GEORGE D. PRENTICE AND GEORGE W. WEISSINGER, CO-PARTNERS DOING BUSINESS UNDER THE STYLE AND FIRM OF PRENTICE & WEISSINGER, PLAINTIFFS IN ERROR, *v.* PLATOFF ZANE'S ADMINISTRATOR.

Where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, this court will not render a judgment, but remand the cause to the court below for a *venire facias de novo*.[1]

Therefore, where a suit was brought by an indorsee upon a promissory note, and the special verdict found that the original consideration of the note was fraudulent on the part of the payee, but omitted to find whether the holder had given a valuable consideration for it or received it in the regular course of business, and the court below gave judgment for the defendant, this court could not decide whether that judgment was erroneous or not, and would have been compelled to remand the case.

But the parties below agreed to submit the cause to the court, both on the facts and the law. This court must presume that the court below founded its judgment upon proof of the fact as to the manner in which the holder received it, and must therefore affirm the judgment of the court below.

THIS case was brought up by writ of error from the District Court of the United States for the Western District of Virginia.

In 1836, Platoff Zane, a citizen of Virginia, being in Pennsylvania, executed the following promissory note:—

"$5,437$\frac{50}{100}$. Philadelphia, November 28th, 1836. Five years after date, I promise to pay to the order of James H. Johnson, five thousand four hundred and thirty-seven $\frac{50}{100}$ dollars, without defalcation, for value received.

"PLATOFF ZANE."

On some day afterwards (the record did not show when), this note was indorsed in blank by Johnson, the payee, and delivered to John Stivers, who handed it over to Prentice & Weissinger, without putting his own name upon it.

On the 8th of May, 1840, Prentice & Weissinger filed a bill before the Honorable George M. Bibb, judge of the Louisville Chancery Court in Kentucky, against the above-named John Stivers and one John Thomas. The bill stated, that the complainants and Thomas were sureties for Stivers as principal in a debt which Stivers owed to the Bank of Louisville, that the complainants had paid the debt, and now required Thomas to contribute one half.

[1] FOLLOWED. *Graham* v. *Bayne*, 18 How., 63; *Guild* v. *Frontin*, Id., 135. CITED. *Suydam* v. *Williamson*, 20 How., 441; *Stickney* v. *Wilt*, 23 Wall., 163; *Stewart* v. *Salamon*, 7 Otto, 364.

*On the 16th of June, 1840, Thomas answered, and also filed a cross-bill. He alleged that Stivers had placed in the hands of Prentice & Weissinger a large amount of securities, and required an exhibition thereof. Weissinger answered the cross-bill, and gave in a list of these securities, amongst which was Zane's note; to which was attached the remark, that they had received notice that the note would be defended on the ground of no consideration. The answer also offered to transfer all the securities to Thomas for eighty per cent. of their amount, averring a belief of their insufficiency to pay the debt.

Here these proceedings in chancery stopped.

On the 7th of November, 1845, Prentice & Weissinger, citizens of Louisville, Kentucky, brought an action of debt against Zane, in the District Court of the United States for the Western District of Virginia, upon the above-mentioned promissory note.

The defendant pleaded *nil debet*, and the case went to a jury, who found a special verdict. Before reciting this, it may be mentioned that the deposition of Jacob Anthony, therein referred to, proved that the note in question was passed by Stivers to Prentice & Weissinger, to indemnify them for money paid by them, as his indorsers, in bank.

The jury say, that they find that the note in these words—"$5,437$\frac{50}{100}$. Philadelphia, November 28th, 1836. Five years after date, I promise to pay to the order of James H. Johnson, five thousand four hundred and thirty-seven $\frac{50}{100}$ dollars, without defalcation, for value received. Platoff Zane"—was made by the defendant, and delivered to the payee, at the date thereof, at Philadelphia, in the state of Pennsylvania, and that said note was indorsed by the payee, and delivered by him, so indorsed, to one John Stivers, at the city of Louisville, in the state of Kentucky, before the maturity thereof; that there has not been any evidence submitted to us that said Stivers paid value therefor, or that there was any consideration for such indorsement, unless the same ought to be inferred from the matters herein stated; but should the court be of opinion that, from the facts and evidence herein found, the jury ought to presume that said indorsement to said Stivers was made for a valuable consideration, then we find that the same was made for full value received by the payee from said Stivers therefor; otherwise we find that the same was made without any consideration or value therefor. And we further find, that said Stivers afterwards, but before the said note became payable, delivered the same (indorsed in blank by the

payee as aforesaid, but not indorsed by the said Stivers) to the plaintiffs, at the city of Louisville aforesaid, for the purposes and upon the *consideration shown in the deposition of Jacob Anthony, and the record of a bill, answer, and cross-bill and answers; which deposition and record are in the words and figures following, to wit: (The deposition and record were then set forth *in extenso*, and the special verdict proceeded thus:)

We further find, that the consideration of said note was fraudulent on the part of the payee, and such that the payee could not recover against the maker upon said note.

But we further find, that the plaintiffs had no notice of the fraudulent consideration of said note at or before the time the same was delivered to them as aforesaid.

And we find that the defendant, since the institution of this suit, has duly served the plaintiffs with a notice in the following words, to wit:—

"An action of debt, in the District Court of the United States for the Western District of Virginia, between

"PRENTICE & WEISSINGER, Plaintiffs, } and } PLATOFF ZANE, Defendant. }

"The defendant in this suit will offer evidence to show, and will insist at the trial, that the note described in the declaration was obtained from him, said defendant, by the payee thereof, by means of misrepresentation and fraud, and without any value having been received therefor by said defendant, and will require the plaintiffs to prove at the trial the consideration, if any, paid by them, or the previous holder or holders thereof, for the same, and the time and manner in which they became possessed of said note. Very respectfully, &c.,

PLATOFF ZANE,
By JACOB & LAMB, *his Attorneys.*

"To MESSRS. PRENTICE & WEISSINGER."

"Due service of above admitted.

"M. C. GOOD, *Attorney for Plaintiffs.*"

We further find the statute of Pennsylvania in force within that state at the time of the execution of said note, and the indorsement thereof and delivery of the same to the plaintiffs as aforesaid, in these words:—

"Act of 27th February, 1797.—4 Dall., 102; 3 Smith, 278

"An Act to devise a particular Form of Promissory Notes not liable to any Plea of Defalcation or Set-off.

"6. SEC. 1. All notes in writing, commonly called promis-
*473] sory notes, bearing date in the city or county of Philadelphia, *whereby any person or persons, bodies politic or corporate, or copartnership in trade, shall promise to pay, or cause to be paid, to any other person or persons, bodies politic or corporate, or copartnership in trade, and to the order of the payee for value in account, or for value received, and in the body of which the words 'without defalcation,' or 'without set-off,' shall be inserted, shall be held by the indorsees discharged from any claim of defalcation or set-off by the drawers or indorsers thereof; and the indorsees shall be entitled to recover against the drawer and indorsers such sums as, on the face of the said notes, or by indorsements thereon, shall appear to be due: Provided always, that in every action brought by the holder of any such note, whether against the drawer or indorsers, the defendant may set off and defalk so far as the plaintiffs shall be justly indebted to him in account by bonds, specially, or otherwise."

(See 8 Serg. & R. (Pa.), 481, and posted notes.)

"A copy from a copy filed in my office.

"Teste: ALEXANDER T. LAIDLEY, *Clerk.*"

And if the law be for the plaintiffs, then we find for them the sum of $5437.50, the debt in the declaration mentioned, with interest thereon at the rate of six per cent. per annum from the 1st day of December, 1841, till paid. But if the law be for the defendant then we find for the defendant.

T. W. HARRISON.

And because the court will consider of what judgment should be rendered upon the verdict aforesaid, time is taken until to-morrow.

Memorandum. Upon the trial of this cause, the parties, by their attorneys, filed a written agreement in the words following, to wit:—"And the parties agree that the court, in deciding upon the foregoing verdict, shall look to and regard the decisions of the courts of the state of Pennsylvania, as found in the several printed volumes of the reports thereof, to avail as much as if the same were found by said verdict, and to have such weight as in the judgment of the court they ought to have; and the parties further agree to waive all objections to said verdict on account of its finding in part evidence, and not fact. And that the court, in deciding thereupon, may make all just inferences and conclusions of fact and law from

the evidence and facts therein stated, and the decisions aforesaid, which, in the opinion of the court, a jury ought to draw therefrom, if the same were submitted to them upon the trial of this cause; and that *this agreement is to [*474 be made part of the record in this suit.

"M. C. GOOD, *Attorney for Plaintiffs.*
JACOB & LAMB, *Attorneys for Defendant.*"

Which agreement is ordered to be made a part of the record in this suit.

On the 9th of September, 1846, the District Court pronounced the following judgment, viz.:—"The matters of law arising upon the special verdict in the cause being argued at a former term of this court, and the court having maturely considered thereof, it seems that the law is for the defendant."

A writ of error brought the case up to this court.

It was argued by *Mr. Badger* and *Mr. Bibb*, for the plaintiffs, and *Mr. Ewing*, for the defendant.

The points raised by *Mr. Bibb*, for the plaintiffs in error, were the following:

The legal right of the plaintiffs to have judgment for the sum expressed in the note stands,—1st, upon the effect of the act of 1797, as declared in the title, body, soul, and spirit of the act itself; 2d, upon principles well established by adjudged cases, which confirm and fortify their right.

I. The true meaning and effect of that act, to be collected from the expressions of the act itself, stand in the foreground.

It may be useful, and will be according to the usages of the sages of the law in expounding statutes, to look into the old law, the inconveniences and grievances arising under it, thereby the better to understand the remedy intended by the new law, so that the mischiefs may be suppressed, and the remedy advanced.

The Legislature of Pennsylvania, on the 28th May, 1715, passed "An act for the assigning of bonds, specialties, and promissory notes." (1 State Laws, p. 77.) The inconveniences growing out of the provisions of that act, in the remedies allowed to assignees, will be sufficiently understood, for all the present purposes, by looking into the decisions of the courts in these cases, viz.:—*Wheeler, Assignee*, v. *Hughes*, in 1776 (1 Dall., 23;) *M'Cullough, Assignee*, v. *Houston*, in 1789 (1 Id., 441;) *Stille* v. *Lynch*, in 1792 (2 Id., 194.)

By these decisions it appears that the statute of 3 and 4 Anne, chap. 9, respecting assignments, was not considered as

in force, *ex proprio vigore*, in Pennsylvania; and that the act of Pennsylvania of 1715 differed materially from the statute of Anne, especially in omitting to allow promissory notes to be negotiated and assigned in like manner as bills of exchange.

*475] *The assignee took the assignment of a bond, specialty, or promissory note, under the act of 1715, at his peril, and stood in the place of the payee, "so as to let in every defalcation which the obligor had against the payee at the time of the assignment, or notice of the assignment." "The only intent of the act being to enable the assignee to sue in his own name, and prevent the obligee from releasing after assignment," (1 Dall., 28,) "subject to all equitable considerations to which the same was subject in the hands of the original payee." (1 Id., 444.)

In *Stille* v. *Lynch*, 2 Dall., 194, the maker of a promissory note was permitted, in an action by the indorsee, to set up in defence, that the note was without any consideration. This trial was had at the September term of that court, in the year 1792.

On the 30th of March, 1793, the Legislature of Pennsylvania passed an act, (3 Dallas State Laws, p. 329), by which promissory notes discounted at the Bank of Pennsylvania were placed upon the footing of foreign bills of exchange, except as to damages. Whereby such discounted notes became discharged, in the hands of the indorsee, from any plea of defalcation or set-off on account of the transactions between the original parties. But similar notes, not discounted at bank, were in the hands of indorsees, under the act of 1715, subject to all equities existing between the original parties "at the time of the assignment, or notice of the assignment."

Such peculiar rights, privileges, and immunities, enjoyed by the President, Directors, and Company of the Bank of Pennsylvania, having their office of discount and deposit in the city of Philadelphia, but not accorded to others dealing in like promissory notes, and doing business in the vicinage of the bank and within the sphere of its influence, were inconveniences and grievances. Such differences and privileged anomalies, growing out of the positive acts of legislation by the state of Pennsylvania, called for some remedy.

Such were the old laws and their effects, when the act of 1797 was passed, "to devise a particular form of promissory notes, not subject to any plea of defalcation or set-off. This act, in its title and body, manifests the intent of the Legislature to enable the community to make for themselves promissory notes, which should be thereafter creditable, merchantable negotiable, indorsible, and circulated according to the general

principles and usages of the mercantile law, not subject, in the hands of indorsees, *bonâ fide* and for value, to any defalcation or set-off, not warranted by the established principles of the law merchant.

*The form devised contains, to the full, the terms to impart the characteristics and qualities of negotiable mercantile paper, expressed simply and aptly, in words well known to the law merchant, and intelligible to a common understanding. The notes are to bear date in the city or county of Philadelphia, to promise to pay money, to express the sum to be payable "to order," to express "for value received," and to be payable "without defalcation." Such notes, the act declares, "shall be held by the indorsees discharged from any claim of defalcation or set-off by the drawers or indorsers thereof." [*476

That no ambiguity might exist as to what was meant by a "defalcation," that not a loop might remain whereon to hang a doubt to be solved by construction, the act has superadded, —"And the indorsees shall be entitled to recover against the drawer and indorsers such sum as on the face of the said notes, or by indorsements thereon, shall appear to be due."

The explanation proceeds,—"Provided, always, that in every action by the *holder* of any such note, whether against the drawer or indorsers, the defendant may set off and defalk, so far as the *plaintiffs* shall be indebted justly to him in account by bonds, specialty, or otherwise."

The proviso subjects every holder for his own acts, and no further. The first position and body to which the proviso is appended discharges the indorsee from any difficulty arising out of matters *inter alios acta*, not disclosed by the instrument itself,—not made known to the indorsee before he made a fair acquest of the note for value.

II. Upon the authority of adjudged cases, the right of the plaintiffs is confirmed and fortified against the defence set up.

(The counsel then referred to the following English authorities:—2 Burr., 276; Bl. Com., book 2, chap. 30, p. 470; 4 T. R., 148. Pennsylvania authorities:—4 Dall., 370; 5 Binn. (Pa.), 469; 1 Serg. & R., (Pa.), 180; 9 Id., 193. And a number of English cases; to show that the "general mercantile law" was in harmony with these decisions.)

In *Lickbarrow* v. *Mason*, 2 T. R., 71, Justice Ashurst stated the law to be,—"As between the drawer and payee, the consideration may be gone into; yet it cannot be between drawer and an indorsee; and the reason is, it would be enabling either of the original parties to assist in a fraud."

This same distinction between a defence impeaching the consideration, in actions between the original parties, in which

case it is admissible, and actions by indorsees and in which case such defence cannot be admitted, was adjudged in these
*477] cases:—*Snelling* v. *Briggs*, and *Collet* v. *Griffith*, Bull. N. P., *274; *Puget De Bras* v. *Forbes & Gregory*, 1 Esp. Cas., 119; *United States* v. *Bank of the Metropolis*, 15 Pet., 393; *Swift* v. *Tyson*, 16 Id., 15, 22.

In the case of *Swift* v. *Tyson*, the defendant attempted to defend against the indorsee by showing that the consideration held out to the maker was, on the part of the payee, totally false and fraudulent. But the Supreme Court of the United States decided that "a *bonâ fide* holder of a negotiable instrument for valuable consideration, without any notice of the facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before it becomes payable, holds the title unaffected by those facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning now to be brought forward in its support.

"As little doubt is there, that the holder of any negotiable paper, before it is due, is not bound to prove that he is a *bonâ fide* holder for a valuable consideration without notice; for the law will presume that, in the absence of all rebutting proofs; and therefore it is incumbent on the defendant to establish his defence by proofs, to overcome the *primâ facie* title of the plaintiffs."

In the case of the *United States* v. *Bank of the Metropolis*, the Supreme Court of the United States said,—"The rule is, that a want of consideration between drawer and acceptor is no defence against the right of a third party who has given a consideration for the bill, and this even though the acceptor has been defrauded by the drawee, if that be not known by the third party before he gives value for it." (15 Pet., 393.)

The special verdict finds that Stivers (who received the bill from the payee indorsed in blank) did not indorse it, but delivered it to the plaintiffs. The want of Stivers's indorsement is no objection to the title of the plaintiffs. They had a right to fill up the blank indorsement by an assignment to themselves, as they did. (A number of cases cited. 11 Pet., 81, &c.)

The parties, by agreement of record, waive all objections to the verdict for "finding in part evidence, and not fact," and agree that the court "may make all just inferences and con-

clusions of fact and law from the evidence and facts therein stated, which a jury ought to draw therefrom."

Upon the deposition of Anthony, and the bill, answer, cross-bill, *and answers, between Prentice & Weissinger, as original complainants, and John Thomas, to compel him to contribute for the debt for which the parties were bound as co-securities for Stivers as principal, and paid by Prentice & Weissinger; and the cross-bill by *Thomas* v. *Prentice & Weissinger*, to account for the notes by them received of Stivers, and the answer of Prentice & Weissinger to the cross-bill; it appears that Prentice & Weissinger had paid as indorsers and securities for Stivers upwards of twelve thousand dollars, and that this note and others were delivered over to Prentice & Weissinger in consideration of the moneys so previously paid by them for Stivers, and as indemnities; from which, however, they are not likely to be saved from loss by all the securities which Stivers gave them. [*478

It is clear from the transcript of the record of the suit in chancery, and the deposition of Anthony, as found by the special verdict, that the note upon P. Zane was delivered by Stivers to the plaintiffs, in consideration of a precedent debt. greatly exceeding the sum due by this promissory note.

The question is, whether the possession so obtained by the plaintiffs of this negotiable note, in consideration of a precedent debt, entitles them to protection as indorsees against the defence set up by the maker, on account of the transactions between them and the payee?

This question was fully argued and decided by this court in the case of *Swift* v. *Tyson*, 16 Pet., 2, 16, 20, 21, 22. It was thereupon resolved by the court, that a preëxisting debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. The question was examined upon principle, and upon the adjudged cases, English and American; and the conclusion is, "that a *bonâ fide* holder taking a negotiable note in payment of, or as security for, a preëxisting debt, is a holder for a valuable consideration, entitled to protection against all equities between the antecedent parties." To sustain that doctrine many cases are cited by the court previously decided in the Supreme Court of the United States, and in England, and the opinion in that case says of them:—"They go farther, and establish, that a transfer as *security* for past, and even for future *responsibilities*, will, for this purpose, be a sufficient, valid, and valuable consideration." (16 Pet., 21.)

This decision, and the authorities therein cited by the court.

are full and conclusive. Nothing can be, or need be, added on this point by the counsel for the plaintiffs.

*479] The special verdict submits to the court the question whether, *in the absence of all positive proof upon the subject of the consideration between Johnson and Stivers for the note, it is to be presumed that Stivers gave value for it.

The presumption is so until repelled by proof to the contrary; as stated in *Swift* v. *Tyson*, 16 Pet., 16. But the question is immaterial whether or not Stivers paid value to Johnson, seeing that the plaintiffs are holders *bonâ fide*, for value, and without notice, and obtained the note regularly in the direct line of negotiation.

In *Haley* v. *Lane*, 2 Atk., 182, Lord Hardwicke determined, that, "where there is a negotiable note, and it comes into the hands of a third or a fourth indorsee, though some of the former indorsers might not pay a valuable consideration for it, yet it is a good note to him, unless there should be some fraud, or equity appearing against him in the case."

In the cases of *Grant* v. *Vaughan*, 3 Burr., 1516; *Anonymous*, 1 Salk., 126, plea 5; *Miller* v. *Race*, 1 Burr., 452; and *Peacock* v. *Rhodes*, 2 Doug., 632; the negotiable papers passed through the hands of mere finders and thieves into the possession of *bonâ fide* holders for valuable consideration without notice, yet such valueless and vicious derivatives did not impair the rights and titles of such *bonâ fide* possessors.

The special verdict finds that this note was made and delivered in Philadelphia, and indorsed and delivered in Louisville by the payee to Stivers, and by Stivers delivered to the plaintiffs in Louisville. So this note was made and delivered in one state, negotiated in another, and sued upon in a third.

The note so made in Pennsylvania, having no reference by its terms to performance in any other state, must be adjudged by the laws of that state, and was there a good and valid contract. By the law of that state, it was a mercantile negotiable instrument. The act of the legislature found by the jury and the decisions of the Supreme Court of that state, before cited, (5 Binn. (Pa.), 469, 1 Serg. & R. (Pa.), 180, and 9 Id., 193,) show that this note and all such like are, by the law of that state, negotiable according to the principles of the "general mercantile law;" that such notes are "in the situation of bills of exchange;" that the act of 1797, relating to such promissory notes, was passed "for the purpose of making them subject to the rules of general mercantile law." The supreme judicial tribunal of that state has so expounded the statute, and settled its meaning and effect.

The points were thus stated by *Mr. Badger*, upon the same side.

*It will be also insisted for the plaintiff, that,— [*480

1st. Every holder of a bill or note is presumed to be a *bonâ fide* holder for value, until something is shown to repel the presumption. Story on Prom. Notes, p. 220, § 196; Story on Bills of Exch., p. 492, § 415.

2d. Every person in possession of a bill or note, indorsed in blank, and appearing to be the lawful holder thereof, can by delivery convey a good title thereto to any one believing him to be such owner, so as to convey a right of action against the maker or acceptor, notwithstanding the want of consideration, or any other matter of defence, as between the previous parties to the bill or note. *Arbouin* v. *Anderson*, 1 Ad. & Ell., N. S., 498; Story on Bills, § 415.

3d. To repel the presumption that the holder came by the bill or note honestly, fraud, felony, or some such matter, must be proved, and a holder for value is not affected by any infirmity in the bill or note, or in the previous negotiations thereof, unless *mala fides* is brought home to him. *Knight* v. *Pugh*, 4 Watts & S. (Pa.), 445; *Goodman* v. *Harvey*, 4 Ad. & Ell., 870; *Arbouin* v. *Anderson*, above cited; Story on Bills, §§ 415, 416.

And as a consequence from these positions, it will be insisted that the plaintiff in error is entitled to recover.

And even upon the doctrine once held, that gross negligence or even ground of suspicion is sufficient to affect the holder, (Story on Prom. Notes, § 195; Story on Bills, § 416; *Goodman* v. *Harvey*, above cited,) the plaintiff in error is here entitled to recover, there being in this case neither such negligence nor ground of suspicion.

Mr. Ewing, for defendant in error.

1st. This suit was brought in Virginia, on a promissory note, by the assignee, against the maker. It is not averred in the declaration that the note was made in any other state or community, or that it is affected by any law or usage other than the laws and usages of Virginia. There being no such averment, there can be no such proof or fact found legally in the case, for it makes a different contract, governed by different legal principles. The case, therefore, stands as it is set out in the declaration. A suit upon a note made in Virginia, and controlled by the laws and usages of Virginia. By these, a promissory note is not a commercial instrument, and the fraud of the payee in obtaining the note may be set up against the indorser.

The special verdict finds that the note was obtained by fraud. This is enough to sustain the judgment of the *481] court below. *But if the declaration be out of the question, and the case rest upon the special verdict, irrespective of the pleadings, then the note is commercial paper, and the special verdict finds that it was fraudulently obtained.

The plaintiffs are indorsees; but pending the case in the courts below, they had due notice that the note was obtained by fraud, and that they would be called upon on the trial to prove the consideration paid for the note.

Commercial paper which is obtained by fraud is subject to the same defence in the hands of the assignee as in those of the payee, unless he show that it was transferred to him for a valuable consideration, in the due course of trade. *Holme* v. *Karpser*, 5 Binn. (Pa.), 469; *Morton* v. *Rogers*, 14 Wend. (N. Y.), 580; 2 Barn. & Ad., 291; 4 Taunt., 114; Chit. on Bills, 69, and cases cited in notes.

The verdict does not find that the plaintiffs gave any consideration for the note, or received it in any fair transaction, except as the same may be deduced from evidence to which it refers. This evidence must be treated as a nullity, were it not for the agreement of counsel, that the court, in deciding the case, may make all just inferences and conclusions of fact and law from the evidence. Conclusions of fact, deduced by the court from the evidence, cannot be a subject of reversal. This court deals with errors in law.

The jury, therefore, not having found any consideration for the assignment of the note, the judgment cannot be reversed because the court below did not infer a consideration from evidence which, by agreement of counsel, it was to pass upon. The record does not show whether the court inferred any consideration for the transfer or not. This court cannot assume that they did infer any. The jury did not find any. So that the facts found leave a clear case of a note obtained by fraud, and transferred without consideration. The evidence referred to cannot change it here, as this court has nothing to do with evidence.

The counsel for the plaintiffs contend that this must be considered as an agreed case, not as a special verdict. This does not help the matter in the least. If it be an agreed case, it is agreed in it that, so far as the jury find facts, the court shall pronounce the law upon them. So far as they find evidence, the court shall infer from it the facts, and pronounce the law upon the facts so inferred. It is *pro tanto* a submission to the court upon the evidence.

But if this court look to and pass upon the evidence, which was by consent submitted to the court below, then the case *made out is that of a note obtained by fraud, [*482 transferred to the plaintiff as security for a pre-existing debt, no consideration being paid for the note, no debt extinguished by its transfer.

We admit and contend that the liability of the maker of this note is governed by the laws of Pennsylvania; and if by the statutes, as expounded by the courts of that state, he is allowed to set up the defence here set up, he is entitled to do so, notwithstanding it has been indorsed in another state. Story's Confl. of Laws, §§ 317, 332, 333, 345; Story on Bills, §§ 158, 161, 163, 164, 167, 168, 169; Judiciary Act, 1789; *Shelby* v. *Guy*, 11 Wheat., 361; *Green* v. *Neal*, 6 Pet., 291; *Elmendorf* v. *Taylor*, 10 Wheat., 152; 12 Pet., 89.

According to the law of Pennsylvania, the defence of fraud in the consideration of this note may be set up against an indorsee who has received it merely as collateral security for a pre-existing debt. *Petrie* v. *Clark*, 11 Serg. & R., 377; *Walker* v. *Geisse*, 4 Whart., 257, 258; *Depeau* v. *Waddington*, 6 Id., 232; *Jackson* v. *Polack*, 2 Miles, 362; and see 4 Whart., 500; and *Evans* v. *Smith*, 4 Binn., 366; *Cromwell* v. *Arrot*, 1 Serg. & R., 180.

In Virginia there has been no decision of the question, as one of general commercial law affecting negotiable paper; but see 2 Rand., 260; 2 Leigh, 503; and *Prentice & Weissinger* v. *Zane*, 2 Gratt., 262.

In Kentucky notes are not negotiable unless negotiated by a bank. (1 Marsh., 540; 3 Id., 162.) No decision of the courts of that state has been found upon the question whether the indorsee of negotiable paper, in a case like this, holds it discharged of all equities between the original parties. At all events, it has been shown that the local law of that state would not affect the liability of this defendant.

In New York negotiable paper is on the same footing as in Pennsylvania, when received as collateral security for an existing debt. *Bay* v. *Coddington*, 5 Johns. Ch., 56; and the same case, in error, 20 Johns., 643; 9 Wend., 170; 6 Hill, 93; 24 Wend., 230.

In New Hampshire, see 10 N. H., 266; 11 Id., 66. In Alabama, 4 Ala. In Tennessee, 10 Yerg., 428, 434.

In England the most of the cases have been those of bankers, who probably make advances to their customers upon an understanding, in all cases, that they shall be covered by bills; or advances are made on the credit of the bills. See 1 Stark., 1; 8 Ves., 531; 4 Bing., 396; 1 Bing. N. C.,

469; 16 Eng. Com. Law, 256; 17 Id., 356; *Vallace* v. *Siddell*, Chit. on Bills, 87, 88 (10th Am. ed.) *De la Chaumette* v. *Bank of England*, 9 *Barn. & C., 209 (17 E. C. L., 356), seems to sustain the doctrine for which we contend.

*483]

Numerous cases, in this court and elsewhere, which seem, perhaps, to affect the present question, really turn upon the circumstance, that the bill or note has been received in payment of the pre-existing debt, and not as collateral security; or that advances have been made, or some other consideration given, at the time of taking the note; as *Swift* v. *Tyson*, 16 Pet., 1; 2 Id., 170; 2 Wheat., 66; *Brush* v. *Scribner*, 11 Conn., 388; 12 Pick. (Mass.), 399; 22 Id., 24; 11 Ohio, 172; &c. Even in Pennsylvania, (4 Whart., 258,) and now in New York, (21 Wend., 499; 23 Id., 311; 24 Id., 115; 1 Hill, 513; 2 Id., 140,) it is held, that, if the indorsee receives a bill in payment or discharge of a pre-existing debt, he holds it exempt from all equitable defences; but not if he has taken it merely as collateral security for such a debt. See *Munn* v. *M'Donald*, 10 Watts (Pa.), 270.

The opinion of Story, J., in *Swift* v. *Tyson*, on this point, is *obiter*, and is not sustained by the authorities in England or America. It is directly opposed to the Pennsylvania cases, which, as expositions of a statute of that state, or of the commercial law prevailing there, must be conclusive.

The protection given to indorsees of negotiable paper is analogous to, and perhaps derived from, the doctrine of courts of equity, in cases where a purchaser has obtained the legal title without notice of equitable right. In such cases, if the legal title has been transferred as a mere security for a pre-existing debt, it cannot be retained against a prior equitable owner. 6 Hill (N. Y.), 96; 22 Pick. (Mass.), 243; 4 Paige (N. Y.), 221; 6 Id., 648, 466; 4 Whart. (Pa.), 506.

It is just that the defence here should be sustained; because the defendant received nothing, the plaintiffs really paid nothing for the note, and therefore it is iniquitous to require the defendant to pay the plaintiff some nine or ten thousand dollars, merely because he signed, and they hold, the paper.

The general commercial law does not exclude the defence. The law of Virginia, where the suit was brought, or (so far as we know) of Kentucky, where the plaintiffs took the note, does not exclude it. In neither of those states is the note negotiable by their own law. (2 Leigh (Va.), 198; 6 Munf. (Va.), 316; 1 Call (Va.), 226, 497; 2 Wash. (Va.), 219.) Therefore the plaintiffs are driven to rely on the statute of Pennsylvania; and that, as expounded by the courts of that state, does not sustain them.

Mr. Justice GRIER delivered the opinion of the court.

The plaintiffs in error were plaintiffs below. They declared *on a promissory note given by defendant to James H. Johnson, or order, for the sum of $5437.59, payable five years after date. The note was indorsed by the payee and delivered to John Stivers, who delivered it to the plaintiffs. The defendant pleaded *non assumpsit*, and a jury being called, found a special verdict, setting forth the note, and finding that it was made by the defendant and delivered by him to the payee, but that "the consideration was fraudulent on the part of the payee;" that the note was indorsed by the payee to John Stivers before its maturity, "and that there has not been any evidence submitted to the jury that said Stivers paid value therefor, or that there was any consideration for such indorsement, unless the same ought to be inferred from the matters herein stated," &c. They also find that Stivers delivered the note to plaintiffs, but without saying whether for a valuable consideration or not; and they refer the court to the deposition of a witness and the record of a chancery suit appended to the verdict for the evidence on that point. [*484

This special verdict is manifestly imperfect and uncertain, as it finds the evidence of facts, and not the facts themselves.[1]

A verdict, says Coke (Co. Litt., 227, *a*), finding matter uncertainly and ambiguously, is insufficient, and no judgment will be given thereon.

A verdict which finds but part of the issue and says nothing as to the rest is insufficient, because the jury have not tried the whole issue. So, if several pleas are joined, and the jury find some of them well, and as to others find a special verdict which is imperfect, a *venire facias de novo* will be granted for the whole. 2 Roll. Abr., 722, Pl. 19; *Auncelme* v. *Auncelme*, Cro. Jac., 31; *Woolmer* v. *Caston*, Id., 113; *Treswell* v. *Middleton*, Id., 653; *Rex* v. *Hayes*, 2 Ld. Raym., 1518.

In all special verdicts, the judges will not adjudge upon any matter of fact, but that which the jury declare to be true by their own finding; and therefore the judges will not adjudge upon an inquisition or *aliquid tale* found at large in a special verdict, for their finding the inquisition does not affirm that all in it is true. *Street* v. *Roberts*, 2 Sid., 86.

In the *Chesapeake Ins. Co.* v. *Stark* (6 Cranch, 268), and *Barnes* v. *Williams* (11 Wheat., 415), this court have decided that, where in a special verdict the essential facts are not dis-

[1] FOLLOWED. *Graham* v. *Bayne*, 18 How., 63; *Guild* v. *Frontin*, Id., 135. CITED. *Suydam* v. *Williamson*, 20 How., 441; *Stickney* v. *Wiet*, 23 Wall., 163.

tinctly found by the jury, although there is sufficient evidence to establish them, the court will not render a judgment upon such an imperfect special verdict, but will remand the cause to the court below, with directions to award a *venire de novo*.

*485] The court in this case would have been bound to pursue the same *course, if the judgment of the court below had been rendered on the imperfect special verdict which the record exhibits. But it appears that the court and counsel were aware of this imperfection in the verdict, and that it was not such as would warrant any judgment thereon by the court. Nevertheless, the parties, instead of asking for a *venire de novo*, or amending the verdict, agree to waive the error, and to submit the cause to the court, both on the facts and the law. Their agreement is as follows:—

"*Memorandum.* Upon the trial of this cause the parties, by their attorneys, filed a written agreement in the words following, to wit:—'And the parties agree that the court, in deciding upon the foregoing verdict, shall look to and regard the decisions of the courts of the state of Pennsylvania, as found in the several printed volumes of the reports thereof, to avail as much as if the same were found by said verdict, and to have such weight as in the judgment of the court they ought to have; and the parties further agree to waive all objections to said verdict on account of its finding in part evidence, and not fact. And that the court, in deciding thereupon, may make all just inferences and conclusions of fact and law from the evidence and facts therein stated, and the decisions aforesaid, which, in the opinion of the court, a jury ought to draw therefrom if the same were submitted to them upon the trial of this cause; and that this agreement is to be made part of the record in this suit.'"

The judgment of the court below was rendered upon this submission, and not on the special verdict alone.

In cases at law, this court can only review the errors of the court below in matters of law appearing on the record. If the facts upon which that court pronounced their judgment do not appear on the record, it is impossible for this court to say that their judgment is erroneous in law. What "inferences or conclusions of fact" the court may have drawn from the evidence submitted to them, we are not informed by the record. The fact submitted to the judge formed the turning-point of the case. So far as the record exhibits the facts, no error appears. The note being found to have been obtained from the defendant by fraud, the plaintiff's right to recover on it necessarily depended on the fact that he gave some consideration for it, or received it in the usual course of trade.

We must presume that the court found this fact against the plaintiff; and if so, their judgment was undoubtedly correct. Whether their "inferences or conclusions of fact" were correctly drawn from the evidence, is not for this court to decide.

*That such has been the uniform course of decision in this court, may be seen by reference to a few of the many cases in which the same difficulty has occurred. In *Hyde* v. *Booraem* (16 Pet., 169), this court say,—"We cannot upon a writ of error revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence, or drew right conclusions from it. That is the proper province of the jury, or of the judge himself, if the trial by jury is waived. The court can only re-examine the law so far as he has pronounced it on a state of facts, and not merely on the evidence of facts found in the record in the making of a special verdict or an agreed case. If either party in the court below is dissatisfied with the ruling of the judge in a matter of law, that ruling should be brought before the Supreme Court, by an appropriate exception, in the nature of a bill of exceptions, and should not be mixed up with supposed conclusions in matters of fact." See, also, *Minor* v. *Tillotson*, 2 How., 394, and *United States* v. *King*, 7 Id., 833. [*486

The judgment of the court below is therefore affirmed.

Mr. Justice McLEAN, Mr. Justice WAYNE, and Mr. Justice WOODBURY dissented.

Mr. Justice WAYNE.

I do not concur with the court in the course which it has taken in this case, or in affirming the judgment. The record in my view is irregular. It is difficult to say whether it has been brought to this court upon a special verdict, or a case stated by agreement of the parties; and I think it difficult to determine whether the court below acted upon either. It may have given its judgment *pro forma* to get the case to this court. I think a different direction ought to have been given to it, by returning the case to the District Court for amendment, so that the case might have been decided substantially upon its merits. This would have been according to what has been done by this court in other cases similarly circumstanced as this case is.

Mr. Justice WOODBURY.

I feel obliged to dissent from the judgment in this case. It is conceded that the special verdict is defective in form. Instead of stating some of the matter as a fact,—only the

evidence of it is given. The most obvious and proper course under such circumstances would seem to be, to send the case back, and give an opportunity to the plaintiff to have that
*487] defect corrected, and afterwards, if the case comes up again, *to render judgment on the merits upon all the facts, when thus formally set out. This could regularly be done by reversing the judgment below, instead of affirming it, as here. That judgment was rendered erroneously on this same defective verdict, instead of putting it first in proper shape, and then deciding on it as corrected.

After the reversal here, we should, in my opinion, remand the case to the Circuit Court, not to have judgment entered there either way on this imperfect verdict, but to have a *venire de novo* ordered so as to correct it. Such I understand to be the well-settled practice of this court. As decisive proof that the course now pursued, of refusing to send the case back for correction before final judgment, is not in accordance with what has been done by this court in like cases, Chief Justice Marshall, in *Chesapeake Ins. Co.* v. *Stark*, 6 Cranch, 268, observed,—"In this case the jury have found an abandonment, but have not found whether it was made in due time or otherwise. The fact is therefore found defectively, and for that reason a *venire facias de novo* must be awarded." "Judgment reversed, and the cause remanded, with directions to award a *venire facias de novo.*" Such was deemed the proper course there, rather than at once to give absolute and final judgment, as here, against the plaintiff, because the special verdict was defective. Another objection there was precisely as here, "because the jury have found the evidences of the authority and time, but not the fact of authority nor the reasonableness of the time." (p. 271.)

So again, in *Livingston* v. *Mar. Ins. Co.*, 6 Cranch, 280, the court made a like order. And another of similar character in *Barnes* v. *Williams*, 11 Wheat., 415. We should thus obtain a verdict in due form, with all the facts found positively, and not the mere evidence of some of them submitted. And the judgment below could then be rendered understandingly, as it could also here, if the case was again brought here by either party.

It does not seem promotive of justice to affirm a judgment below, on the ground that the imperfect verdict must at all events stand, and to decide technically on the hypothesis that a certain transaction is not in the case as a fact, and is not to be considered, nor allowed to be corrected and re-stated, though full evidence of it is submitted. And the more especially does it look wrong, where, if it was corrected in con-

formity with what the evidence proves, the judgment ought, in my view, to be for the plaintiffs.

But it is objected, that the counsel agreed below to waive *this exception to the special verdict, and consequently the court there rendered judgment on that agreement and waiver, as well as on the verdict, and that this was a wrong course of proceeding. [*488

Supposing it was wrong, there is no proof that the court acted on the agreement and waiver, but may have deemed it proper to disregard them and decide on the verdict alone. On the contrary, if that court decided on the whole, their decision for the defendant seems to me erroneous, both on the merits and on the course of proceeding, and ought in either court to be reversed instead of affirmed, as it has been on this occasion by the majority of this court. The original plaintiffs should, on the apparent merits, in my apprehension, recover, because no doubt exists, first, that in point of law the note in controversy must be construed by the laws of Pennsylvania, where it was made; and that by those laws it was negotiable. See act of February 27th, 1797, 4 Dall., Laws of Pennsylvania, 102.

It is as little in doubt, that no pretence exists but that the plaintiffs took this note from the second indorsees before it was due, and without any circumstances to excite suspicion or cast a shade over its goodness, and without any notice or knowledge of the badness of its original consideration.

Under such circumstances it is equally clear, that such a *bonâ fide* holder of a note is presumed to have given a valid consideration for it, and on producing it is entitled to a recovery of its amount, unless this presumption is repelled by counter evidence. Story on Prom. Notes, p. 220.

Furthermore, in such case it is no obstacle to a recovery, that a consideration is not shown between the first indorsee and his indorser. 1 Ad. & Ell., 498.

But it is found here that, for some reason not specified in the record, there was fraud in the original consideration. Hence it is contended that the holder must, in such case, prove a consideration given by him; but he is not otherwise affected by the original fraud, when without notice of it. 4 Ad. & Ell., 470; Chit. on Bills, 69.

Granting this for the argument, it appears that he proceeded to show a consideration, and proved that the second indorsee passed the note to him to secure and pay certain debts and liabilities assumed then in his behalf, as would seem to be inferable from the record. It would in that event be obtained in the course of business for a new and original con-

sideration, and thus the transfer stood unimpeached. But if
*489] the debts were pre-existing ones, as is contended, they would still constitute a *good consideration. However the decisions in different states on this may differ, and may have changed at different periods, this court seems deliberately to have held this doctrine in *Swift* v. *Tyson*, 16 Pet., 15, 22.

It will not answer to overturn all these established principles, because some might fancy the equities of the maker, who was defrauded as to the consideration, greater than those of the present holder, who paid a full and valuable consideration for the note, relying, too, on the good faith of the maker, not to send negotiable paper into the market, and running for five years, so as to mislead innocent purchasers, and, for aught which appears, making no attempt to recall it when discovering he was defrauded, and giving no public and wide caution, as is usual, by advertisement or otherwise, against a purchase of it after such discovery.

Under such circumstances, if equities were to weigh, irrespective of the law, which cannot be correct, they seem rather to preponderate in favor of the holder, who has thus been misled and exposed to be wronged by the conduct of the maker. *United States* v. *Bank of the Metropolis*, 15 Pet., 398.

Finally, were we compelled to give a decision as to the merits on the special verdict, as it now stands somewhat defective in form, but with an agreement by counsel virtually to waive the defect of form, it would be most just to regard the jury as intending to find for a fact what they find as given in evidence and uncontradicted. This is clearly the substance of this verdict, and in such a view, as already shown, the same result would follow, that the plaintiffs appear in law entitled to recover.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia, and was argued by counsel. On consideration whereof, it is now here 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.

502