*William Covington, Plaintiff in error, *v.* David A. Comstock, Defendant in error.

Promissory notes.

An action was instituted in the circuit court of Mississippi, on a promissory note, dated at and payable in New York; the declaration omitted to state the place at which the note was payable, and that a demand of payment had been made at that place. The court held, that to maintain an action against the maker of a promissory note or bill of exchange, payable at a particular place, it is not necessary to aver in the declaration, that the note, when due, was presented at the place for payment, and was not paid; but the place of payment is a material part in the description of the note, and must be set out in the declaration.

Error to the District Court for the Northern District of Mississippi. An action was instituted in the district court of Mississippi, by the defendant in error, on a promissory note, dated at New York, March 2, 1836, by which Covington & McMorris promised to pay $4560.04, six months after date, to Nelson, Carleton & Company, at New York. The note was indorsed by the payees to the defendant in error, David A. Comstock.

The declaration on the note omitted to state the place where the note was payable; and on the trial, the note was offered in evidence, and objected to by the defendant. The court allowed the note to be given in evidence; on which the defendant tendered a bill of exceptions; and a verdict and judgment having been rendered for the plaintiff, this writ of error was prosecuted.

The case was argued by *Cocke*, with whom was *Key*, for the plaintiff in error. No counsel appeared for the defendant.

Cocke contended, that it was necessary to state the place at which payment of the note was to be made; and to prove a demand at the place. That the note being joint, a separate action could not be maintained upon it.

Nothing is clearer, than that a declaration on a note payable at a particular place, should state the place of payment. The omission to do this is fatal. Cited, Bailey on Bills 429; 3 Camp. 453; Chitty on Bills 321; 14 East 500; 15 Ibid. 110; 5 Taunt. 7; 3 Camp. 248 and note.

McLean, Justice, delivered of the opinion the court.—This case is brought before this court from the circuit court of Mississippi, by a writ of error. The plaintiff in the circuit court brought his action on a promissory note, and stated in his declaration, that the defendant, "heretofore, to wit, on the 2d day of March 1836, at New York, to wit, in the district aforesaid, made a certain note in writing, commonly *called a promissory note, bearing date the day and year last aforesaid, and then and there [*44
delivered the said note to Nelson, Carleton & Co., who are citizens of the state of New York; by which said note, the said defendant promised, by the name and style of Covington & McMorris, to pay to said Nelson, Carleton & Co., or order $4560.04, six months after the date thereof, for value received; and the said Nelson, Carleton & Co. then and there indorsed and delivered said note to the said plaintiff," etc. The defendant pleaded the general issue; and on the trial, the following note was offered in evidence.

$4560.04. New York, March 2d, 1836.

Six months after date, we, the subscribers, of Columbus, state of Mis-

sissippi, promise to pay the order of Nelson, Carleton & Co. forty-five hundred sixty dollars and four cents, at New York, for value received.

COVINGTON & MCMORRIS.

The defendant objected to the note being given in evidence, on the ground, that there was a material variance between it and the note described in the declaration. But the circuit court overruled the objection, admitted the note in evidence, and entered a judgment for the plaintiff. The defendant excepted to this ruling of the court; and the question now is, whether there is error in the decision of the circuit court. The note given in evidence was payable at New York; but the place of payment was not stated in the declaration.

To maintain an action against the maker of a note or bill, payable at a particular place, it is not necessary to aver in the declaration, that the note, when due, was presented at the place for payment, and was not paid; but the place of payment is a material part in the description of the note, and must be set out in the declartion. The place of payment regulates the rate of interest, and in other respects may become important. A note, payable generally, is a very different instrument from a note given by the same parties, and for the same amount, payable at New York. We think, therefore, that the circuit court erred in admitting the note as evidence; for which cause the judgment is reversed; and the cause is remanded for further proceedings in the circuit court, were the plaintiff may move to amend the defect in his declaration.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the northern district of Mississippi, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this court be and the same is hereby reversed, with costs; and that this cause be and the same is hereby remanded to the said circuit court, for further proceedings to be had therein, according to law and justice, and in conformity to the opinion of this court.

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*45] *JOSEPH SMITH, Appellant, *v.* The CHESAPEAKE AND OHIO CANAL COMPANY, Appellees.[1]

Transfer of franchises.

The legislatures of Virginia and Maryland authorized the surrender of the charter granted by those states to the Potomac Company to be made to the Chesapeake and Ohio Canal Company, the stockholders of the Potomac Company assenting to the same; a provision was made in the acts, authorizing the surrender, for the payment of a certain amount of the debts of the Potomac Company by the Chesapeake and Ohio Canal Company, a list of those debts to be made out, and certified by the Potomac Company. This assignment does not impair the obligation of the contract of the Potomac Company with any one of its creditors, nor place him in a worse situation in regard to his demand; the means of payment possessed by the old company are carefully preserved, and, indeed, guarantied by the new corporation; and if

[1] Reported below, in 5 Cr. C. C. 563; but affirmed without reference to the point decided in the circuit court.