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.

to the said plaintiff, to demand and have of the said defendant, the aforesaid sum, &c."

*To this declaration, there was a plea of *nil debet*, issue was thereupon joined, and, after a trial, the jury found a special verdict in the following words: "We of the jury find, that the consideration given for the bill of exchange in the declaration mentioned, was the undertaking of Andrew Clow & Co., a party interested in receiving the same, to deliver to James Brown, the drawer thereof, other bills of exchange, in sterling money, to the same amount: If the court shall be of opinion that the consideration above mentioned, did not come within the operation of the 4th section of the act of assembly of the 28th Geo. II., c. 2, entitled 'an act to amend an act entitled, an act declaring the law concerning executions, and for the relief of insolvent debtors, and for other purposes therein mentioned,' then we find for the plaintiff $4404.42 damages—if otherwise, we find for the plaintiff $3303.82 damages." To the special verdict, this memorandum was added: "And it is agreed by the parties, that if, in the opinion of the court, the plaintiff could not legally give parol testimony to prove that the bill in the declaration mentioned was, in fact, drawn for other consideration than current money, the verdict shall be changed from the greater to the less sum found in the said verdict." [*366

The case was first argued in the circuit court, on a motion made by the defendant to arrest the judgment, for the following reasons: 1st. Because the declaration aforesaid demands foreign money, without stating the value thereof in the current money of the United States of America, or of the commonwealth of Virginia. 2d. Because the said declaration does not charge that the bill of exchange therein mentioned was protested for non-acceptance; neither doth it charge, that the said bill was presented to the persons on whom it was drawn for acceptance, or that they ever were required to accept it. 3d. Because the said action is founded on an act of assembly, which was not in force, at the time when the bill of exchange mentioned in the declaration was drawn." But these objections having been overruled, the law arising on the special verdict was argued, and adjudged to be in favor of the plaintiff; whereupon, judgment was rendered for the sum of $4404.42, with interest at five per cent. from the day of rendering the judgment, and costs.

From the judgment of the circuit court, the present writ of error was brought, a variety of exceptions were taken to the record, and after argument by *Lee*, Attorney-General, for the plaintiff in error, and by *E. Tilghman*, for the defendant, the opinion of the court was delivered by the Chief Justice, in the following terms:

*Ellsworth, Chief Justice.—In delivering the opinion of the court, I shall briefly consider the exceptions to the record, in the order in which they have been proposed at the bar. [*367

I. The first exception states, that the act of the legislature of Virginia, passed in the year 1748, on which the action is founded, as an action of debt, was not in force, when the bill of exchange was drawn, to wit, on the 11th of February 1793. The question is, whether two subsequent acts of the legislature of that state, passed at a session in 1792 (namely, one of November, declaring the repeal of the act of 1758, and another of December, de-

claring a suspension of that repeal until October 1793), did, in fact, repeal, and leave repealed, the said act of 1748. This, it is contended, must have been their effect, as ascertained and limited by two other statutes, namely, one of 1789, declaring, that the repeal of a repealing act shall not revive the act first repealed; the other of 1783, declaring, that statutes should take effect from the day on which they in fact passed, unless another day was named. It must be taken, however, that the act of 1748 remained in force; and that, until after the bill was drawn, for the following reasons: 1. The act suspending the repealing act of November 1792, is not within the act of 1789, which declares, that the repeal of a repealing act shall not revive the act first repealed. The suspension of an act for a limited time, is not a repeal of it: and the act of 1789, being in derogation of the common law, is to be taken strictly. 2. The repealing act, and the act suspending it (acts of the same session) are, according to the British construction of statutes, and the rule which appears to have prevailed in Virginia, parts of the same act, and have effect from the same day: and taken together, as parts of the same act, they only amount to a provision, that a repeal of the act of 1748 should take place at a day then future. The act of 1785, declaring the commencement of acts to be from the day on which they in fact pass, does not apply here; for, by the third section of the act of 1789, it is provided, that when a question shall arise, whether a law passed during any session, changes or repeals a former law, during the same session, which is the present case, the same construction shall be made, as if the act of 1785 had never been passed, that is, both acts being of the same session, shall have the same commencement, on the first day of the session. 3. The manifest intent of the suspending act was, that the act repealed by the repealing act, should continue in force until a day then future, the first of October 1793. It could have had no other intent. And the intention of the legislature, when discovered, must prevail, any rule of construction declared by previous acts, to the contrary notwithstanding. Thus *the act of 1748 clearly was in force when the bill was drawn.

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II. The second exception states, that there is no averment of a protest for non-acceptance of the bills. This exception is invalid, on two grounds. 1. It does not appear, that the bill was not accepted, so that there could have been such protest; and, if accepted, it would have been immaterial for the plaintiff to show, that it was so, as his right of action could in no measure depend on that fact. The silence of the declaration as to the question, whether the bill was accepted or not, does not vitiate it; the action being on a protest for non-payment. 2. As to bills drawn in the United States and payable in Europe, of which this is one, the custom of merchants in this country does not ordinarily require, to recover on a protest for non-payment, that a protest for non-acceptance should be produced, though the bills were not accepted. I say, the custom of merchants in this country; for the custom of merchants somewhat varies in different countries, in order to accommodate itself to particular courses of business, or other local circumstances.

III. The third exception states, that the judgment is for too large a sum, the bill having been taken for sterling, when, by the act of 1775, it ought to have been taken for current money of Virginia. That act requires, that if the consideration of a bill be a pre-existing currency-debt, or be cur-

rent money paid at the time of the draft, the bill shall express the amount of the debt, or currency paid, which was the real consideration. And that on failure so to do, the bill, though it may be expressed for sterling, as in this case, shall be taken to be for current money. The bill is thus expressed, "for value received in current money;" but it does not say how much. The jury, however, have, by their special verdict, ascertained, that the real consideration of the bill was an engagement to draw other sterling bills. Now, it is clear, that the consideration, in fact, though variant from the face of a bill, is regarded by the act, and must be sought for, to give the act effect. Upon inquiry, the jury have found the consideration to be such as to take the case out of the statute. In this bill, then, the words added to value received, viz., "in current money," were immaterial and without effect: and therefore, the words in the declaration, as descriptive of the bills, might be disregarded by the jury and the court.

IV. The fourth exception states, that the action is for foreign money and its value is not averred. The verdict cures this: the jury have found the value, their verdict being in dollars. The value of sterling money, here sued for, had been long ascertained in Virginia by statute, and was certain enough.

*V. The fifth exception states, that the declaration is in the *debet*, as well as the *detinet*, though for foreign money. The reason of the rule, that *debet* for foreign money is ill, is the uncertainty of its value; and therefore, both the answers given to the fourth, apply to this present exception. [*369

Let the judgment of the circuit court be affirmed.

Emory *v.* Grenough.

Averment of citizenship.

Where the jurisdiction depends on the citizenship of the parties, it must be set forth in the process and pleadings.[1]

Error from the Circuit Court for the district of Massachusetts.

The plaintiff in error was a native of Massachusetts, formerly resident in Boston, where he contracted the debt in question to the defendant in error, who was also a native, and had always continued a resident of that state. Some years afterward, the plaintiff in error removed into Pennsylvania, became a resident citizen of the state, took the benefit of her bankrupt law (which, in its terms and operation, was analogous to the bankrupt laws of England), and duly obtained a certificate of conformity from the commissioners. Subsequent to this discharge, he returned, on a transient visit, to Boston; and being there arrested by the defendant in error, for the old debt, he caused the suit to be removed from the state into the circuit court, and pleaded his certificate in bar to the action: but the court (consisting of Judge Iredell and

[1] There are numerous decisions to this point: Bingham *v.* Cabot, *post*, p. 382; Turner *v.* Enrille, 4 Dall. 7; Mossman *v.* Higginson, Id. 12; Evans *v.* Stead, Id. 22; Abercrombie *v.* Dupuis, 1 Cr. 343; Wood *v.* Wagner, 2 Id. 9; Capron *v.* Van Norden, Id. 126; Martold *v.* Murray, 4 Id. 46; Sullivan *v.* Fulton Steamboat Co. 6 Wheat. 450; Browne *v.* Keene, 8 Pet. 112; Scott *v.* Sandford, 19 How. 393; Hornthall *v.* The Collector, 9 Wall. 560.