APPENDIX.

SIR,—I will thank you to publish the accompanying opinion in the case of the *Bank of the United States* v. *The United States*, in the appendix to your second volume. The opinion itself will show why I have deemed it proper to publish it in the manner proposed.

I am, very respectfully, your obedient servant,

R. B. TANEY.

Benjamin C. Howard, Esq.,
Reporter to the Supreme Court of the United States.

The Bank of the United States } Supreme Court,
v. } January Term, 1844.
The United States. }

The question in this case is, whether the Bank of the United States is entitled to fifteen per cent. damages on the bill drawn by the Secretary of the treasury of the United States, upon the French minister and Secretary of state for the department of finance, for the first instalment due from France to the United States, under the convention of July 4, 1831. This bill was protested for non-payment; and the bank thereupon gave notice of the protest, and claimed these damages in addition to the re-exchange and to all costs and damages actually sustained, except only the commissions charged by Hottinguer and Co., which according to its statement were considered as included in the fifteen per cent. The claim for these damages was resisted by the executive department of the government, which offered to pay the re-exchange and all costs and charges actually incurred, and to give the bank a full indemnity. This was refused; and as the sum in controversy was a very large one, amounting I believe to about $150,000, it attracted a good deal of attention at the time, and has been the subject of much public discussion.

When this dispute arose I was the attorney-general of the United States, and my opinion was called for by the Secretary of the treasury; and was against the claim set up by the bank. Having thus been *consulted as the counsel [*746
of the United States, and given the advice upon which the

government acted, it seemed proper for me to withdraw from the bench, when the subject was judicially disposed of; and I should not therefore have taken any part in the decision, even if the state of my health had permitted me to be in Washington when the question came before the court.

The opinion I originally gave was a very brief one, without stating any of the reasons upon which it was founded. Some time afterwards at the request of the gentleman who succeeded me in the office of Secretary of the treasury, I stated some of the grounds upon which I had formed my opinion, but without intending to go into a full discussion of the subject; and indeed without having all the papers within my reach at the time. I have not seen that opinion since it was written. And as the subject is now brought up for decision in the Supreme Court, and as upon a more full consideration of the case I still entertain the opinion I originally expressed, it is due to myself, and to the official station I now hold, that the reasons should be fully understood upon which, in my judgment, the claim of the bank had no foundation in law or equity. No place appears to be so proper for such a publication, as the volume of Reports which contains the case. But as I did not sit in the cause I cannot with propriety insert my opinion in the body of the report, and therefore place it in the appendix.

I must here remark that a letter from Mr. Biddle to Mr. Duane, then Secretary of the treasury, dated August 24, 1833, is inserted in the record, in which it is said that *I had declined communicating to the Secretary* my reasons for the opinion I had given. The statement as there made is calculated to create an impression which is not correct. The letter, as printed in the record, is, by some mistake, represented as an answer to one from Mr. Duane of June 27, which is also given. But that letter certainly does not authorize the statement; and Mr. Biddle's was I presume an answer to one from Mr. Duane of the 17th of August. And in a letter addressed by me to the Secretary on the 16th of that month, in answer to one from him informing me of Mr. Biddle's wish to know the reasons for my opinion, I said—"It is no doubt due to the public, and to the executive branch of the government, which has acted on my opinion, and also to myself, that I should in due time place on file in your department the reasons which in my judg-
*747] ment justify the government in its refusal to pay this demand;" and after telling the secretary that I must *exercise my own discretion as to the time, I concluded by saying —"I cannot therefore imagine that it is the duty of the counsel for the United States to argue this question for the satisfaction of the president and directors of the bank whenever they may think proper to call on him to do so." My refusal,

therefore, was to answer the call of the bank, which I then thought, and still think, it had no right to make.

I give these extracts from my letter, because Mr. Biddle's would seem to have been introduced in the record for the purpose of proving that I had refused to give *the Secretary of the treasury* any reasons for the opinion I had expressed. If the circumstance of my giving or refusing to give reasons was deemed to be a matter sufficiently material and important to be offered in evidence at the trial, and spread upon the record, I can see no just reason why Mr. Biddle's statement should have been selected as the testimony to be offered, and my own letters upon the subject withheld. They are upon file in the treasury department as well as Mr. Biddle's, and copies of them could have been as easily furnished.

In examining the questions of law which arise in this case, it is necessary in the first place that all the material facts should be well and clearly understood. I proceed to state them. In doing this, however, I shall have occasion to refer to some papers which, although material to the controversy, are not in the record. But they are on the public files of the departments in Washington; and as I shall give their dates, there will be no difficulty in verifying the correctness of the references.

By the treaty between the United States and France, of July 4, 1831, article 2d, it was stipulated that twenty-five millions of francs, which the latter agreed to pay to the United States in discharge of the claims of sundry American citizens upon the French government, should "be paid at Paris in six annual instalments of four millions one hundred and sixty-six thousand six hundred and sixty-six francs and sixty-six centimes each, into the hands of such person or persons as should be authorized by the government of the United States to receive it;" and by the same article, the first of these instalments was to be paid at the expiration of one year, from the exchange of the ratification of the treaty; and the others annually thereafter until the whole should be paid. The exchange of the ratification took place on the 2d of February, 1832; and the first instalment therefore became due on the 2d of February, 1833.

*By an act of Congress passed July 13, 1832, it was [*748 made the duty of the Secretary of the treasury to cause the several instalments with interest thereon to be received from the French government, and transferred to the United States in such manner as he might deem best. The difficulty between the bank and the government has arisen out of this act of Congress, and the manner in which it was carried into execution.

On the 31st of October, 1832, Mr. McLane, then Secretary

of the treasury, addressed a letter to the president of the bank, referring him to the act of Congress, and expressing his desire to transfer the money to the United States, in a manner, "most beneficial to the interest of the claimants," and suggesting that a bill drawn on the French government might be an advisable mode. He concludes his letter with the following request: "I shall be happy to receive your views on the whole subject; and if, as I presume, an arrangement for the transfer may be best made with the bank, I will thank you to state the terms."

On the 5th of November following the president of the bank replied to this letter, and after stating his willingness to offer such suggestions as occurred to him "in regard to the transfer of the first instalment payable by the French government," proceeded to recommend a bill upon the French government, which he advised the Secretary not to offer in the market, as it would depress the price; and proposed that he should give to the Bank of the United States a bill for the whole amount, at a certain rate mentioned in his letter. He states that he advises this, because it is believed to be "the best operation for the government;" that the bank is purchasing from individuals on better terms; and that the offer is made from "an anxiety to make the transfer on such terms as would merely prevent a loss to the bank; and concludes by saying that in making the offer the bank was "influenced exclusively by the belief that any other arrangement would be less advantageous to the treasury."

No further correspondence appears to have taken place between the parties until the 26th of January, 1833, when the Secretary again wrote to the president of the bank, stating that the department was then ready to draw on the French government for the first instalment; that he presumed the bank was still disposed to purchase on the terms it had before offered; and that as the instalment would be due before the bill could possibly arrive in France, it would be made payable on demand, and it was desirable that credit should be given to the treasurer by the bank on receiving the bill.

*749] *This letter was answered by the president of the bank on the 30th of the same month, and he stated in his reply that exchange had fallen since the former offer, and proposes new terms, which he represents as made by the bank "without looking to any profit in the operation, but merely in the expectation of incurring no loss upon it;" and that if this offer is accepted, the bank would, upon the receipt of the bill, pass the amount to the credit of the treasurer.

On the 6th of February, the Secretary informed the bank that the last-mentioned proposition was accepted, and that the bill would be forwarded the next day. It was accordingly so

transmitted, and the letter of Mr. McLane, which accompanied the bill, stated that he sent with it a communication from the Secretary of state to the French government, advising of the drawing of the bill, in order that the said communication might accompany the bill; and on the 9th of the same month he again wrote to Mr. Biddle, sending him "duplicates and triplicates of the act of the President, and a letter of advice to the American Chargè d'Affaires at Paris, intended to accompany the bills drawn by the department on the French government." The bill forwarded was in the following words:

"*Treasury Department of the United States,*
Washington, February 7, 1833.

"Sir:—I have the honor to request that at the sight of this my first bill of exchange (the second and third of the same tenor and date unpaid) you will be pleased to pay to the order of Samuel Jaudon, cashier of the Bank of the United States, the sum of four millions, eight hundred and fifty-six thousand, six hundred and sixty-six francs and sixty-six centimes; which includes the sum of $3,916,666.66, being the amount of the first instalment to be paid to the United States under the convention concluded between the United States and France, on the 4th of July, 1831, (after deducting the amount of the first instalment to be reserved to France under the said convention,) and the additional sum of nine hundred and forty thousand francs, being one year's interest at four per cent. on all the instalments payable to the United States, from the day of the exchange of the ratification to the 2d of February, 1833."

This bill was signed by Mr. McLane as Secretary of the treasury, and directed to "Mr. Humann, minister and Secretary of state for the department of finance, Paris." Upon the back was endorsed a particular account, certified by the register of the treasury, showing *that the amount [*750
claimed to be due to the United States under the treaty was the same with that for which the bill was drawn.

The paper which accompanied the bill, and which is described in Mr. McLane's letter of the 7th as "a communication from the Secretary of state to the French government," and in his letter of the 9th as "the act of the President," was an instrument under the seal of the United States, signed by the President and countersigned by the Secretary of state, bearing the same date with the bill, and which after reciting the article of the convention, hereinbefore-mentioned, and that the first instalment became due on the 2d of that month—and reciting also the act of Congress by which the Secretary of the treasury was directed to cause it to be trans-

ferred to the United States, and that in virtue of the power vested in him, he had drawn the bill above-mentioned for the first instalment under the convention, proceeded to declare that the President of the United States ratified and confirmed the drawing of the said bill, and authorized "the said Samuel Jaudon or his assignee of the said bill to receive the amount thereof, and on the receipt of the sum therein mentioned to give full receipt and acquittance to the government of France for the said first instalment, and the interest due on all the instalments, payable on the said second day of February by virtue of the said convention."

The letter of advice to the American Chargè d'Affaires at Paris, transmitted with the bill, was one from Mr. Livingston to Mr. Niles, then chargè at Paris, informing him of what had been done in this business, and directing him to "take an early opportunity therefore to apprize the French government of this arrangement."

On the 11th of February, Mr. Biddle acknowledged the receipt of the bill, and informed the Secretary that he had passed the amount of it to the credit of the treasury. And after explaining the reasons for receding from the first offer made by the bank, he says, "the purchase of the bill is not in the least desirable to the bank, nor would the rate now allowed have been given to any other drawer than the government."

This bill, it appears, was afterwards endorsed to the Barings by the bank, and by them to Rothschild, and was presented to the French minister of finance for payment. But no appropriation having been made by the French Chambers, Mr. Humann was unable to pay it. It was therefore protested, and was paid by Hottinguer and Co., for the honor of the bank—and the bank gave notice of the protest to the Secretary of the treasury, and demanded not only the costs and
*751] expenses *sustained, and re-exchange, but also 15 per cent. damages on the principal amount of the bill.

Upon the receipt of this notice, the money which had been transferred to the government on the books of the bank in payment of the bill, was immediately re-transferred to the bank—it not having been used by the government, nor even brought into the treasury. And the government offered to indemnify the bank for all costs, expenses and damages it had actually sustained, by the non-payment of the bill; but refused to pay the 15 per cent. damages, upon the ground that the bank was not entitled to them.

These damages are claimed under an act of assembly of Maryland passed in 1785, which provides "That upon all bills of exchange hereafter drawn in this state on any person, corporation, company, or society, in any foreign country, and reg

ularly protested, the owner or holder of such bill, or the person or persons, company, society, or corporation entitled to the same, shall have a right to receive and recover so much current money as will purchase a good bill of exchange of the same time of payment, and upon the same place, at the current exchange of such bills, and also 15 per cent. damages upon the value of the principal sum mentioned in such bill, and costs of protest, together with legal interest upon the value of the principal sum mentioned in such bill from the time of the protest until the principal and damages are paid and satisfied:" and then comes a provision that if any endorser shall pay the holder the principal, damages, and interest above mentioned, he shall be entitled to recover the sum paid by him, with interest, from the drawer.

This act of assembly was in force at the time Congress assumed jurisdiction over the District of Columbia, and was of course embraced by the act of Congress, which declared the laws of Maryland in force in that part of the district which had been ceded to the United States by Maryland.

The 15 per cent. damages is the only point in controversy, and if the bank succeeds in establishing its demand, it will make a clear profit of about $150,000, without having run any risk or suffered any inconvenience, and without having rendered any service to the public; and the treasury of the United States will be subjected to this heavy loss without any fault on the part of its officers, unless it be regarded as a fault to have consulted the bank and relied upon its counsel.

[*752 *It is indeed impossible to read the statement of the case without being strongly impressed with the utter want of any thing like equity or justice on the part of the bank in making this demand. The Secretary of the treasury, it appears, being charged by law with transferring this money to the United States, and regarding the bank as the great fiscal agent of the government, which, from its extensive monetary transactions was best able to judge in what mode the transfer could most advantageously be made, very naturally consulted with its officers before he took any step in the business; and it is evident by his letter, that he addressed himself to the president of the bank not merely as to a person with whom he proposed to bargain for the sale of a bill of exchange, but as one who stood in such a relation to the public that the Secretary supposed he had a right to ask his counsel upon this subject, and might safely act upon it when given.

The answer of the president of the bank represented the officers of that institution as receiving the application of the Secretary in a corresponding spirit; and as advising and acting in the business altogether from public and patriotic motives, without any view whatever to their own profit. The

Secretary is advised that the simplest form would be the sale of a bill on Paris; but reasons are stated (no doubt good ones) why this operation should not be attempted, and why it would be advisable to deliver a bill to the bank at a rate which he mentions; and the Secretary is assured, that in making its proposal the bank is not governed by the market price for which bills on Paris are then selling, and that in its offer it is not governed by any selfish considerations, but "is influenced exclusively by the belief that any other arrangement would be less advantageous to the treasury." It was upon the faith of these statements that the offer of the bank was accepted, and it obtained possession of the bill for the whole amount of the instalment upon its own terms, without any competition in the market with others. It needs no commentary upon the letter to show how little the present demand corresponds with the assurances contained in it, or with the motives upon which the bank professed to be acting.

But this letter proves still more. It shows that the parties were not dealing with one another for the sale and purchase of a bill of exchange, in the commercial and legal sense of those terms, where the rights and responsibilities of the drawer and drawee, and of all the parties to the instrument, depend upon the bill itself, and are determined *by the law-merchant and the usages of trade; but that the proposition made by the bank and accepted by the Secretary was an offer to act as the agent of the United States in transferring this fund, upon the terms and for the considerations therein mentioned—and that the bill, together with the other instruments executed at the same time, were delivered to the bank in order to enable it to perform this service. If such was the contract between the parties, there is no color for the claim now made; and that such was its real character, and that it was so regarded at the time, is evident when we take into consideration in connection with this correspondence the object which both parties intended to accomplish, and the other instruments executed and delivered with the bill, and making therefore a part of the contract.

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It must be borne in mind, that both parties had the same knowledge of the situation of this fund and of the circumstances connected with it, and both had the same object in view—that is, to transfer it to the United States, upon terms most advantageous to the treasury. And it is evident from the papers executed and delivered at the time, that neither party supposed that a bill of exchange would enable the bank to accomplish the object contemplated. The form of a bill was indeed given to one of the instruments, and it is spoken of in the correspondence referred to as the sale of a bill of exchange, and very naturally so spoken of from the shape

given to the contract, and the manner in which the compensation to the bank was arranged. But the question is, was the contract upon which this instrument was delivered in substance and in truth a sale and purchase of a bill of exchange, according to the usages of trade, and the legal meaning of the terms? or was it given to the bank merely to enable it, more conveniently, to execute an agency it had undertaken?

Now it is manifest that this bill would not give the endorsee or holder the right to demand this money of the drawee; and so the parties to it understood the matter; and the bank therefore took the power of attorney to Mr. Jaudon, without which it would have been unable to transfer this fund, even if the money had been in the hands of the French minister of finance, ready to be paid.

Undoubtedly so far as our government was concerned a bill of exchange would of itself have been all-sufficient. The act of Congress authorized the Secretary to adopt any mode he thought proper, to transfer this money to the United States; and the President and other officers of the government were bound to co-operate with the Secretary, *and to [*754 assist him as far as their assistance might be necessary to carry into effect any mode he might adopt.

But the act of Congress could create no obligation on the French government, nor impose upon it the duty of making the payment in any other mode but the one prescribed by the convention, and sanctioned by the usages of nations in their intercourse with one another. France had not agreed to pay a bill of exchange drawn by the Secretary of the treasury upon the French minister of finance; nor was she bound to take upon herself the risk of deciding whether the signature to a bill presented by a private individual as endorsee was the proper handwriting of the Secretary of the treasury; nor whether the endorsements upon it were genuine or not. By the convention she engaged to pay this money "into the hands of such person or persons as should be authorized by the government of the United States to receive it." And the only authority which she was bound to recognize, was one from the executive department of the government, which in its foreign intercourse is regarded as representing the nation. France did not stipulate, that in carrying this convention into execution the established usages of nations should be put aside, and her department of finance treated as a mercantile house, and subjected to the usages of trade and the custom of merchants, instead of the laws and usages of nations. She bound herself to pay this money to any one who produced an authority from that department of the government of the United States with which she had negotiated, with which she had made her contract, and which, in its foreign intercourse, is always under-

stood to represent the nation, provided the authority thus given was made known and authenticated, according to the established usages of diplomatic intercourse to that department of the French government which is charged with its foreign relations. This is the real and substantial meaning of this convention. She did not agree to accept a bill of exchange.

Whatever duties, therefore, the act of Congress imposed upon the officers of this government, and whatever authority it conferred upon the Secretary of the treasury, it did not and could not alter the obligations of France. So far as she was concerned, the bill of the Secretary of the treasury in favor of the cashier of the Bank of the United States, gave him no authority to demand the money, and created no obligation on France to pay it. Standing by itself, it would have been useless and ineffectual; and in this light it was evidently regarded by all the parties to the contract—by the President of the *United States, by the Secretary of state, by the Secretary of the treasury, and by the officers of the bank. The other instruments executed and delivered at the same time show that such were the impressions under which they were acting. The power of attorney in favor of Mr. Jaudon, certified under the seal of the United States, was the real authority relied on by all of the parties to enable the bank to receive the money; and the only effect of the bill was to make this power negotiable and transferable, and therefore I presume more convenient to the bank. It was convenient also to the United States, because it enabled the Secretary to ascertain at once the sum that the treasury would realize from this instalment. And even this power of attorney, carefully as it is drawn and attested, was not deemed sufficient under the treaty, without adding to it an original letter from the department of state to the American chargè, which was to accompany both the bill and the power of attorney, in order that he might by an official communication to the proper department of the French government assure them of the authenticity of the power and the bill.

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Now it seems to me to be confounding things which are essentially unlike, to apply to such a transaction between nations the commercial usages in relation to bills of exchange, merely because one of the instruments executed between the parties is in that form and called by that name.

The instrument of writing acknowledged in commerce as a bill of exchange, and to which the law-merchant applies, is one which, of itself, without any other aid, gives the payee or his endorsee the right to demand and receive the amount specified in it; and the payee and endorsee is presumed to buy it upon the faith that the drawee, upon the authority of the

bill itself, will pay the money. But if the bank in this case supposed that it was entering into such a contract with the government, and purchasing such a bill, why did it take the power of attorney to Mr. Jaudon, bearing the same date with the bill? Why take the letter from the Secretary of state to the American chargè? It had no occasion whatever for these papers, if it meant merely to buy a bill. It had nothing to do with them, and no business with them; and the acceptance of these instruments, delivered with the bill, to bear it company in all its transfers, and to be presented with it to the French government, is utterly inconsistent with the pretension now set up of being nothing more than the purchaser of a bill. But they are in perfect accord with the letter of *Mr. [*756 Biddle, in which he proffers the agency of the bank to transfer the fund.

The subsequent proceedings in this business conform in every respect to the view I have taken, and prove that it was regarded in the same light not only by the parties originally concerned, but by those also who afterwards became interested in it. For before the bill was presented for payment to Mr. Humann, the letter of the Secretary of state to the American chargè, herein before mentioned, was delivered by the assignee and holder of the bill to Mr. Niles, the chargè of the United States at Paris, who, pursuant to the instructions therein contained, on the 21st of March, 1833, addressed a letter to the Duc de Broglie, the French minister of foreign affairs, apprizing him of the contents of the despatch from the state department, and informing him that the bill would probably be presented in a day or two at the department of finance, and assuring him that the assignee had full power from the President of the United States to give the necessary receipt and acquittance to the French government, according to the treaty.

Now if this had been the purchase of the mercantile instrument recognized as a bill of exchange, and to be treated as such by the holder, he would have believed, and would have had a right to believe, that the bill itself authorized him to receive the money and give an acquittance. And if as a matter of courtesy (the bill being payable at sight) he chose to give notice of the time when it would be presented for payment, that notice would naturally and properly have been given to the drawee. But here the notice was not given by the holder to the person from whom he was to ask payment, nor to any officer of the French government, but he delivers the letter from the department of state to the American chargè, in order that he may, by an official communication from the government of the United States, apprize the French government of the assignee's right to receive the money and give the acquittance; and this notice was not given, and could

not with propriety have been given, by Mr. Niles to Mr. Humann, the drawee, but was necessarily and properly given to the minister for foreign affairs. In other words, this letter from the state department was placed in the hands of the chargé in order that he might demand the money, in behalf of the holder of the bill, from the French minister of foreign affairs, and through him obtain an authority to the drawee to pay it. For this is the real meaning and object of those communications.

[*757 *Here, then, is a paper in the form of a bill of exchange; which the parties to it know gives no right to demand the money mentioned in it, because that money is due from one nation to another, and the mode of payment is particularly specified in a treaty; and that mode is not by a bill of exchange drawn by the Secretary of the treasury upon the French minister of finance. The payment is to be made to an agent appointed by the government of the United States. No person would be recognized as such unless his appointment was authenticated by the President of the United States, nor unless that appointment was regularly notified to the French minister of foreign affairs. Then, and not before, it was the duty of the French government to order the payment to be made; and then, and not before, the holder of the bill, according to the treaty, was entitled to demand and receive the money. This was all known and agreed to, and acted upon by the parties originally or subsequently interested in the contract, and indeed appeared on the face of the papers. Now it seems to me impossible to treat such a transaction as an ordinary mercantile operation, and to apply to it the rules and principles of the law-merchant. It is impossible, with any show of reason, to treat the Secretary of the treasury of the United States and the French minister of finance as if they were mere trading houses, which might lawfully deal with one another, and draw bills upon each other whenever they pleased. The American Secretary acted under a special law of Congress in this instance, and in execution of a treaty, and we might as well apply the rules of the law-merchant and the doctrine of private partnerships to a treaty of alliance between nations, as subject this transaction to the usages of trade.

It is, moreover, worthy of remark, that the Duc de Broglie, in his answer to the note of Mr. Niles, complains of the course adopted by the American government, guarded as it was, and says that in his opinion they had gone out of the natural course, which the treaty itself pointed out, and which was supported by so many precedents: *vid.* 2d vol. Exec. Doc., 2d. sess. 23d Cong., Doc. 40, page 22, 23. I do not, however, mean to admit the justice of this remark, because in the power given by the President, and the official notification of it, according

to the usual forms of diplomatic intercourse, the stipulation in the treaty was complied with, and the only office of the bill of which he complained was to designate the person authorized to act under the power executed by the President and certified under the seal of the United States.

[*758 *Nobody will imagine for a moment, that if the United States are compelled to pay these damages, the French government can be called on to reimburse them. For, if the United States superadded any other instrument to the one pointed out by the treaty, or adopted a different mode of communication from the one which the treaty authorized, and thereby subjected themselves to the payment of damages, they have no right to throw the loss thus sustained upon France. And, certainly, France did not agree by the treaty that a bill might be drawn for this instalment upon their minister of finance, nor that our Secretary of the treasury might hold any communication with him on the subject. The refusal, therefore, of Mr. Humann to accept or pay the bill was not a breach of the treaty stipulation; and, consequently, our government can have no claim to compensation on that account. The breach consisted in not paying the money to the agent duly appointed by the government of the United States, whose appointment was sufficiently authenticated to the proper department of the French government, according to the usages of diplomatic intercourse—that is to say, to the minister of foreign affairs. And the omission to pay when this had been done, undoubtedly entitled the United States to demand the interest provided for by the treaty until the money was paid. But there is no clause in the treaty subjecting the French government to fifteen per cent. damages, if the money was not paid on demand. Yet the money was due; and, unquestionably, if this case is to be treated as a bill transaction in the usual course of business, the drawee would be responsible to the drawer for all the damages he might sustain by the protest of the bill. Is the transaction to be regarded as the sale and purchase of a bill of exchange, in order to charge the United States with the payment of these large damages to the bank, but for no other purpose? I cannot assent to the justice of such a decision, nor to the principles on which it is founded.

In discussing this question, I have so far taken into consideration the letters of the parties, and the other instruments of writing executed and delivered at the same time with the bill, in order to determine the true character of the contract. Unquestionably, upon well settled legal principles, this is the only mode in which the intention of the parties can be ascertained, and their respective rights and liabilities decided. But if we are to throw aside every thing but the bill, and regard that as the only evidence before us, still it will be found that

the act of assembly of Maryland does not apply to the *case. And if it does not, then it is very clear that the damages claimed cannot be recovered.

It cannot be necessary to cite authorities, to prove that by the general law-merchant the holder of a protested bill of exchange is entitled to nothing more than costs, expenses, and re-exchange. In other words, he has a right to be indemnified from loss; but beyond this he has no claim to damages.

In many places, indeed, damages are given by established local usage, or by express statute. But these damages not only differ in amount in different places, but they differ also in the purpose for which they are given. In some instances they are allowed in lieu of expenses and re-exchange, and in that case they stand in the place of such allowances, and are regarded as a just equivalent for them: a general rule or fixed sum being adopted as a matter of convenience, to save the difficulty and inconvenience of proving, in every case, the reasonable costs and expenses actually incurred, and the price of the re-exchange at the time.

But in other places damages are superadded to these allowances, and are given to the holder over and above the usual indemnity. In such cases the damages are not given for the loss supposed to have been sustained. They are imposed upon the drawer as a penalty. And the right to recover them is given to the holder in order to prevent persons from selling exchange without having provided funds to answer it.

The damages given by the Maryland act of Assembly are of the latter description. The law gives the usual compensation allowed by the general commercial code—that is, costs, interest, and re-exchange—the re-exchange being measured by the price of the new bill in Maryland, instead of the country in which it is payable. It also gives fifteen per cent. damages over and above these allowances. The damages, therefore, are, in effect, a penalty imposed upon the drawer, in case his bill is protested. And the question arises, whether this provision of the statute extends to the United States, and embraces bills drawn on behalf of the government, by an officer authorized by law to draw them.

If such be the construction of this law, and it is construed to embrace bills drawn by the state, it is the first instance in the history of nations in which a sovereignty has imposed a penalty upon itself, in order to compel it to be honest in its
*760] dealings with individuals. A sovereignty is always presumed to act upon principles of justice, *and if, from mistake or oversight, it does injury to a nation or an individual, it is always supposed to be ready and willing to repair it. It is bound to compensate the party injured, and to make the indemnity a full and ample one. But it is bound to nothing

more. And it ought not to be supposed to have made a provision so unusual as the one now contended for, unless very clear words were used to indicate that intention.

Nor does it matter whether this fifteen per cent. is technically to be regarded as a penalty or not. It is, at all events, a new provision, engrafted upon the general law-merchant. It is a new charge imposed upon the drawer of a protested bill, beyond that to which he was before subject. The question still recurs, does this statute include bills drawn by the state? In England it is well settled that the king is not embraced by the provisions of an act of Parliament, however broad and general the terms of it may be, unless he is expressly named, or the language of the statute and the nature of its enactments imply that it was intended to operate on the rights of the sovereign as well as upon those of individuals. 5 Co., 14 b; 11 Id., 70; 8 Mod., 8; 1 Str., 516. The same doctrine has been long since firmly established in Maryland. *Murray & Taylor* v. *Ridley, adm'r.*, 3 Har. & M. (Md.), 171; *Contee* v. *Chews' ex'r*, 1 Har. & J. (Md.), 417; *The State* v. *The Bank of Maryland*, 6 Gill & J. (Md.), 226. And if the state of Maryland would not have been liable to this demand under the act of 1785, it follows that the United States are not responsible. For the adoption by Congress of the Maryland law, certainly did nothing more than place the general government, in relation to this contract, upon the same ground that the state would have occupied before the cession of the District.

Now in this law there are certainly no express words including the state; nor is there any thing in its language or its object to lead to that conclusion. And it appears to me that no one who reads the act can for a moment imagine, that the state intended to impose upon itself this fifteen per cent. damages, in case one of its foreign bills, from some unforeseen cause or other, should happen to be protested. It is no answer to this argument, to refer to cases decided or usages adopted, where certain fixed damages are given as a substitute for the charges recognized by the general mercantile law. Such decisions and usages rest upon different principles from the present case, and the reasons upon which they are allowed would undoubtedly apply to government bills as well as to those of individuals. Neither *is it sufficient to say that the government, if it was the holder of a protested bill, would be entitled to these damages from an individual, and that it is therefore just that it should pay them in return. If such a rule be a sound one, and if it ought to be followed by the legislature, yet it would not authorize the court to repeal a statute, and make a regulation different from that enacted by the legitimate authority. It would be difficult, [*761

however, for any one to maintain, that there is any foundation in justice or fair dealing for applying such a rule against the United States in this instance, and in favor of the bank. The justice of the case is most manifestly on the same side with the law.

And, indeed, the law of the case would be the same, even if the contract had been nothing more than the sale of this bill, and the liabilities of the United States were to be determined by the rules which govern similar contracts between two individuals.

The bill, upon the face of it, is drawn upon a particular fund. And such a bill, although usually spoken of as a bill of exchange, is yet not recognized as such in the commercial code. Nor is it subject to the rules and usages which have been established in relation to bills of exchange. It cannot be declared on as such, nor is the drawer answerable to the endorsee or holder upon protest for costs, charges, or re-exchange; nor for any fixed sum in lieu of them. The act of 1785, therefore, does not apply to it; for that statute manifestly intended to embrace those instruments only which are recognized by law as bills of exchange.

The general rule as to what constitutes a bill of exchange, in the legal sense of these terms, is given in Story on Bills of Exchange, sect. 46; where, after stating that bills payable out of a particular fund only, or upon an event which is contingent, are not in contemplation of law bills of exchange, the definition of that instrument is given in the following words:

"And hence the general rule is, that a bill of exchange always implies a personal credit not limited or applicable to particular circumstances and events, which cannot be known to the holder of the bill in the general course of its negotiation; and if the bill wants, upon the face of it, this essential quality or character, the defect is fatal."

The cases which establish and illustrate this principle, and show what bills are regarded as drawn upon a particular fund, are all referred to in the section above mentioned, and in the one succeeding *it, and may, indeed, be found in any of the standard works on bills and notes. It would be useless, to cite here the multitude of cases on the subject. A single one will show the application of the principle, as settled by the current of authorities. In *Jenney* v. *Herle*, 2 Ld Raym., 1361, the bill was in the following words: "Sir, you are to pay to Mr. Herle £1,945, out of the money in your hands, belonging to the proprietors of the Devonshire mines, being part of the consideration money for the purchase of the manor of West Buckland." It will be observed, that the language of this bill assumes that the money was in the hands of the drawee; that the fund out of which it was payable had

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already been received by the party upon whom the bill was drawn. Yet this was held to be no bill of exchange, in the legal sense of the words, it being payable out of a particular fund. So, too, an order from the owner of a ship to the freighter, to pay money on account of freight, is no bill, because the *quantum* due on the freight may be open to litigation. Chit. on Bills, 58; 2 Str., 1211, *Banbury* v. *Lissett*, so held by Lee, Chief Justice.

And so firmly have the principles decided in these early cases been since adhered to, that it is now greatly doubted whether the cases of *Andrews* v. *Franklin*, 1 Str., 24, and *Evans* v. *Underwood*, 1 Wils., 262, which seemed in some degree to relax the rule, would at this day be held to be law. See Story on Bills, page 60, note.

Now, can any one read the bill in question, and distinguish it in principle from the case of *Jenney* v. *Herle?* or bring it within the definition of a bill of exchange, as given in Story on Bills? Upon the face of the bill, it is drawn by the American Secretary in his official and not in his private character. It is drawn upon Mr. Humann, not for any money he was expected to pay to the American Secretary in his private capacity, but upon a particular fund which was due from the French nation, and which was presumed to be in his hands as the minister of finance. It is upon the credit to which the Secretary supposed himself to be officially entitled, on account of this particular fund, that he draws the bill. This is carefully and distinctly set out in the bill itself. It does not in its terms imply a personal or official credit, not limited or applicable to particular circumstances. On the contrary, it claims the credit, and requests the payment, on account of the particular circumstance that the money was due from the French government, and the funds to pay it presumed to be in the hands of the minister of finance.

Moreover, the Secretary knew, and the bank knew, that France *was a constitutional monarchy, under [*763 which no money could be raised, or applied to any particular purpose, without the sanction of the legislative body. And that the money due from France could not be paid by Mr. Humann, unless money was placed in his hands, and by law appropriated for that purpose: the payment of the bill, therefore, depended upon that circumstance. If that event had not happened—that is to say, if the money had not been provided by the legislature, and the payment authorized out of the fund thus provided, then, upon the face of the bill, it was evident that Mr. Humann would not and could not pay it. It is true that the bill assumes that the money was in his hands. But that was the case, also, in *Jenney* v. *Herle*. Indeed, the bill

there expressly stated the fund to be in the hands of the drawee; yet it was held not to be a bill of exchange.

It will hardly be said that this bill is to be treated as if drawn by the United States against France. But, even if that view of the subject could be maintained, it would not affect the argument. The bill claims no general credit for the United States with France that would give them a right to draw independently of the money due by the treaty. In any aspect of the case, the credit upon which the bill is drawn is expressly confined to this particular sum. And I cannot imagine how this instrument can be dealt with as a bill of exchange, if the rule is to stand, that no instrument is a bill of exchange, in contemplation of law, unless it implies a personal credit not limited or applicable to particular circumstances and events, which cannot be known to the holder of the bill in the general course of its negotiation.

But if none of these objections stood in the way of this claim, and if the transaction were regarded as one between individuals for the purchase of a bill of exchange, in the legal meaning of the terms, and therefore to be governed by the act of 1785, yet the bank would have no claim to the damages in question.

The first clause of the first section of this law gives the fifteen per cent. damages, in addition to the re-exchange, costs, and interest, to the person who is the owner or holder of the bill protested. The second clause of the same section provides, that any endorser who shall have paid to the holder, or other person entitled, the value of the principal, damages, and interest, shall have a right to recover the same from the drawer or other person liable to such endorser on the bill. The plain language of the law gives the fifteen per cent. damages to the *764] party who is the holder of the bill at the time of the protest; and *gives to the endorser the right to recover from the drawer, or other person liable, so much only as he shall be compelled to pay on account of the protest. The endorser is entitled to nothing—neither to principal, costs, re-exchange, nor damages—until he has paid them; and then to so much as he has actually paid; and to nothing more.

The policy of this law is as obvious and as just as its words are plain. It conforms in its provisions to the general commercial code, as nearly as the situation of Maryland would at that time permit.

By the general mercantile law, the holder of a protested bill is entitled to re-draw from the place where it was dishonored, upon the drawer or endorser, in the country where they reside, for an amount that will produce, by its sale, at the existing market price of such bills, a sum exactly equal to the amount of the original bill at the time when it ought to have

been paid, or when he is able to draw the re-exchange, together with his necessary expenses, and interest. He is not, however, obliged to re-draw, but is entitled to recover what would be the price of such a bill, with interest, and the necessary expenses and charges. This is the amount of the holder's damages. But the endorser is not entitled to recover of the drawer the damages incurred by the non-payment of a bill, unless he has paid them or is liable to pay them. 3 Kent's Com., 115, 116 (4th edition); Story on Bills, 470, and notes; Chit. on Bills, 670 (8th edition).

The reason of the difference made between the holder at the time of the protest, and the endorser, who may afterwards by taking up the bill become the holder, is evident. The holder, by purchasing the bill and presenting it for payment, shows that he desires funds to that amount, at that place, at the time when the bill becomes due, and that he has counted upon obtaining them by means of the bill which he holds. His disappointment may subject him to serious loss and embarrassment in his business, and the law therefore authorizes him to raise the same sum immediately by re-exchange, on the drawer or endorser, in the country in which they reside. And if he cannot or does not re-draw, the price of the re-exchange to which he was entitled, together with his costs and expenses, is, of course, the measure of his damages.

But the endorser stands on different ground. He has already sold the bill, and received the consideration for it, at the time and place where it suited his convenience. And, having by his endorsement guarantied the safety of the bill to any subsequent holder, if, in consequence of this engagement, he is compelled to pay it, the natural and just *measure [*765 of his damages against a party answerable over to him is the precise sum he is compelled to pay, with interest upon it. This is the uniform rule, where one person is obliged to pay money, for which he has his remedy against another; and it is daily and familiarly acted upon, where a surety pays money for his principal.

Now the Maryland statute differs from the general mercantile code only in this—that in relation to the holder, it gives him the price of the re-exchange from the place where the bill was drawn, instead of the place where it was payable; and superadds the fifteen per cent. to the usual allowances; and the reason of this difference is readily understood, when we advert to the situation of Maryland at the time this law was passed. The state was then just renewing her commerce with England, which had been broken up by the revolutionary war; and she was for the first time about to open a trade with the other nations of the world; and when that law was passed, there was most probably not a place in Europe (certainly not

one out of England) at which there was any market rate of exchange for bills upon Maryland, by which damages could be measured in the case of a protested bill; and if such a rate happened to exist at any place, it would in the then state of navigation have produced ruinous delays and expenses to procure the testimony to prove it. The price of re-exchange in Maryland upon the same place was, therefore, from necessity substituted for the re-exchange in the foreign country. Because, here, the proof of the sum for which a new bill could be brought could be easily obtained, and would always be within the reach of the party. But as the holder of a bill payable in a foreign country could hardly at that time be expected to find a purchaser for his re-exchange upon Maryland, and the injury and inconvenience produced by the protest could not, therefore, be repaired immediately on the spot, by the sale of a re-exchange upon the drawer or endorser, the act of assembly imposed the penalty of fifteen per cent., in addition to the established allowances of the general mercantile law, in order to insure, as far as practicable, caution and prudence on the part of drawers and endorsers; and to deter the unprincipled and greedy from attempting to create for themselves a fictitious capital, by giving currency to bills which they knew would be dishonored. The second clause of this section, in relation to endorsers, conforms entirely with the general law-merchant. They are entitled to recover over only what they are compelled to pay.

*766] Upon what ground, then, can the bank claim the fifteen per cent. *damages under this law? It was not the holder of the bill at the time it was protested. It appears by the record that the bank had endorsed it to Baring, Brothers and Co.; they to Rothschild, and he had endorsed it to Rothschild and Brothers, who presented it for payment, and were the holders at the time of the protest; and Hottinguer and Co. paid it, *supra protest*, for the honor, as they declared, "of the signature and account of Mr. Samuel Jaudon, cashier of the Bank of the United States, the first endorser." It also appears by the statement in the record, that, although Hottinguer and Co. said they had funds of the bank in their hands, and were apprised that the bill would not be paid by Mr. Humann, they yet declined taking it up, until it should be protested. They did not, therefore, pay it as agents of the bank, but paid it *supra protest;* and they thereby, upon established and indisputable principles of commercial law, became the holders of the bill in their own right, and not as agents of the party for whose honor it was paid. Rothschild and Brothers, having received the amount due them, had certainly no claim to these damages; and they have made none. I shall not stop to inquire, whether Hottinguer and Co., who

voluntarily intervened in this business, could have claimed of the bank, or of the United States, either re-exchange or damages of any kind. It is sufficient for the decision of this controversy, that they neither claimed nor received them. They demanded what they were entitled to by the general law-merchant, and nothing more—that is to say, the principal, the costs and charges, and usual commissions. They had a right to make this demand directly upon the United States, as drawers, or upon the bank as endorser, both being responsible to them. *Ex parte Lambert*, 13 Ves., 129. They made their demand upon the bank as endorser, and as such it paid it. Can the bank enlarge the claim of Hottinguer and Co.? or can it, under and by virtue of the act of 1785, recover from the United States more than it has paid, or is liable to pay as endorser? It will scarcely be said that the bank has become the owner and holder, by paying Hottinguer and Co, and taking up the bill, and are, therefore, entitled to all the rights given to the owner and holder by the first clause of the first section of the act of Assembly. This clause evidently applies to the holder at the time of the protest, and it is the second clause in the same section which defines the rights of endorsers who become holders afterwards by discharging the claim against them; and this clause gives them a right to recover so much as they have paid, and nothing more. If *this claim is to be allowed to the bank, what is to [*767 be done with this clause in the act of Assembly? It is plain and unambiguous in its words; it is consistent with the other provisions of the law; its policy is evident, and it is in perfect conformity to the general commercial code, which has always been celebrated for the justice and equity of its principles; and this claim of the bank cannot be maintained, unless this clause is blotted out of the statute. Can this be done by judicial authority, upon any known rule for the construction of statutes? I think not. There have been many decisions upon the construction of many statutes, but it will be difficult to find a precedent anywhere, or of any time, that would sanction such a decision on an act of Assembly like this. Certainly there never has been any practice in Maryland, nor any decision under this law, to warrant such a construction. Upon the whole case, therefore, the following conclusions appear to me to be irresistible:

1. That the contract with the bank, according to its true construction and meaning, was not for the sale of a bill of exchange, in the legal sense of these terms; but an agreement by which the bank undertook, as agent for the government, to transfer to the United States the first instalment due under the treaty with France; and that the bill in question was

used as one of the instruments for carrying that contract into execution, for the greater convenience of the parties.

2. That if the contract be even considered as one merely for the purchase of a bill of exchange, in the strict legal meaning of the words, yet the bank is not entitled to these damages, because the Maryland act of 1785, under which alone they are claimed, does not extend to bills drawn by the United States.

3. But if the law of 1785 is construed to embrace bills of exchange drawn by the government, and this case is to be decided by the same rules which apply to similar contracts between individuals, still the United States are not responsible for these damages, because the bill in question is drawn upon a particular fund, and, therefore, not a bill of exchange in the legal meaning of the terms, and, consequently, not within the statute.

4. And if the claim were free from the three preceding objections, and to be decided under and according to the provisions of the act of 1785, yet the bank being an endorser of the bill, and not the holder or owner at the time of the protest, it is not by that act entitled to recover these damages, since it has not paid them.

*768] *Upon each of these grounds, I think the bank has no claim in law or equity to the damages in question.

Note. When this subject was before me as attorney-general of the United States, (if my recollection is correct,) I was under the impression, from the evidence, that Hottinguer and Co. had paid the bill out of the money of the bank in their hands, and as agents of the bank. In that view of the subject there could, I presume, be no foundation for the claim of fifteen per cent. damages; because the bank being the agent of the government, with public money in its possession sufficient to take up the bill, the payment by the agents of the bank out of its money ought to be regarded as a payment for the government, and would in substance and effect be a payment out of the public funds in the hands of the bank. But, upon the facts as now presented in the record, upon the evidence offered by the bank, it appears that Hottinguer and Co. declined paying the bill before protest; and that they paid it *supra protest*, reserving their remedy on the bill against the bank as well as the United States. They, therefore, according to the proofs, as now stated, became the holders of the bill on their own account; and it is upon this view of the facts that the foregoing opinion is formed.

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