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no offence ; while the taking on board of a negro or mulatto, who was the inhabitant of any other country, would have been a high misdemeanor, and subjected the party to severe punishment, and the vessel to forfeiture. It would be difficult to assign a reason for this discrimination, if the persons of color described in the exception, could not be brought to this country, without subjecting the vessel to forfeiture ; and the exception made in this section, in relation to those who are inhabitants, or held to service by the laws of either of the states or territories of the United States, proves that congress did not intend to interfere with persons of that description, nor to prohibit our vessels from transporting them from foreign countries back to the United States.

The principles above stated decide also the case of the *United States v. The Ship Fortune*. We think, there is enough in the record, to show that the persons of color therein mentioned, were sent to New Orleans, the place of their residence, for the purpose of being there manumitted, and not to be held in slavery. But it is \*unnecessary to go into an examination [79 of the evidence on this point ; because, in either case, the bringing them home was not an offence against the act of congress, and the vessel in which they returned is not, on that account, liable to seizure and condemnation. The decree of the district court must, therefore, be affirmed, in each of these cases.

THESE causes came on to be heard, on the transcripts of the record from the district court of the United States for the eastern district of Louisiana, and were argued by counsel : On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said district court, in each of the causes, be and the same is hereby affirmed.

\*THOMAS EVANS, Plaintiff in error, v. STERLING H. GEE. [\*80

*Jurisdiction.—Bills of exchange.—Waiver of irregularities.*

A bill of exchange was drawn in Alabama, by a citizen of that state, in favor of another citizen of Alabama, on a person at Mobile, who was also a citizen of that state ; it was, before presentation, indorsed in blank by the payee, and became, *bond fide*, by delivery to him, the property of a citizen of North Carolina ; and by indorsement subsequently made upon it, by the attorney of the indorsee, the blank indorsement was converted into a full indorsement, by writing the words, " pay to Sterling H. Gee," the plaintiff, over the indorser's name ; the bill was protested for non-acceptance, and a suit was instituted on it, before the day of payment, against the indorser, in the district court of the United States for the district of Alabama. The district court rejected evidence offered by the defendant, to show that the bill was given by him to the partner of the plaintiff, a resident in Alabama, for property owned by him and the plaintiff, they being copartners ; that the indorsement, when given, was in blank, and that the drawer and drawee of the bill are also citizens of Alabama ; the district court also instructed the jury that the indorsement in blank, authorized the plaintiff to fill it up as had been done ; and that the plaintiff was, under the law of Alabama, entitled to recover ten per cent. damages the bill not having been accepted : *Held*, that there was no error in the instructions of the district court : evidence to show that the original parties to the bill of exchange were citizens of the same state, if offered to affect the jurisdiction of the court, was inadmissible, under the general issue ; a plea to the jurisdiction should have been put in.<sup>1</sup>

<sup>1</sup> *Sime v. Hundley*, 6 How. 1 ; *Smith v. Kernochan*, 7 Id. 216 ; *Railroad Co. v. Quigley*, 21 Id. 202.

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The rule was established by this court, in *Young v. Bryan*, 6 Wheat. 146, that a circuit court of the United States has jurisdiction of a suit brought by the indorsee of a promissory note, who is a citizen of one state, against the indorser, who is a citizen of a different state, whether a suit could be brought in that court by the indorsee against the maker, or not.<sup>1</sup>

The *bonâ fide* holder of a bill of exchange has a right to write over a blank indorsement, directing to whom the bill shall be paid, at any time before or after the institution of a suit; this is the settled doctrine in the English and American courts; and the holder, by writing such direction over a blank indorsement, ordering the money to be paid to a particular person, does not become an indorser.

A suit may be brought against the drawer and indorser of a bill of exchange, on its non-acceptance; the undertaking of the drawer and indorser is, that the drawee will accept and pay; and the liability of the drawer only attaches, when the drawee refuses to accept, or, having accepted, fails to pay. A refusal to accept is, then, a breach of the contract, upon the happening of which, a right of action instantly accrues to the payee, to recover from the drawee the value expressed in the bill; that being the consideration the payee gave for it; such also is the undertaking of an indorser, before the bill has been presented for acceptance, he being, in fact, a new drawer of the same bill, upon the terms expressed on the face of it.<sup>2</sup>

It was urged, that the transcript of the record from the district court, showed that a general demurrer had been filed, which had not been disposed of; that a nonsuit had been taken by the defendant in the district court, and that a motion to set it aside had been over-ruled; that the case had been submitted to the jury, without an issue between the parties, and that the verdict had been returned by eleven instead of twelve jurors; on these alleged grounds, it was claimed that the judgment of the district court should be reversed. Whatever might have been the original imperfections, if not waived expressly, they were so, by the defendant going to trial upon the merits; and thus they cannot constitute an objection to the judgment on a writ of error.

**ERROR** to the District Court for the Southern District of Alabama. The defendant in error, Sterling H. Gee, a citizen of the state of North Carolina, instituted an action of *assumpsit* in the district court, against Thomas Evans, a citizen of the state of Georgia. The action was founded on a bill of exchange, drawn by Harris Smith, in Wilcox county, in the state of Alabama, December 16th, 1834, on George M. Rives, at twelve months after date, payable to the order of Thomas Evans, and by him indorsed in blank. The bill was regularly protested for non-acceptance, and the suit was brought, without waiting for the arrival of the day of payment. The cause was tried at May term 1836. The defendant excepted to the opinion of the court, and a verdict and judgment having been given for the plaintiff, the defendant prosecuted his writ of error.

The record showed, that at May term 1835, the defendant filed a demurrer to the plaintiff's declaration, which was in the common form; and that at the December term of the court following, "the plaintiff takes nonsuit;" upon which the court entered a judgment of nonsuit, and immediately after, on motion, the judgment of nonsuit was set aside. At the following May term, no other pleadings having been filed, the case was tried by a jury, and a verdict, under the instructions of the court, was given in favor of the plaintiff, for the whole amount claimed by him, on which the court entered a judgment, according to the verdict.

The bill of exceptions stated, that the bill being relied on by the plaintiff to sustain his action, together with proof of protest for non-acceptance, and notice to the drawer and indorser of the protest for non-acceptance; the defendant offered to prove by way of defence against the said evidence,

<sup>1</sup> See note to *Young v. Bryan*, 6 Wheat. 146.

<sup>2</sup> *Watson v. Tarpley*, 18 How. 517.

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that the said bill was given by the said defendant to Charles J. Gee, for property purchased by him ; that \*the property belonged jointly to Charles J. Gee and Sterling H. Gee, the plaintiff ; that they then [\*82 were, and continued to be, and then were, general copartners ; that when the indorsement was made on the bill, it was indorsed in blank, and that the said indorsement has been filled up by the plaintiff's counsel, since this suit was commenced ; that Charles J. Gee resided in this state, and did when the suit was brought, and was a citizen of the state of Alabama ; and that the defendant, and H. S. Evans and George M. Rives, were also, citizens of this state. This evidence the court rejected, on the ground, that the indorsement having been made and given in blank, the plaintiff was authorized to fill it up, as above shown ; and that the facts above set forth could constitute no defence, and were not proper evidence. The court further instructed the jury, that the bill being drawn in this state, and on a person residing in this state, and made payable in this state, upon non-acceptance and notice, the indorser was liable for ten per cent. damages on the amount of the bill, for want of acceptance therefor.

The case was argued by *Key*, for the plaintiff in error ; and by *Ogden*, for the defendant.

WAYNE, Justice, delivered the opinion of the court.—This action is brought upon a bill of exchange of which the following is a copy.

\$5350.

Wilcox County, Dec. 16, 1834.

Twelve months after date of this my sole and only bill of same tenor and date, pay to the order of Thomas Evans, five thousand three hundred and fifty dollars ; negotiable and payable at the office of discount and deposite branch Bank of the United States, at Mobile, for value received, this, the 16th day of December 1834.

To GEORGE M. RIVES, Mobile.

H. SMITH EVANS.

The plaintiff in error, the payee of the bill, indorsed the same in blank, and the defendant in error became the *bonâ fide* holder of it by delivery ; though the indorsement in blank was, at the time of the delivery to the holder, by himself, and subsequently, by his attorney, converted into a full indorsement ; the words, " pay to Sterling H. Gee," having been written over the indorser's name. Upon the trial of the cause in the court below, the bill, with proof of protest for \*non-acceptance, and notice to the drawer and indorser of the protest, was given in evidence. To resist [\*83 a recovery, " the defendant offered to prove, that the bill was given by him to Charles Gee, for property purchased by himself ; that the property belonged jointly to Charles J. Gee and Sterling H. Gee, the plaintiff ; that they then were, and continue to be, and now are, general copartners ; that when the indorsement was made, it was in blank, and that the said indorsement has been filled up by the plaintiff's counsel, since the suit had been commenced ; that Charles J. Gee resides in this state, and did when the suit was brought, and is a citizen of the state of Alabama ; and that H. Smith Evans and George M. Rives, the drawer and drawee of the bill, are also, and were, citizens of the state." The court rejected this evidence, stating, " that the indorsement having been made and given in blank, the plaintiff was authorized to fill it up, as had been done ; and that the facts

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set forth could constitute no defence, and were not proper evidence; the court further instructed the jury, that the bill being drawn in this state, by a person residing in the state, and made payable in the state, upon non-acceptance and notice, the indorser was liable for ten per cent. damages on the amount of the bill, for non-acceptance. We consider the court was right in rejecting the evidence, and in instructing the jury as to the liability of the indorser for damages.

If, by the evidence proposed, it was intended to deny the jurisdiction of the court, on account of the citizenship of the parties to the action, that being averred on the record, a plea to the jurisdiction should have been filed, and such evidence was inadmissible under the general issue. If it was intended to apply to the jurisdiction, on account of the original parties to the bill having been citizens of the same state, when the bill was drawn, then the rule laid down by this court in *Turner v. Bank of North America*, 4 Dall. 8, which was a suit by the indorsee of a promissory note against the drawer, does not apply to the parties in this case; but the rule established in *Young v. Bryan*, 6 Wheat. 146, does apply; which was, that the circuit court has jurisdiction of a suit brought by the indorsee of a promissory note, who was a citizen of one state, against the indorser, who is a citizen of a different state; whether a suit could be brought in that court by the indorsee against the maker, or not. This is a case of an indorsee of one state, suing an indorser of a different state. If the evidence was intended to resist a recovery upon the merits, on account of the interest which \*84] another copartner \*or other person had in the consideration for which the bill was indorsed; we observe, the plaintiff being the *bonâ fide* holder of it, such a fact could not be inquired into, in an action on the bill, as it would import a different bargain and agreement from the tenor of the bill and indorsement, when the bill was given or transferred; and a copartner's interest could only be inquired into, in a suit in equity between the copartners, for its recovery.

As regards the right of a *bonâ fide* holder of a bill to write over a blank indorsement, to whom the bill shall be paid, at any time before or after the institution of a suit against the indorser; it has long been the settled doctrine in the English and American courts; and the holder, by writing such direction over a blank indorsement, ordering the money to be paid to particular persons, does not become an indorser. *Edie v. East India Company*, 2 Burr. 1216; Com. 311; 1 Str. 557; *Vincent v. Horlock*, 1 Camp. 442; *Smith v. Clarke*, Peake 225.

But it was urged in argument, that this suit could not be maintained, because it appears by the record, that the action was brought before the expiration of the time limited by the bill for its payment. The law is otherwise, upon reason and authority. The undertaking of the drawer is, not that he will pay the bill, but that the drawee will accept and pay; and the liability of the drawer only attaches, when the drawee refuses to accept; or having accepted, fails to pay. A refusal to accept is, then, a breach of the contract, upon the happening of which, a right of action instantly accrues to the payee, to recover from the drawer the value expressed in the bill, that being the consideration which the payee gave for it. Such is also the undertaking of an indorser, before the bill has been presented for acceptance, he being in fact a new drawer of the same bill, upon the terms

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expressed on the face of it. The case of an indorser is not distinguishable from that of a drawer in regard to such liability. *Ballingalls v. Gloster*, 3 East 481; *Milford v. Mayor*, 1 Doug. 55; *Mason v. Franklin*, 3 Johns. 202.

As to the damages which the court ruled the indorser in this case to be liable for, we need only say, the statute of Alabama gives them, and applies directly to the case. Aiken's Alabama Digest, 328, § 5. "Every bill of exchange, of the sum of twenty dollars and upwards, drawn in, or dated at, and from, any place in this territory, and payable at a certain number of days, weeks or months after date or sight thereof, shall, in case of non-acceptance by the \*drawee, when presented for acceptance; or, if accepted, in case of non-payment by the drawee, when due and [\*85 presented for payment, be protested by a notary-public, in like manner as foreign bills of exchange, and the damages on such bill shall be ten per cent. on the sum drawn for, and shall in every other respect be regulated and governed by the same laws, customs and usages, which regulate and govern foreign bills of exchange: provided, that such protest shall, for want or in default of a notary-public, be made by any justice of the peace, whose act in such case, shall have the same effect as if done by a notary-public."

The counsel for the plaintiff in error, also contended for the reversal of the judgment, on the ground of sundry irregularities in the progress of the cause in the court below, apparent on the record. Such as, that a general demurrer had been filed, and had not been disposed of; that a nonsuit had been taken by the plaintiff in error, and that a motion to set it aside had been overruled; that the case had been submitted to a jury, without an issue between the parties; and finally, that the verdict, if an issue was made, had been returned by eleven, instead of twelve jurors. These irregularities, whatever might have been their original imperfections, if not waived, were in our opinion, waived, by the defendant going to trial upon the merits, and cannot now constitute any objection upon the present writ of error. For a writ of error does not bring up for review any irregularities of this sort. Judgment affirmed, with six per cent. damages.

THIS cause came on to be heard, on the transcript of the record from the district court of the United States for the southern district of Alabama, and was argued by counsel: On consideration whereof, it is ordered and adjudged, by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.