be calculated to the present time, upon the aggregate sum of principal and interest in the judgment below; but no further. We cannot extend the calculation to June term next, when the mandate will operate in the circuit court, as the party has a right to pay the money immediately.

The judgment affirmed, with single costs.

RULE.

February 13th, 1797. It is Ordered by the Court, that the clerk of the court to which any writ of error shall be directed, may make return of the same, by transmitting a true copy of the record, and of the proceedings in the cause, under his hand and the seal of the Court.

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*AUGUST TERM, 1797. [*357

FENEMORE, Plaintiff in error, *v.* UNITED STATES.

Assumpsit.— Waiver of tort.—Certiorari.

If one false represent that he is a public creditor, and thereby obtains a certificate of stock in the public funds, the government may waive the *tort*, affirm the transaction, and recover the value of the certificate, in *assumpsit*.[1]

And the interest paid may be recovered back, under a count for money had and received.

It seems, that a *certiorari*, issued on a suggestion of diminution of record, is to be returned in the same manner as a writ of error.

WRIT of Error to the Circuit Court for the district of New Jersey. On the return of the record, it appeared, that a declaration in case had been filed in this action, containing three counts; the first and second of which were special counts for a fraud and deceit, and the third was a general count, for money had and received by the defendant to the use of the plaintiff.

(*a*) CHASE, Justice, observed, that he concurred in the opinion of the court; but that it was on common-law principles, and not in compliance with the laws and practice of the state.

[1] In general, a party may waive his action of *tort* for a deceit, and sue in *assumpsit* for the money paid on the footing of the contract Gray *v.* Griffith, 10 Watts 431; Pearsoll *v*

The first count charged the defendant with an express *assumpsit*, that in consideration that the commissioner for settling continental accounts, would issue a certificate for $4273\frac{42}{90}$, he promised his account against the United States was just for that sum, and exhibited certain vouchers to support it; that the account ought to be allowed, and that the vouchers were true and lawful: it averred that, confiding in the said promises, the United States, by their said commissioner, did issue the said certificate: and it assigned as a breach of the said promises, that the defendant did not regard the same, but craftily deceived the United States in this, that the said certificate ought not to have been issued and delivered; that the account was not, nor was any part of it, for a just debt, but was deceitful, and that the account and vouchers were not true and lawful; whereby, the United States had been greatly deceived.

The second count stated, that whereas, the United States had, before that time, issued and delivered to the defendant the said certificate, and had accepted and received from him, as lawful vouchers for the issuing and delivery thereof, the account aforesaid, together with certain paper writings in *the declaration set forth, in consideration thereof, he undertook and faithfully promised that the said account was a just and true account, and that the sum mentioned in it was lawfully due from the United States and ought to be so certified, and that the said certain paper writings then and there exhibited as further vouchers for issuing the said certificate, were regular and lawful vouchers: nevertheless, the defendant did not regard his said last-mentioned promises, inasmuch as the said account was not true, nor was any part thereof due, nor were the said paper writings lawful vouchers, by means whereof, the United States were by him deceived and greatly injured.

*358]

The third count having stated an *assumpsit* in the usual form, for $8000 received to the plaintiff's use, concluded, that the defendant, not regarding his several promises, for making payment thereof, had not paid the said sum of money, but refused and still refuses to pay the same, to the damage of the United States, $8000.

The defendant pleaded non *assumpsit*, whereupon, issue was joined; and on the trial of the cause, the jury found a special verdict of the following tenor:

"The jury find, that the commissioner named in the first and second counts was the lawful officer of the United States, for transacting the business therein mentioned; and that certain regulations were made by congress, in relation thereto, on the 20th of February 1782, and the 3d of June 1784, to which the jury refer. That the defendant, on the 2d of August 1784,

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Chapin, 44 Penn. St. 9; Camp *v.* Pulver, 5 Barb. 91. So, a party who has been induced to enter into a contract, by fraud, may affirm it, and sue in *assumpsit*, even though the fraud amount to a felony. Benedict *v.* Bank of the Commonwealth, 4 Daly 171. Where goods are fraudulently purchased on credit, the vendor may waive the *tort*, and maintain his action immediately for goods sold and delivered. Wigand *v.* Sichel, 3 Keyes 120; Roth *v.* Palmer, 27 Barb. 652. And it was held, that the government could recover back a sum paid for a spurious treasury note, purchased for retirement, which had never been issued under any act of congress. Cooke *v.* United States, 12 Bl. C. C. 43; s. c. 4 Ben. 376. This case was reversed by the supreme court, on another point, in 91 U. S. 389, but the principle was affirmed

fraudulently exhibited an account, claiming a balance of 1602*l.* 11*s.* 7¾*d.*; equal to $4273\frac{9}{90}$, as due from the United States to him, which account, so fraudulently exhibited, and the vouchers therefor, the jury set forth at large. That then and there, the defendant received, through fraud and imposition, from the United States, the said balance, so as aforesaid falsely pretended to be due to him, in a certificate, which the jury set forth in its proper words and figures. That the defendant gave a receipt for the same, in the words and figures set forth by the jury. That according to law, the defendant, on the 12th of May 1791, subscribed and funded the said certificate, in the funds of the United States, and became a holder of the stock it produced, amounting, with the interest, to $4893\frac{8}{90}$; and that he gave to the United States a receipt for funded debt comprising the said certificate, which was thereupon delivered up and cancelled. But whether the said subscription, the subsequent funding of the said $4273\frac{9}{90}$, with the interest of $619\frac{59}{90}$, and the stock acquired in virtue thereof as aforesaid, ought to be allowed as payment of the amount of the said certificate by the said United States to the said defendant, the said jurors know not; and thereupon, they pray the advice of the court here in the premises: *And if it ought to be allowed, then they say, he was paid the full amount, to wit, $4893\frac{8}{90}$. [*359 And the jurors further find, that prior to the year 1791, the United States had paid part of the interest due on the said certificate, amounting to $1025\frac{58}{90}$. That the defendant, on the 2d of August 1784, undertook and promised to the United States, that the said account was just and true; that the sum of $4273\frac{9}{90}$ was justly due to him from the United States, and ought to be so certified; and that the vouchers produced by him in support of the said account were regular and lawful vouchers for issuing and delivering the said certificate to him. That the said account was not just, nor was the sum specified to be due therein, or any part thereof, justly due, but the said account was fraudulent, and the vouchers produced by him in support thereof were not regular and lawful vouchers for issuing and delivering to him the said certificate. And whether, on the whole matter by the jurors so as aforesaid found, the plaintiff ought to recover against the defendant, they are ignorant, and pray advice of the court. And if, upon the whole matter, &c., it shall appear to the court, that the defendant did assume in manner and form as the United States complain, then they say, he did assume upon himself, &c., and they assess the damages by reason of the non-performance of his promises and assumptions aforesaid, $3939.70, besides costs and charges; and for costs and charges, ten cents: but if it appear to the court that he did not assume, &c., then they say he did not assume, &c. And if, upon the whole matter aforesaid, by the jurors found in the manner aforesaid, it shall appear to the court, that the defendant did assume as to the sum of $1025\frac{58}{90}$ so as aforesaid paid by the United States, in part of the interest so due on the said certificate, funded as aforesaid, &c., then they find he did assume, &c., and assess the damages of the United States by reason of the non-performance of the promises within mentioned, besides costs and charges, at $1023.64,(*a*) and for costs and charges, ten cents: but if, upon the whole matter, &c., it shall appear to the court, that he did not assume, in con-

(*a*) There seems to be a variance between the sums, but no notice was taken of it in the argument.

struction of law, in manner and form as the United States complain, then they say he did not assume as to the said $1025\frac{88}{100}$, &c."

Upon this verdict, the circuit court rendered the following judgment, on the 2d of April 1795: "That the United States do recover against the said Thomas Fenemore, their damages aforesaid, by the jurors aforesaid, in form aforesaid, assessed at $4965.34; and also $169.43, for their costs and charges, by the court *here, to the United States, with their assent, of increase adjudged; which said damages in the whole amount to $5134.77: and the said Thomas in mercy, &c."

*360]

The cause was argued at the last term, upon an issue joined, after an assignment of the general errors, and the plea of *in nullo est erratum*, by *Ingersoll* and *E. Tilghman*, for the plaintiff in error, and by *Lee* (the Attorney-General), for the United States. It was then alleged in diminution, however, that a rule had been made, by consent, in the court below, which was not transmitted with the record, allowing special counts to be added to the declaration, and agreeing "that no objection should be made to them, by reason of their being of such a nature, as not to be joined with the first or any other counts;" in consequence of which, the two special counts above stated had been added. A *certiorari* was, therefore, awarded, at the instance of the attorney-general, upon the return to which, at the present term, the rule was duly certified. (*a*)

For the *plaintiff* in error, it was observed, that the object is to compel Fenemore to pay the full value of a certificate, which the action itself considered as fraudulently obtained, and which, consequently, is a mere nullity. For so much cash as he had actually received on account of interest, an action of *assumpsit* may be regularly brought; but the remedy as to the certificate, is a bill in equity to compel him to surrender it; or, perhaps, an action of deceit might be proper, but *assumpsit* will not lie. Two questions, however, are suggested by the special verdict: 1st. Whether there has been a payment of the amount, by the United States, to Fenemore? And 2d.

(*a*) It became a question, whether the return to a *certiorari* (which was made in this instance, by the clerk of the circuit court, under his hand and the seal of the court) was within the rule established at the last term (*ante*, p. 356), relative to the return of writs of error?

Chase, Justice.—It appears to me, that the cases are embraced by the same principle; and therefore, that the return of the *certiorari* ought to be allowed.

Iredell, Justice.—I cannot think, that a regulation respecting writs of error, extends, of course, to writs of *certiorari*. They are process whose nature and operation are in some respects widely different. The present case, therefore, seems to require a new rule.

Paterson, Justice.—I will not decide, whether, generally speaking, writs of error will include writs of *certiorari;* but as to the present object, they are clearly within the principle of the same rule.

Cushing, Justice.—It is enough for the present purpose, that the principle of the rule applies as strongly to the return of a *certiorari*, as to the return of a writ of error.

Ellsworth, Chief Justice.—By the rule, it was made the duty of the clerk of the circuit court, to return the writ of error, and as the writ of error is not returned, unless all the proceedings in the cause accompany it, the return to the present *certiorari* can only be considered as completing the duty imposed by the original rule, in pursuance of a supplementary order from this court.

Whether *he assumed in the manner and form stated in the declaration? In answering the first question, it is to be remarked, that in a special verdict, nothing is to be intended, the promise, whether express or implied, must be expressly found; and as the special verdict finds no consideration for charging Fenemore with the sum of $3939.70, the certificate of stock (which is still to be presumed to be in his possession, which is not proved to have been converted into cash, and which is, indeed, of no value, on account of the fraud in obtaining it) cannot be presumed to be a payment, either in fact or law; and of course, there is no foundation for a promise, either express or implied.[1] In answering the second question, it is not denied, that an express promise (essentially the same in both of the special counts) is laid in the declaration; and it is supposed, that an attempt was made to prove it as laid; but still, the finding of the jury does not support either the first or second count; for though the jury find the promise, it is not found upon the consideration laid in the declaration, which must be the governing principle. By way of supporting the third count, likewise, the jury find all the circumstances of subscribing to the funding system (which do not amount to a payment); whereas, they were bound to find the actual receipt of the money, and the only finding of an actual receipt of money, is the interest of $1025 on the funded stock.

But the facts arising upon the case, as set forth in the declaration, are inconsistent; the counts are of a nature so different, that they cannot be joined in the same form of action; the defendant could not be apprised of what he must prepare to try; and he ought not to be entrapped by the generality of the count for money had and received. The special counts are in the nature of a deceit; which cannot regularly be united with case upon promises. Again, the first and second counts affirm the transaction, consider the certificates as the lawful property of Fenemore, and bring this action to recover damages for the breach of his engagement; but the third count disaffirms the transaction, considers the certificate as a nullity, and brings this action to recover the money paid to Fenemore, under color of the certificate, as so much money received by him, for the use of the United States. The verdict and the judgment are affected by the same incongruity; for both parts of the finding and judgment cannot be true; the first part supposing the transaction valid, and giving damages; while the second part, supposing it invalid, adjudges the money to be the property of the United States. Thus, the plaintiff presented an inconsistent cause of action; the jury mixed the inconsistent ingredients together; and the court below have unadvisedly given the whole their sanction. But if the inconsistency appears *on the record, this court cannot undertake to decide, to [*362
which part of the finding the jury would have adhered, had the question been seasonably proposed to them; and must, therefore, reverse the whole proceeding. The United States may, perhaps, either affirm or disaffirm the transaction; but they cannot do both; and they must make an election, before they institute their action. (*a*)

(*a*) Cushing, Justice.—May not the money be considered as part of the damages assessed under the special counts, and so avoid the objection of a disaffirmance?

Tilghman.—The finding of the jury negatives that idea. They leave it to the court

[1] See Cushman *v.* Jewell, 7 Hun 525.

The following authorities were cited, in the course of the argument, for the plaintiff in error: 3 T. R. 288; 1 Ibid. 22; 3 Bl. Com. 158; Doug. 39; 1 Esp. 97; Cowp. 414; Doug. 132, 134; 2 T. R. 289, 143; Imp. Pr. 55; 3 Wils. 354; 2 Ld. Raym. 825; Cowp. 818; 2 W. Bl. 848, 849.

For the *defendant* in error, it was premised, that there seemed to be no hesitation in admitting, on the part of the opposite counsel, that every principle of conscience and equity was opposed to the conduct of their client; but they contended (and it must be agreed), that a court of error can only decide on the record, and the principles of law which are pertinent to it. Considering the case, then, in the strictest point of view, the judgment ought to be affirmed. Though the verdict is certainly informal, and appears, at first, to be imperfect; yet, every material fact is found; and any unnecessary reference to the court, will be disregarded as mere surplusage. The judgment is for both the sums found by the verdict; and without giving both, it is manifest, that justice could not be done to the United States. A contract may be affirmed, or disaffirmed: the public policy of the government required that this contract should be affirmed. The person who committed the fraud ought not, however, to be benefited by it; and having recovered from him the value of the certificate, he will himself (*à fortiori*, every purchaser) be entitled, in future, to receive the principal and interest from the United States. The gist, therefore, of the inquiry is, whether it sufficiently appears on the record, that the United States have suffered an injury by the fraudulent conduct of the plaintiff in error? To this inquiry, it is immaterial, whether Fenemore paid or received anything; and even if there had been no express *assumpsit* laid in the declaration, or found in the special verdict, the court were empowered to decide, that there was an implied *assumpsit*, upon the reference of the facts for that purpose, by the jury: the jury having, however, found an express *assumpsit;* that subsequent
*363] *reference to the court must be considered as surplusage. Trials per Pais 269, 270, 169; Hob. 54.

But it is urged, that the counts are inconsistent, and cannot be joined in the same declaration: to which, it is answered, that wherever there can be the same plea, and the same judgment, different counts may be joined (1 T. R. 257; 2 Wils. 321); and wherever there has been an express warranty (which extends to all faults known and unknown to the seller), *assumpsit* is the proper form of action. Doug. 19. There may, however, be different forms of action for the same injury. 4 Co. 92. In 3 Bl. Com. 164, it is stated, that if any one sells one commodity for another, an action on the case lies against him for damages, upon the contract which the law always implies, that every transaction is fair and honest. The same commentator observes, that an action of deceit also lies in the cases of warranty, before mentioned, and other personal injuries committed, contrary to good faith and honesty: but an action on the case for damages, in nature of a writ of deceit, is more usually brought upon these occasions. Ibid. 166; Morg.; Esp. 342–59.

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to decide for whose use the interest money was received, and the court adjudge that it was received for the use of the United States.

On the 7th of August 1787, the judges delivered their opinions to the following effect :

CHASE, Justice.—The judgment of the circuit court ought to be affirmed. Here is a case of a plain fraud. A man sets up a claim, exhibits colorable vouchers to support it, deceives the public officer, obtains a certificate that his claim is just, and finally, converts that certificate into transferable stock. The transaction is rank from the beginning to the end ; and the jury have properly found, not only the fraud, but the value of the certificate obtained by it. The United States, by adopting the present mode of proceeding, have precluded themselves from ever disputing hereafter, the validity of the certificate; and they will never, perhaps, be able to indemnify themselves against the subsequent payments of interest, unless Fenemore remains solvent, and accessible to legal process. But, surely, it ought never to have been a subject of argument in a court of justice, whether, on stating a manifest fraud practised upon the public credit and treasury, the United States is entitled to recover an equivalent for the pecuniary injury, from the avowed delinquent.

IREDELL, Justice.—I am clearly of the same opinion. Upon strict technical rules, I had, at first, some doubts, whether the inconsistence of the counts in the declaration would not be fatal: but on the appearance of the rule entered into by consent, for the very purpose of obviating objections on that ground, my mind was perfectly satisfied. The only question, therefore, that remains to be decided, turns upon the right of the *United States to affirm the original transaction ; and if they have that right, [*364 it follows, inevitably, that they ought to recover from the defendant an equivalent for the value of the certificate, which was surreptitiously obtained. I have no difficulty in saying, that the right exists ; and that the public interest, involved in the credit of a public paper medium, required the exercise of the right, in a case of this kind. The circulation of the certificate should be unimpaired ; but the defendant ought, at least, to be made responsible in his purse for the fraud. The defence is, indeed, an extraordinary one: it is an attempt to make the very act of fraud, an instrument or shield of protection. But I trust, no man will ever be able to defend himself in an American court of justice, upon the ground of his own turpitude. As, therefore, every exception to form has been obviated by consent, and as the special verdict finds every material fact to justify the judgment of the court below, I think, that judgment ought to be affirmed.

CUSHING, Justice.—The cause is susceptible of little doubt. The United States had a right to affirm the original transaction, and to proceed, as they have done, for the recovery of the value of the certificate and the interest.

ELLSWORTH, Chief Justice.—Giving a reasonable effect to the rule, which the parties themselves have entered into, all objection as to the form and inconsistencies of the declaration, is obviated. Then, it is to be considered, that the United States had an option, either to affirm or disaffirm the original contract ; and by the present action, they have chosen to affirm it. The special verdict fairly authorized the court below to give judgment for the value of the certificate, on the first and second counts, and for the amount of the money received as interest, on the third count. With respect, how-

ever, to the right of disaffirmance, I wish to be understood, as limiting it to the continuance of the certificate in the hands of the original party; for, if the certificate had passed into the hands of a *bonâ fide* purchaser, even a court of equity would, I think, refuse to invalidate it; and I am sure, public policy would forbid the attempt.

PATERSON, Justice.—As I joined in giving the judgment of the circuit court, it gives me pleasure to be relieved from the necessity of delivering any opinion on the present occasion. But though I have no doubt on the case now to be decided, it appears to me, to be another, and a great question, how far a bill in equity would reach all the points involved in the original transaction. Judgment affirmed.

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*365] *BROWN, Plaintiff in error, *v.* BARRY.

Construction of statute.—Bills of exchange.—Verdict.

A repealing act, and one suspending its operation, passed at the same session, are to be taken together, as parts of the same act.

A statute in derogation of the common law, is to be strictly construed.

In an action against the drawer of a bill, for non-payment, it is unnecessary to aver or prove that the bill was accepted, or, if not, that it was protested for non-acceptance.[1]

In an action on a bill of exchange, if the jury specially find the value of foreign money, the want of an averment of its value in the declaration, is cured;[2] and in such case, a declaration in the *debet* is not erroneous.

ERROR from the Circuit Court for the district of Virginia. An action of debt had been instituted in the circuit court, by James Barry, a citizen of Maryland, against James Brown, a citizen of Virginia; in which, the declaration set forth, that the plaintiff, by his attorney, "complains of James Brown, &c., of a plea that he render to him the sum of 770*l.* sterling money of Great Britain, with interest thereon, at the rate of ten per cent. *per annum*, from the 11th of February 1793, which to him he owes, and from him unjustly detains: For that whereas, the said defendant, on the 11th of February 1793, at Virginia aforesaid, according to the custom of merchants, did make his first bill of exchange, to the court now here shown, bearing date the said 11th of February 1793, signed with his name, by his proper hand subscribed, and directed to Messrs. Donald & Burton, whereby he requested the said Donald & Burton, at sixty days sight of that his first of exchange (his second and third not paid), to pay to the order of Mr. Hector Kennedy, 770*l.* sterling, for value in current money here received (that is to say, at Virginia aforesaid), and to place the same to the account of him the said James Brown." The declaration then proceeded to set forth, in the usual form, successive indorsements by H. Kennedy to Joseph Hadfield, by Joseph Hadfield to Richard Muilman & Co., and by Richard Muilman & Co. (on the 26th of June 1793) to James Barry, the present plaintiff; and a protest for non-payment, on the 21st of June 1793. After averring that none of the bills of the set had been paid, it concluded, "whereby, and by force of the act of the general assembly of the commonwealth of Virginia in that case made and provided, action accrued

[1] Clarke *v.* Russell, *post*, p. 415; Nicholson *v.* Patton, 2 Cr. C. C. 164; Read *v.* Adams, 6 S. & R. 356. But see United States *v.* Bisher, 4 W. C. C. 464, 469.

[2] See Butt *v.* Hoge, 2 Hilt. 81.