It is not intended to say, that the person receiving such a note is compellable, without special agreement, to sue upon it, in any state of things. It is not designed to say, that he may not, on its being protested, return it to the indorser, and resort to his original cause of action? it is only designed to say, that, under the circumstances of this case, nothing can be more clear, than that there was no obligation to sue.

The court gave no opinion, that the suit in Fairfax was, or was not, a bar to that brought in the county of Alexandria. It is, however, clear, that no such bar was created.

To waive the question, whether, in such a case as this, with declarations for such distinct causes, a verdict in a prior suit may be given in evidence as a bar to another suit, really for the same cause of action? it is perfectly clear, that in this case, the same question was not tried in both causes. In Fairfax, the point decided was, that the suit against the indorser would not lie, until a suit had been brought against the maker; in the suit in Alexandria, the point to be decided was, whether the plaintiffs had lost their remedy on the original contract, by their conduct respecting the note. These were distinct points, and the merits of *the latter case were not [*194
involved in the decision of the former.

On the second bill of exceptions, the only real new point made, is, whether the action is maintainable, unless Robert Young & Co. had offered to return and re-assign the note, before the institution of the suit? Unquestionably, Clark is entitled to the benefit of the note, but as it was no extinguishment of the original cause of action, there was no absolute necessity to prove an offer of the note, before the institution of the suit. Indeed, it does not appear in this bill of exceptions, whether the note was merely a collateral security or a conditional payment: this is nowhere stated positively. In the first opinion of the court, it is stated hypothetically, and that opinion must be considered, on the presumption that such was the fact. But no such presumption is raised respecting the second bill.

Judgment affirmed, with costs.

Wilson *v.* Lenox & Maitland.

Action on bill of exchange.

A declaration in debt, under the law of Virginia, upon a protested bill of exchange, for the principal, interest, damages and costs of protest, must aver the amount of those costs of protest.

Quære? Whether, if the holder of the bill of exchange, after due notice to the indorser of the non-payment by the drawee, charge the bill in account-current against the drawer, and upon the whole of that account, the balance due is less than the amount of the bill, the indorser is thereby discharged?

Whether the indorser is discharged, by the holder's receipt of part from the drawer, after due notice given to the indorser?

Whether it be necessary to aver protest for non-acceptance, in an action on protest for non-payment?

Whether the drawer be a competent witness for the indorser, in an action against the latter?

Lenox *v.* Wilson, 1 Cr. C. C. 170, reversed.

Error to the Circuit Court of the district of Columbia, sitting at Alexandria, on a judgment obtained by the present defendants in error, against the plaintiff in error, in an action of *debt*, as indorser of a bill of exchange, for 300*l.* sterling, drawn on the 2d January 1799, at Alexandria, by A. &

W. Ramsay, on Findley, Bannatyne & Co., London, at ninety days' sight, payable to Wilson, the plaintiff in error, and by him indorsed to the defendants. This bill was presented for acceptance, on the 28th of February 1799, and refused, and on the 1st of June 1799, protested for non-payment.

The declaration was, "of a plea that he render unto them the sum of 300*l.* sterling, with damages, interest and charges of protest, on a protested bill of exchange, which *to them he owes, and from them unjustly detains," and went on to state the drawing of the bill of exchange "according to the custom of merchants," the indorsement by Wilson to Lenox & Maitland; the refusal of Findley, Bannatyne & Co. to accept the bill, on its being presented for acceptance (but did not state a protest for non-acceptance, nor notice of the non-acceptance given to Wilson), and the protest, "in due form, according to the custom of merchants," for non-payment; "of which, the said defendant, afterwards, to wit, on the ——— day of ———, in the year aforesaid, at the town and county aforesaid, had notice; whereby, and by force of the act of assembly of the commonwealth of Virginia, in such case made and provided, action accrued to the said plaintiffs to demand and have of the said defendant, the said sum of 300*l.* sterling, with damages, interest and charges of protest: nevertheless, the said defendant, although thereto often required, hath not paid unto the said plaintiffs, the said sum of three hundred pounds sterling, with damages, interest and charges of protest, but the same to pay, hath hitherto refused, and still doth refuse, to the damage of the plaintiffs, $750, and thereupon, they bring suit," &c.

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The act of assembly of Virginia, which gives the action of debt on a protested bill of exchange (Rev. Code, p. 121), provides, "that where any bill of exchange is, or shall be, drawn, for the payment of any sum of money, in which the value is, or shall be, expressed to be received, and such bill is, or shall be, protested for non-acceptance or non-payment, the drawer or indorser shall be subject to the payment of fifteen per centum damages thereon, and the bill shall carry an interest of five per centum per annum, from the date of the protest, until the money therein drawn for, shall be fully satisfied and paid."

§ 3. "It shall be lawful for any person or persons, having a right to demand any sum of money upon a protested bill of exchange, to commence and prosecute an action of debt, for principal, damages, interest and charges of protest, against the drawers or indorsers jointly, or against either of them separately; and judgment shall and may be given for such principal, damages *and charges, and interest upon such principal, after the rate aforesaid, to the time of such judgment, and for the interest upon the said principal money recovered, after the rate of five per centum, per annum, until the same shall be fully satisfied."

*196]

§ 4. "In all bills of exchange, given for any debt due in current money of this commonwealth, or for current money advanced and paid for such bills, the sum in current money that was paid or allowed for the same, shall be mentioned and expressed in such bill, and in default thereof, in case such bill shall be protested, and a suit brought for the recovery of the money due thereby, the sum of money expressed in such bill shall be held and taken as current money, and judgment shall be entered accordingly."

§ 6. "In any action which hath been, or shall be, commenced, and is, or shall be, depending, for the recovery of any sterling money, in any court of

record within this commonwealth, wherein the plaintiff or plaintiffs shall recover, such courts shall have power. and are hereby directed, by rule to be entered at the foot of their judgment in such action, to order such judgment to be levied or discharged in current money, at such a difference of exchange as they shall think just."

The cause in the court below was tried upon the plea of *nil debet*, and the jury found a verdict for the debt in the declaration mentioned, and one cent damages; it was, therefore, considered by the court, "that the said plaintiffs recover against the said defendant, their debt aforesaid, amounting to three hundred pounds sterling, and their damages aforesaid, by the jurors aforesaid, in form aforesaid assessed, and also their costs by them about their suit in this behalf expended; and the said defendant in mercy, &c. But this judgment (damages and costs excepted) is to be discharged by the payment of eight hundred and fifty-five dollars and twenty-three cents." The record which came up contained six bills of exception.

*1. That the defendant Wilson produced in evidence to the jury, the accounts of the plaintiffs, Lenox & Maitland, against A. & W. Ramsay, the drawers of the bill, whereby the latter were charged as debtors to Lenox & Maitland, on the 22d of August 1799, for the amount of the bill and damages, in dollars and cents, among many other debts and credits, upon which whole accounts-current, a balance of $1095 only appeared to be due from A. & W. Ramsay to Lenox & Maitland; and thereupon, prayed the opinion of the court, whether, by making the said bill an item of account, as stated in the aforesaid accounts against the said A. & W. Ramsay, the said Wilson was not thereby, as indorser, discharged; and the court were of opinion, that he was not. [*197

2. That the defendant offered to prove, that the plaintiffs had received part of the money from the drawers of the bill, since the defendant Wilson had notice of the protest; but the court were of opinion, that the same, if proved, would not discharge Wilson as indorser.

3. That the defendant offered to prove, by the bill and protest, that after the protest of the said bill, at the request of Roberts, Curtis & Co., the then holders of the bill, it was paid by Dorin, Strange & Co., to Roberts, Curtis & Co., for the honor of Lenox & Maitland, the plaintiffs, and thereupon, prayed the opinion of the court, whether, as the bill had been so paid, this action would lie against the defendant, as indorser; and the court gave it as their opinion, that it would lie.

4. That the defendant prayed the opinion of the court, whether it was not incumbent on the plaintiffs, to prove the value of current money received here, for the bill upon which this action is brought, which bill is in these words: "Exchange for 300*l.* sterling, Alexandria, 2d January 1799. Ninety days after sight of this our first of exchange (second, third and fourth of the same tenor and date unpaid), pay to the order of William Wilson, Esq., the sum of three hundred pounds sterling, for value here received, and place it to account, as advised by Andrew & William Ramsay. To Messrs. Findley, Bannatyne & Co., London." And the court gave it as their opinion, that it is not necessary for the plaintiffs *to prove the value given here, in current money, for the said bill. [*198

5. That the defendant offered to prove, by the account thereunto annexed, that the bill upon which this suit was brought, was given in the

commonwealth of Virginia, either for dollars and cents due in the said commonwealth, from A. & W. Ramsay, to the plaintiffs, or for dollars and cents advanced by the plaintiffs, or some other persons, for the said A. & W. Ramsay, in the state of New York, and prayed the opinion of the court, whether, if the said facts were proved to the jury, the said bill ought not to be settled according to its nominal amount, as current money of Virginia. Whereupon, the court instructed the jury, that if they were of opinion, from the evidence offered, that the bill of exchange was given for any debt due from A. & W. Ramsay, in current money of the commonwealth of Virginia, or for current money advanced and paid for the said bill, and the sum in current money that was paid or allowed for the same, is not expressed in the bill, the sum expressed in the bill shall be held and taken as current money of Virginia; and if, from the evidence offered, they should not be of that opinion, that the sum expressed in the bill shall be taken and held, as so expressed, to wit, in sterling money.

6. That the defendant offered to examine William Ramsay, one of the drawers of the bill, to which the counsel for the plaintiffs objected; and the court gave it as their opinion, that the said W. Ramsay was an incompetent witness in the cause.

The 2d, 3d, 4th and 5th exceptions seem to have been abandoned in the argument in this court.

C. Lee, *E. J. Lee* and *Swann*, for the plaintiff in error. *Simms*, for the defendants.

The errors insisted on by the counsel for the plaintiff in error were—

1st. The opinion of the court below, as stated in the first bill of exceptions.

*199] *2d. The rejection of W. Ramsay as a witness.

3d. That there was no protest for non-acceptance of the bill.

4th. That the declaration does not state any demand of payment of the bill, made on the drawees.

5th. The damages are not laid in the same currency as the debt.

6th. The jury have awarded that the sterling debt should be discharged by the payment of $855.23.

7th. The debt demanded is not certain.

E. J. Lee, for the plaintiff in error.—1st. The court below erred, in not instructing the jury, that the defendants in error, by charging the bill in account against the drawers, in the manner stated in the accounts, had discharged the indorser. The court ought, at least, to have left it to the jury, to decide whether the circumstances did not amount to a discharge of Wilson. By the account of Lenox & Maitland against the drawers of the bill, it appears, that after charging the amount of the bill, and damages, interest and charges of protest, and turning the amount into dollars and cents, at such rate of exchange as the defendants in error pleased, there was only a balance of about $1000 due to them from the drawers; it is not reasonable, that they should recover more than is due to them, against an innocent indorser who must look to insolvent drawers for his indemnification. The defendants have, in fact, given credit to the drawers, for the amount due on the bill, and have agreed to liquidate it in account. If the holder of a bill receives part of the money from the acceptor, without giving notice to the drawer, the latter is

discharged. Bull. N. P. 275. So, if he receives part from the drawer, he discharges the indorser. Here no notice was given to Wilson ;(*a*) *or if there was, it is waived by the conduct of Lenox & Maitland. In [*200 the case of *Dingwall* v. *Dunster*, Doug. 247 (235), it is true, that Judge Buller says, that nothing but an express agreement can discharge an acceptor, but the court are careful to distinguish between the case of an acceptor, and that of a drawer or indorser. The implication is, that there are many circumstances which will discharge the latter, without an express agreement. The court ought, at least, to have instructed the jury that they might infer a discharge from the circumstances of this case. (*b*)

2d. W. Ramsay, the drawer of the bill, ought to have been admitted as a witness: he had no interest which would render him incompetent. The verdict in this case could not have been given in evidence either for or against the witness; and whether Lenox & Maitland recovered against Wilson, or not, he was still liable to an action as drawer, to Lenox & Maitland, if they failed against Wilson, or to Wilson, if they succeeded. In the case of *Smith, qui tam*, v. *Prager*, 7 T. R. 62, the rule is clearly laid down to be, that "no objection could be made to the competency of a witness, upon the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause, so as to give it in evidence on any future occasion, in support of his own interest." The objection only goes to his credit, unless the judgment can be given in evidence for him in any other suit. The same principle is confirmed in the case of *Jordaine* v. *Lashbrooke*, 7 T. R. 601, where, in a suit between the indorsee and the acceptor of a bill, the payee was called and allowed as a witness to defeat the action, by proving that the bill, although dated at Hamburg, was, in fact, drawn in London, and so void for want of a stamp. It may be observed in that case, that *it was admitted, that there could [*201 be no objection, on the ground of interest, but the objection relied on was, that the witness ought not to be permitted, from motives of policy, as it respected mercantile credit, to impeach a negotiable instrument to which he had assisted in giving currency by his indorsement; and even that objection was overruled. In the case of *Carter* v. *Pearce*, 1 T. R. 163, the court said, that "the bare possibility of an action being brought against a witness, is no objection to his competency;" and that, "in order to show a witness interested, it is necessary to prove, that he must derive a certain benefit from the determination of the cause, one way or the other."(*c*)

3d. Here was no protest for non-acceptance, nor does the declaration state a demand of payment from the drawees, nor notice of the non-pay-

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(*a*) Marshall, C. J.—Does the bill of exceptions state that notice was not given to Wilson? If it does not, you cannot argue upon the want of notice.

E. J. Lee.—It does not. But the declaration does not allege notice of the non-acceptance, nor of the non-payment; but only of the protest for non-payment, and a material fact, not averred, cannot be presumed to have been proved.

(*b*) Chase, J.—There is no doubt, a drawer or indorser may be discharged in express terms; or by facts amounting to a discharge; but where the discharge is not express, but by implication arising from facts, the jury, and not the court, are to decide whether it is a discharge; the court ought not to say it was a discharge.

(*c*) Chase, J.—Upon the statute of gaming, usury, and the like, but in no other case, are the drawers, indorsers, &c., competent witnesses. The cases all show it.

ment or non-acceptance given to Wilson. The protest for non-payment is not evidence that the money was demanded at the time the bill became payable. 4 Bac. Abr. 735 (Gwyllim's edition).

In the case of *Rushton* v. *Aspinall*, Doug. 679 (653), it is expressly decided, that the plaintiff must allege in his declaration, a demand and refusal of the acceptor, on the day when the note was payable, and notice thereof to the indorser, before he can be made liable; and that the want of such averments in the declaration, is not cured by a verdict. And Lord MANSFIELD there lays down the rule to be, "that where the plaintiff has stated his title or ground of action defectively, or inaccurately (because, to entitle him to recover, all circumstances necessary in form and substance to complete the title so imperfectly stated, must be proved at the trial), it is a fair presumption, after a verdict, that they were proved; but that where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore, there is no room for presumption." The demand and refusal of the drawee to pay, is the very substance of the plain-
*202] tiff's title to recover; and therefore, *the not setting it forth in the declaration, is a total omission of his cause of action.

4th. The damages are not laid in the same currency with the bills and the promise. To support this objection, he relied on the decision of the court of appeals of Virginia, in the case of *Scott's Executors* v. *Call*, 1 Wash. 115, and *Skipwith* v. *Baird*, 2 Ibid. 165.

C. Lee, on the same side.—1st. The question to the court below was, whether the plaintiffs, by making the bills an item of the accounts, as therein stated, had not discharged the indorser, Wilson. The accounts of Lennox & Maitland against the drawers of the bill, begin in 1798 and end in 1800. The bills are entered in account, on the 22d of August 1799, and charged with interest and damages; and the amount carried out from sterling into dollars and cents, at such rate of exchange as the defendants in error pleased. They have, therefore, changed the nature of the demand, and given credit to the drawers for a certain sum in the currency of the United States. They have, so far as they were able, manifested their intention to give credit to A. & W. Ramsay.

These circumstances being subsequent to the notice to Wilson, are a discharge in law, and are equivalent to an express discharge. If I am right, the court ought to have instructed the jury, that these facts discharged all persons but A. & W. Ramsay. Perhaps, the court might have left it to the jury, to infer an intention to discharge the indorser; but the court ought not to have instructed the jury, that Wilson was *not* thereby discharged as indorser.

2d. The objection to the competency of W. Ramsay as a witness, was not good. If he had any interest, it was in favor of the plaintiffs. The objection was made generally, and goes to his proving any fact whatever. A witness may be competent to prove some facts and not others. He was competent to prove, not only that the bill was charged in account, but that it was given up and came surreptitiously to the possession of the plaintiffs,
*203] if the fact had been so. I state this only to show that he ought not *to have been wholly excluded. On a criminal prosecution for forgery, the party whose name is forged may be a witness. 1 Dall. 110.

The doctrine that a man shall not be permitted to disprove a paper to which he has put his name to give it credit, is overruled in the case of *Jordaine* v. *Lashbrooke*, 7 T. R. 601. In the case of *Walpole* v. *Pulteney*, cited in Doug. 249 (237), in the note, at the second trial of the cause, at Guildhall, at the sittings after Michaelmas term 1779, before SKINNER, Chief Baron, Alexander, the indorser of the bill, was sworn as a witness for the acceptor, and no objection made to his competency. But in this case, there is not any interest whatever in the witness. For if the evidence of Ramsay went to discharge Wilson, still it would not go to discharge Ramsay himself. There is a case also in Espinasse's reports, in which the acceptor was sworn as a witness, in a question between the indorsee and drawer.

Simms, contrà.—1st. The charge of the bill in account against the drawers, does not amount to a legal discharge of the indorser. It is neither an express nor an implied discharge. The holder has a remedy against all or any of the indorsers or the drawer, until he gets full satisfaction. If he gives due notice to the party to whom he means to resort, he is not bound to commence suit *instanter*. If he receives part from the drawer, it is so much to the benefit of the indorser, and he has no right to complain. Due notice is all that the indorser has a right to require, and if he does not then secure himself, it is his own fault. The case from Buller's N. P. 275, is not denied to be law; but BULLER there says, "if the indorsee give credit to the drawer, without notice to the indorser, it will discharge him." But here, it is admitted, that notice was given, and the allegation is, that notwithstanding such notice, the subsequent charge in the accounts of Lenox & Maitland against the drawers, has discharged the indorser. Lenox & Maitland might have brought suit against the drawers, without prejudice to their claim against the indorser; *à fortiori*, the charging a bill in account against the drawers, cannot prejudice the claim against the indorser.

2d. W. Ramsay was offered as a witness, generally, *without a release from Wilson. The court were right in rejecting him, both on [*204
the grounds of interest and of public policy. If judgment should be rendered against Wilson, Ramsay, as drawer, would be clearly liable to refund Wilson the costs of suit; and a relief from that liability was a clear interest. A party to a negotiable paper ought not to be permitted to discredit it: an underwriter cannot be a witness for another underwriter, in an action upon the same policy.

The case in Doug. 247, does not affect the present. The note in 249, is of an ancient case; and there, Walpole's own book was produced, with a *memorandum* that Pulteney was discharged from his liability as acceptor. All the cases cited are where a party to the bill has been admitted as a witness either *ex necessitate*, or on the ground of public convenience and policy. The case of *Jordaine* v. *Lashbrooke* was one where the revenue would have been defrauded of the stamp duty, if the witness had been excluded; and to prevent that evil, he was admitted. In the cases of usury, the maker of the note or other security is not admitted, unless the debt has been paid. And in the case of forgery, it is a public criminal prosecution, in which the injured party is always admitted.

The fault of the declaration, if it does exist, is cured by the verdict, under the statute of *jeofails* of Virginia, which declares, that no judgment,

after verdict, shall be stayed or reversed, for mispleading, insufficient pleading, or for omitting the averment of any matter, without proving which the jury ought not to have given such verdict. Rev. Code, 118. But the averment was not necessary. The declaration contains an allegation that the bill was protested in due form, according to the custom of merchants, for non-payment; and, by the custom of merchants, the bill could not have been
*205] protested, until demand and refusal of payment. *But this action is grounded on the act of assembly, and not on the custom of merchants; and by the act, it is only necessary that it should be a protested bill of exchange.

As to notice of the non-acceptance and non-payment not being alleged in the declaration, the fact is not so. The declaration alleges that the bill was presented for acceptance, and refused; and afterwards, on the 1st of June, protested, in due form, according to the custom of merchants, for non-payment; of which (that is, of all the facts before recited), the defendant had notice, &c.

As to the damages being laid in current money; this is always done when tobacco or foreign money is sued for. There are some unintelligible cases in the court of appeals of Virginia; but they have never decided the present point. In one case, the court said, that if the suit is for a sterling debt, its value must not be laid in current money, because the law of Virginia authorizes an action of debt for sterling money.

Simms, on a subsequent day, stated that a demand of payment was not necessary, where the bill was not accepted; and cited Lilly's Entries, 44, 45. The declaration states the non-acceptance; and the protest for non-payment.(*a*) He also mentioned a case in Peake's Rep., where a party to a bill of exchange was refused as a witness; but did not produce the book.

Swann, in reply.—1. The plaintiffs below having assumed a rate of exchange, and charged the amount in account against the drawers, is conclusive evidence of their intention to extinguish the sterling debt.

2. The jury have awarded that the sterling debt should be discharged
*206] by the payment of $800,(*b*) the balance *of the account, therefore, and not the rate of exchange, must have been the guide of the jury.

3. The testimony of Ramsay was not to destroy the paper, but to explain the nature of the consideration; to show that it was given for current money of Virginia, so as to bring it within the operation of the 4th section of the act of assembly, respecting bills of exchange given for current money due in Virginia. This act applies as well between indorsee and indorser, as between payee and drawer;(*c*) and if the bill was given for current money due in Virginia, the sum mentioned in the bill is to be taken as current money, and not as sterling.

4. A protest for non-acceptance, and a demand of payment from the drawee, at the time the bill became payable, were requisite to enable the

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(*a*) CHASE, J.—A protest for non-acceptance is absolutely necessary, in the case of a foreign bill.

(*b*) The fact does not so appear in the record.

(*c*) MARSHALL, C. J.—The law has been so construed in Virginia.

plaintiffs below to recover. Kyd on Bills, 76, 87. It being an action on the statute, makes no difference, because the statute gives the action only to such persons as have "a right to demand any sum of money upon a protested bill of exchange." The holder, therefore, must show a right to demand the money, independently of the provisions of the statute; and to ascertain whether he has such a right, we must resort to the custom of merchants, and see whether he has complied with all the requisites of that custom.

5. This is an action of debt; and the demand is uncertain. The debt demanded is the principal, damages, interest and charges of protest, without stating the amount of the charges of protest. The principal is certain, because it is stated to be 300*l.*, and the damages and interest are certain, because the law has ascertained their relative proportion to the principal; but there is nothing in the declaration, by which the amount of the charges of protest can be rendered certain.

6. The damages ought to have been laid in sterling, and not in dollars. The damages follow the nature of the debt. The act of assembly has authorized sterling debts to be sued for and recovered as such. Sterling money is not to be considered as foreign money. *Skipwith* v. *Baird*, 2 Wash. 165. The court of appeals of Virginia, in *that case, decided that the damages must be laid in sterling.(*a*) The court are to fix the rate of exchange; but here the jury have awarded at what sum in current money the sterling debt should be paid, and it is evident that the $800 which the jury said should discharge the debt, is not the exchange, but the balance of account.(*b*) [*207

Simms cited *Brown* v. *Barry*, 3 Dall. 365, to show that a protest for non-acceptance was not necessary; and that a protest for non-payment being alleged in the declaration, it was not necessary to aver a demand of payment from the drawee.

C. Lee.—The act of *jeofails* in Virginia is construed to be the same as that of England, although the words are somewhat broader. *Stevens* v. *White*, 2 Wash. 203.(*c*)

(*a*) Marshall, C. J.—In that case, the court spake of the damages which constitute part of the debt, in an action under the statute, upon a bill of exchange, and not of those damages which are demanded at the end of the declaration for the non-payment of that debt. There is no such decision respecting the latter.

(*b*) Chase, J.—If you have no law of Virginia authorizing such a judgment, it is bad, because, at common law, no condition or alternative can be added to the judgment. It is not a good judgment at common law.

Marshall, C. J.—If it is bad, the defendant cannot complain. It is for his benefit.

Chase, J.—That may be the opinion of the chief justice; but I have considered the question in a greater case than this. I am well satisfied (and it will be difficult to alter my opinion), that at common law, no condition can be annexed to a judgment.

Simms.—It is the practice of Virginia. The law of Virginia allows discounts to actions of debt, and the judgment is to be rendered for the debt, to be discharged by the sum really due.

(*c*) Marshall, C. J.—The decisions have been so, although the statute of Virginia is broader than the English statute. The general principle decided by the court of appeals of Virginia is, that a verdict will not cure the want of an averment of a material fact, which goes to the gist of the action.

Feb. 22d. At a subsequent day, the court having suggested an error, not noticed by the counsel, or not much relied on at the argument, as being apparently fatal, viz., that the costs of protest, which are uncertain, are joined as part of the debt declared for—

*208] *Simms*, for the defendants in error, was now permitted to support the declaration.

1st. The declaration is sufficiently certain. An action of debt will lie for what may easily be reduced to a certainty. Nothing can be more easily ascertained and rendered certain, than charges of protest on a protested bill of exchange. They always appear upon the protest; and the indorsement on the protest is always considered as evidence of their amount: no other evidence is ever required. Debt may be brought for a sum capable of being ascertained, though not ascertained at the time of the action brought. (*Walker* v. *Witter*, Doug. 6.) It is not necessary that the plaintiff, in debt, should recover the exact sum demanded. (Ibid.; *Aylett* v. *Love*, 2 W. Black. 1221.) If so, then a demand of the charges of protest on a protested bill of exchange particularly described in the declaration, is good, because the sum or amount of those charges is capable of being ascertained by the protest, without further evidence. It is admitted, that the amount of damages or interest need not be stated in the declaration. To ascertain the amount of interest, reference must be had to the protest, to find its date, from which time the interest begins to accrue; a reference to the same protest, will ascertain the amount of charges.

2d. But if the charges of protest are not demanded with sufficient certainty, yet the judgment ought not to be reversed on that account; because the judgment is not rendered for the charges of protest, but is rendered for 300*l.* sterling, the principal of the bill. It is now well settled, that in an action of debt, judgment may be rendered for less than is demanded in the declaration. (*Walker* v. *Witter*, Doug. 6; *Mc Quillin* v. *Cox*, 1 H. Black. 249.)

*209] *In the present case, the demand is for the principal sum drawn for by the bill of exchange, with damages, interest and charges of protest thereon. It appears by the record, and by the evidence produced by the plaintiffs in error, which is made a part of the record, that a part only of the original demand on the bill was due, the residue having been settled and paid. Shall the judgment, then, be reversed, for not stating the amount of the charges of protest, which had been previously paid, and for which the judgment was not rendered?

No other action can be brought by Lenox & Maitland against Wilson, for the charges of protest on the bill of exchange stated in the declaration; no judgment has been rendered for them, in the present action. How, then, has he been injured, or how can he be injured, by the omission to state the amount of the charges in the declaration?

In the declaration, four distinct things are demanded, viz.: 1. The principal; 2. The damages on the protest; 3. The interest; 4. The charges of protest.

I take it to be settled law, that if a declaration be good in part, though bad as to another part, the plaintiff is entitled to judgment for so much as is well alleged, especially, if it be not of an entire demand.

An action of debt might be brought for the principal sum due on a bill of exchange, without including the damages, interest and charges of protest. If, then, an action of debt be brought for the principal, damages, interest and charges of protest, and the damages, interest and charges of protest, or either of them, should not be demanded with sufficient certainty, it would not be error, to render judgment for that which was sufficiently alleged. In this case, the principal sum is demanded with sufficient certainty, and for the principal sum only is the judgment rendered. *Woody's Case*, Cro. Jac. 104; 4 Bac. Abr. 25, 26.

*A man shall not reverse a judgment for error, if he cannot show that the error is to his disadvantage. *Tey's Case*, 5 Co. 39 *b*. It appears by the record, that judgment was not rendered for the charges of protest, therefore, the plaintiff in error has sustained no damage or injury, by reason of not alleging in the declaration the amount of the charges of protest. [*210

3d. If the omission of the amount of the charges of protest could in any stage of the proceedings be considered as an error, it is cured by the verdict. By the act of assembly of Virginia (Rev. Code, p. 118), it is declared, that after a verdict of twelve men, no judgment shall be stayed or reversed, for any mispleading or insufficient pleading. The omission, if it is an error, must be one or the other. In Jacob's Law Dict., it is said to be mispleading, if anything be omitted that is essential to the action or defence. The title to recover in the action is the protested bill of exchange; that is set forth in the declaration. The title, therefore, is not wholly defective in itself, though it may be set forth defectively, in not stating the amount of the charges of protest: so that it comes within the rule in the case of *Rushton* v. *Aspinall;* and *Vass* v. *Chichester*, 1 Call 98. The court is not bound to inquire into errors, if the party does not show them. 2 Bac. Abr. 217.

E. J. Lee, in reply.—The case of *Walker* v. *Witter*, Doug. 6, does not say that the sum demanded may be uncertain, but only that you may recover a less sum than that demanded. The demand must be certainly expressed, if it be possible, at the time of bringing the action. In the cases of *Scott's Ex'r* v. *Call*, 1 Wash. 115, and *Skipwith* v. *Baird*, 2 Ibid. 165, the amount of the charges of protest are particularly mentioned; in one they were 4*s*. 6*d*., in the other, 7*s*. 8*d*.

*February 26th, 1803. The Chief Justice delivered the opinion of the court.—In this case, there was an objection taken to the plaintiff's declaration, which was in debt on a protested bill of exchange. The declaration claims 300*l*. sterling, with damages, interest and charges of protest, on a protested bill of exchange, without stating, in any part of it, the amount of those charges. The verdict is for the debt in the declaration mentioned, on which judgment is rendered, to be discharged by a less sum. The objection is, that the demand is uncertain, inasmuch as the amount of the charges of protest, which constitute a part of the debt claimed, is not stated. [*211

The clause of the act on which this suit is instituted is in these words: "It shall be lawful for any person or persons," &c., "to prosecute an action of debt, for principal, damages, interest and charges of protest, against the drawers," &c. The charges of protest constitute an essential part of the debt, and the declaration would not pursue the act, if those charges should

be omitted. This part, therefore, cannot be considered as surplusage. It is a component part of the debt for which the action is given. Being a necessary part, its amount ought to be stated with as much certainty as the amount of the bill. As this is a mere technical objection, the court would disregard it, if it was not a principle, deemed essential in the action of debt, that the declaration should state the demand with certainty.

The cases cited by the counsel for the defendant in error do not come up to this case. They relate to different debts; this to a single debt, composed of different parts.

Judgment reversed and arrested.(*a*)

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*212] *Clarke *v.* Bazadone.

Jurisdiction in error.

A writ of error does not lie from the supreme court of the United States, to the general court for the territory northwest of the Ohio.

This was a writ of error issued from this court to the general court for the territory northwest of the river Ohio, to reverse a judgment rendered in that court against Clarke, the plaintiff in error, in favor of Bazadone, on a foreign attachment, for $12,200 damages, and $95.30 costs.

The general court of the North-western Territory was established by the ordinance of the old congress, under the confederation, and the principal question was, whether a writ of error would lie from this court to the general court of that territory? There was no appearance for the defendant in error.

Mason, for the plaintiff in error, contended: 1st. That this court possesses a general superintending power over all the other courts of the United States, resulting from the nature of a supreme court, independent of any express provisions of the constitution or laws of the United States. 2d. That this court has the power, under the constitution of the United States.

1. It is a general principle, that the proceedings of an inferior tribunal are to be corrected by the superior, unless the latter is expressly restrained from exercising such a control. This is a principle of the laws of that country from which we derive most of our principles of jurisprudence, and is so intimately connected with them, that it is difficult to separate them.

In the Saxon times, the Wittenagemote was the supreme court, and had the general superintendence. But in the time of William the Conqueror, the *aula regis* was established as the sovereign court of the kingdom, *213] *and to that court devolved all the former judicial power of the Wittenagemote; the power of superintending the other courts was derived from the principle of supremacy. 1 Crompton's Practice, 3, 5, 12, 21, 22, 26, 27, 28; 1 Bac. Abr. 553; 2 Ibid. 187. A writ of error is a commission to judges of a superior court, by which they are authorized to examine the record, upon which a judgment was given in an inferior court, and on such examination, to reverse or affirm the same, according to law. 2 Bac. Abr. 213. The court of king's bench superintends the proceedings of all

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(*a*) See the case of Rudder *v.* Price, 1 H. Black. 550.