Fenwick *v.* Sears's Administrators.

Powers of administrators.—Notary-public.—Protest.—Notice to indorser.

An administrator having had letters of administration in Maryland, before the separation of the District of Columbia from the original states, cannot, after that separation, maintain an action in that part of the district ceded by Maryland, by virtue of those letters of administration; but must take out new letters within the district.

Quære? Whether the acts of a notary-public, who certifies himself to be duly commissioned and sworn, are valid, if he be duly appointed, but not actually sworn, in due form?

Whether, between contending parties, the certificate of a notary-public, that he is "duly commissioned and sworn," can be contradicted?

Whether a protest for non-payment of a bill of exchange must be made on the last day of grace?

Whether the reasonableness of notice be matter of fact or matter of law?

Whether, on a count for money had and received, notice of non-acceptance and of non-payment be necessary to charge an indorser, who knew, at the time of indorsement, that the drawer had no right to draw.

Error from the judgment of the Circuit Court of the district of Columbia, sitting at Washington, in an action on the case, on a foreign bill of exchange, by the administrators of the indorsee against the indorser. The case, as it appeared in the pleadings and bills of exceptions, was as follows:

Francis Lewis Taney, at Paris, in France, drew the following bill of exchange:

"Paris, 5th August 1797.

Sixty days after sight of this my second of exchange (first and third not paid), pay to the order of Mr. Joseph *Fenwick the sum of three [*260
hundred and fifty dollars, for value received in account, which charge as advised by your most obedient servant,

Fras. Lew. Taney.

"To Messrs. Ben. Stoddert and John Mason, Georgetown, Maryland."

This bill was indorsed by Fenwick to George Sears, of Baltimore, and on the 30th of March 1798, it was presented for acceptance, refused, and protested in the usual form for non-acceptance, by Samuel Hanson, of Samuel, styling himself notary-public for the county of Montgomery, in the state of Maryland, dwelling in Georgetown, in said county, duly commissioned and sworn.

On the 2d of June 1798, payment of the bill was demanded of the drawees by the same notary, and refused, whereupon, on the same day, he protested it in the usual form for non-payment. Fenwick, the indorser, was, at the time of indorsing, and had been for ten years before, a resident of France, but in the year 1800, he came to this country, and on the 4th of April 1801, the plaintiffs below brought suit against him here upon his indorsement. The declaration had two counts, one upon the non-acceptance of the bill, the other for money had and received.

The defendant below pleaded, 1st. *Non assumpsit.* 2d. That the plaintiffs "have not obtained letters of administration on all and singular the goods and chattels, rights and credits, which were of the said George, at the time of his decease, to wit, at Washington county aforesaid, and this he is ready to verify, wherefore he prays judgment," &c. To which the plaintiffs replied, that the said George Sears, the intestate, departed this life, in the town of Baltimore, in the county of Baltimore, in the state of Maryland, which was at that time his place of residence, on the ——— day

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of———, in the year of our Lord 1800, intestate; and afterwards, to wit, on the 8th day of November, in the year aforesaid, administration of all and singular the goods and chattels, rights and credits of the said intestate, was *261] granted to the said John Stricker and Henry *Payson, in due form of law, by William Buchanan, register of wills for Baltimore county aforesaid; an exemplification of the letters of administration granted to the said Stricker and Henry Payson as aforesaid, duly authenticated, is now here to the court produced; and this they are ready to verify; wherefore they pray judgment," &c. To this replication, there was a general demurrer and joinder; which demurrer was overruled by the court below.(a)

On the trial of the issue in fact, five bills of exception were taken by the defendant's counsel. 1. The first stated that the defendant objected to the second bill of the set of exchange going in evidence to the jury, unless the plaintiff first offered evidence to account for the first and third of exchange, and to show that they, or either of them, were not paid, or passed in the course of business to some other person who still holds the same; but the court overruled the objection, and suffered the second bill to be read.

2. The second bill of exceptions stated, that the defendant objected to the admission of the two protests in evidence, because, as he alleged, Samuel Hanson, of Samuel, was not a notary-public, on the 30th of March 1798, nor on the 2d of June 1798, and to prove this, the defendant offered to give evidence, to prove that the said Hanson, previous to the 30th of March 1798, had been named and appointed by the governor of the state of Maryland, by and with the advice and consent of the council of Maryland, a notary-public, but that he never did take the oath or oaths prescribed for a notary-public to take, until after the 3d day of June 1798; but the court were of opinion, that the evidence so offered to prove that the said Hanson was not a notary-public, was not admissible for that purpose, and refused to let the said evidence be given; and the protests were permitted to be read to the jury.

3. That the defendant's counsel prayed the court to direct the jury, that *262] the protest for non-payment is not such *a protest as by the law of merchants is required, and was not made within the time by the law and custom of merchants required, and therefore, that the plaintiffs cannot in this case recover of the defendant upon the said bill of exchange; but the court refused to give such instruction.

4. The fourth bill of exceptions stated at great length the testimony of several witnesses, tending to show notice of the non-payment given to the defendant in this country, some time in 1800 or 1801, and that the defendant had made some propositions for settling the bill. That the drawees had no funds of the drawer in their hands. That the drawees held a deed from the drawer of certain lands in Georgia and North Carolina, and an assignment of a large demand on the French government, and of another large demand against an individual in France, which they held in trust to pay certain debts due from the drawer, and to pay him the surplus, if any. That they had permitted the drawer to go to France, and attend to these claims, and sell the lands, but that it was understood between them and the drawer, that he

(a) The jurisdiction of the several states of Virginia and Maryland over the territory ceded by them to the United States, for the seat of government, ceased on the first Monday of December 1800. United States v. Hammond, 1 Cr. C. C. 15.

should bear his own expenses, but that they did not inform the defendant of that circumstance. That at the time he went, they thought favorably of the trust, and wrote, by the drawer, to the defendant, expressing their opinion of it, and inclosing to the defendant a power of attorney to act for them in the business, and to receive any moneys that might be recovered under the trust, and informing him that the drawer would attend and look after the said concerns. That at the time of presenting the bill, they had not received any money under the trust, but were in advance on that account. That the bill was indorsed by the defendant, to enable the drawer to raise money in France, for the purpose of supporting his necessary expenses, whilst he was prosecuting there those claims in which the drawees were interested as trustees, and that the drawer sold them for that purpose. That the defendant came to this country on business, in October 1800, and returned to France in May 1802, and during his stay in this country, made Georgetown his place of residence.

That after this bill was drawn, the drawer received in France a sum of between $2000 and $3000, in the *beginning of the year 1798; that during the years 1798, 1799 and 1800, French ships were permitted to [*263 sail directly from America to France, for the purpose of carrying Frenchmen home; this happened perhaps twice a year, or oftener. That during these years, there was a communication between America and France for letters, &c., through the medium of London and Hamburg. That after the spring of 1798, American vessels were very often captured by the French armed vessels on the high seas; and that at the time, previous to the year 1798, American ships were embargoed in France.

The defendant then prayed the court to instruct the jury, that upon the whole evidence, as stated, the plaintiffs, by their neglect in not giving notice to the defendant, the indorser on the said bill, that it was protested for non-acceptance and for non-payment, sooner than they did, had released the defendant from all responsibility on the same, and could not recover thereon; which direction was not given as prayed, the court being divided in opinion, whether, in this case, the question of reasonable notice was a matter of law to be determined by the court, or a matter of fact to be determined by the jury. But the court were of opinion, and so directed the jury, that if they should be of opinion, from the evidence, that the defendant who indorsed the bill drawn by F. L. Taney in this suit, knew, at the time of such indorsement, that the said Taney had no effects in the hands of the drawers, on which he could draw, notice of the non-payment, or of the protest therefor, was not necessary to enable the plaintiffs to recover, in this action, on the count for money had and received.

5. The fifth bill of exceptions, after repeating the evidence at length, stated that the defendant prayed the court to instruct the jury, that although they might be of opinion, that Fenwick, the defendant, knew, at the time of his indorsement, that the drawer had no effects in the hands of the drawees, on which he could draw, yet, to support an action on the bill of exchange, against the defendant, it was necessary for the plaintiffs to give him reasonable notice of the protest of the bill for non-acceptance or non-payment, one or the other; and that, under the circumstances of this case, notice to the said Fenwick of *such protest for non-acceptance, or non-payment, in October 1800, was not reasonable notice; where- [*264

upon, the court were of opinion, and directed the jury, that if they were satisfied from the evidence, that the defendant, at the time he indorsed the bill, knew that Taney had no effects in the hands of the drawees, upon which he could draw, still it was necessary for the plaintiffs, in order to support their action against the defendant, upon the first count in the declaration, to give him reasonable notice of the protest for non-acceptance, or for non-payment, one or the other ; but whether, under the circumstances of this case, reasonable notice had been given to the said Fenwick, of the said protest, the court gave no opinion ; being divided in opinion, whether the same was matter of law to be determined by the court, or matter of fact to be determined by the jury.

Verdict for the plaintiff, $439.46, and judgment accordingly ; to reverse which, the present writ of error was brought by the defendant.

Mason, for the plaintiff in error. *Simms* and *C. Lee*, for the defendants.

Mason now waived the consideration of the first bill of exceptions, and relied upon the following points : 1st. That the protests ought not to have been admitted to be given in evidence, because Hanson, who made them, although he styles himself notary-public, was not a notary-public. 2d. That the protest for non-payment was not a sufficient protest to charge the indorser, because it was not made within the days of grace, but on the day after the last day of grace. 3d. That the notice of the non-payment given to the defendant was not given in reasonable time ; and did not come from an indorsee, but from Judah Hays, for whose use this suit is brought. The court, and not the jury, are to decide what is reasonable notice. *4th. The letters of administration granted in Maryland, before the jurisdiction over the district of Columbia vested in the United States, do not authorize the plaintiffs to maintain an action, as administrators, within the district, after the transfer of the jurisdiction.

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I. That Hanson was not a notary-public, and therefore, the protest void. A protest by a person having due authority, is the only evidence which can be received of the non-acceptance or non-payment of a foreign bill, to charge the indorser. Kyd 136, 142 (87, 91). The only person who can have such due authority is a notary-public. Kyd 137 (87). With regard to inland bills and promissory notes, the statute of Anne is adopted in Maryland, and the courts of Maryland are governed by the same rules, laws and authorities as the English courts. By the constitution of Maryland, § 48, notaries-public are to be appointed by the governor and council. The 55th section declares, "that any person appointed to any office of profit or trust shall, before he enters on the execution thereof," take the oath therein prescribed, "and shall also subscribe a declaration of his belief in the Christian religion." The act of assembly of Maryland, February 1777, c. 5, prescribes an oath of office to be taken before the officer enters into the execution of his office. The act of assembly, November 1779, c. 25, § 2, ascertains his fees, and the 8th section prescribes the form of another oath to be taken, before entering on the duties of his office, under a penalty of 150*l*.

If a man assumes a character which he does not possess, and a seal to which he has no right, his acts are not obligatory. No man can constitute

himself a notary-public. If not duly appointed and qualified, his protest is not better than the protest of any other person. If *Hanson had not [*266 taken the oaths, and if he could not act, until he had taken them, then the protest is not by a notary; and it was competent to the defendant to give evidence, to prove that he had not taken the necessary oaths.

II. The protest for non-payment was made a day too late. The bill was presented for acceptance on the 30th of March; the last day of grace was the 1st of June; the protest was on the 2d of June. The custom as to the days of grace, and the mode of computation of time, is stated in Kyd 9 (6). The bill must be presented for payment within the days of grace, and protested on the last day of grace. Kyd 136, 142 (87, 97).

Althought the bill be protested for non-acceptance, yet it must be presented for payment, at the time it becomes due, and regularly protested for non-payment. And although a right of action accrues upon the protest for non-acceptance, yet the holder is held to have discharged the drawer and indorsers, unless he presents it for payment when due, and regularly protests it for non-payment. Kyd 117, 120 (76, 79, &c.), 121, 137, 138, 151, 208.

III. The defendant had not such notice of the protests for non-acceptance and non-payment, as to render him liable. The case of *Brown* v. *Barry*, 3 Dall. 365, has no relation to this case. That was a bill drawn in America upon a person in Europe. This is a bill drawn in Europe on a person in America, and is, therefore, subject to the laws of the place where drawn and indorsed, as to the liability of the drawer and indorsers. The engagement of Fenwick, the defendant, was made in France, and his liability is to be determined by the laws there. The obligation of the drawer and indorsers is only conditional; the holder must do certain things to entitle him to call upon them. Kyd 117 (76). He is bound to give regular notice of non-acceptance to all the preceding parties to whom he means to resort.

*As to the protest being for want of funds in the hands of the [*267 drawees, it goes only to discharge the holder from his obligation to give notice to the drawer, but does not supersede the necessity of notice to the indorser. Kyd 129, 131 (82, 83). There is reason for this distinction. A drawer may have a good reason for drawing, although he has no effects in the hands of the drawee, but yet no injury can result to him by want of notice. But the indorser may know that the drawer has been in the habit of drawing; but may not know the exact state of the funds upon which he drew.(*a*) The indorser indorses on the credit of the drawer; and notice is necessary to enable him to take measures to secure himself from the drawer.

As to the time of notice; the non-acceptance was on the 30th of March 1798, and on that day, the holder's obligation to give notice accrued, but he did not give it until January or February 1801. The act of congress did not stop the intercourse between this country and France, until 1st July 1798. There is no evidence that any attempt was made, during this time, to send notice. The bill, in seven months, found its way from France to Georgetown, and what prevented its getting back again in seven months more? The evidence stated in the bill of exceptions shows that there was always a circuitous route by which letters and papers might have gotten to France.

(*a*) See Evans on Bills, 62, 67 (Am. edition).

There is also evidence that the drawer was able to pay, for some time after the drawing the bill, and that he afterwards left France. Notice must be given by the indorsee himself. Kyd 126 (79, 80). The only notice which was given in this case, was by Judah Hays, who is not a party on the bill.

The court, and not the jury, ought to have decided the question of reasonable notice, or due diligence. It is a question of law. Kyd 126, 127 (79, 80). Notice must be given by the first post. The courts in Maryland have always so decided. If the courts have not decided the question of due diligence, they have erred. They have also erred in the opinion which they did give. They admit, that reasonable notice is necessary, to enable the plaintiffs to recover upon the bill, on the first count, but that, in case the defendant below knew that the drawer had no *funds in the hands of the drawees, it is not necessary to prove such notice, in order to enable the plaintiffs to recover on the count for money had and received. It is not known, on what grounds the court below could take such a distinction. There was certainly nothing in the evidence which could support such an opinion. If the holder had been guilty of such negligence as to discharge the indorser from his liability upon the bill, he was not entitled to recover upon either count. It was an objection which went to the whole merits of the case; and it is not like the case where a security or instrument may be vacated, but the debt still remain.

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IV. The letters of administration, granted in Maryland, did not authorize the plaintiffs to administer assets in the district of Columbia. The laws of Maryland, which were adopted by congress for this district, do not authorize an administration of assets, under letters of administration granted in another state. And such has been the uniform course of decisions in the courts of Maryland; because, by the testamentary laws of Maryland, the administrator s to give bond, and render an account of his administration; and the assets are to be distributed in the manner prescribed by law. Although this is the law of Maryland, and the laws of Maryland have been adopted in this district by congress; yet they do not operate as laws of Maryland, but as laws of the United States. And although the law is the same, yet the jurisdiction is different. This district, and the state of Maryland, are to each other as separate states.

Simms, for the defendants in error.—I. As to the objection that the notary had not taken the necessary oaths. It is believed, that no case can be produced to support this exception. It would be extremely inconvenient, if the acts of a commissioned ministerial officer should be considered as invalid, because he had neglected to take an oath prescribed by law.(*a*)

*By the act of assembly of 1779, c. 25, § 8, a penalty is enacted for not taking the oath there mentioned. This does not make void the acts of the officer, if he neglects to take the oath required, but only subjects him to the penalty for acting without taking it. From this it may be inferred, that the legislature considered his acts as valid.

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The court did not err in refusing the evidence offered, because it was an

(*a*) See the case of Thurstan *v.* Slatford, in the exchequer, 1 Lutw. 377 (8vo. edition, 1618), where it was held, that the town-clerk of Oxford was entitled to recover his fees accruing before he had taken the oaths.

attempt to prove a negative. The oath might have been taken before any judge, or justice of the peace, in the state of Maryland, or any alderman in the city of Annapolis. The law does not require such oath to be recorded, or deposited in any particular place. A party can never be called upon to prove that a notary-public, who protests a bill of exchange, was duly qualified to make such a protest; consequently, the court ought not to admit evidence that he was not, so as to throw the burden of proof upon the other party. There is no penalty prescribed for not taking the oaths required by the constitution of Maryland, and by the act of 1779, but it does not follow from that circumstance, that the acts of the officer, duly appointed and commissioned, would be void, by his not having taken the oaths, because he might be indicted and punished for his contempt of the law, and his neglect of duty. Innocent people ought not to suffer by his negligence, especially, as they have no means of knowing whether he had taken the oaths or not. The public commission from the proper authority is all that can be required to protect the rights of third persons.

It is true, that in the passage cited from Kyd 136 (87), it is said, that "the person whose office it is to do these acts (that is, make protests, &c.) is, in common language, termed a public-notary;" but it is also said, in Evans 94, that when there is no public-notary in the place, the protest may be made by any other person.

II. As to the time of making the protest for non-payment. The time when a protest ought to be made, depends much on the custom of the place. 4 Bac. Abr. (Gwillim's ed.) 687. *The time in England was for a long while unsettled. In *Hill* v. *Lewis*, 1 Salk. 132, it was determined, [*270 that, with respect to foreign bills, the drawee had three days of grace to pay them in, and that no demand need be made until the expiration of the three days, consequently, that the protest need not be made until after the third day of grace. But in the case of *Tassel* v. *Lewis*, Ld. Raym. 743, it was held, that the time of payment is the last of the three days, and that the demand ought to be made on that day. In a late case of *Leftly* v. *Mills*, 4 T. R. 173, Lord Kenyon held, that the acceptor had until the last moment of the last day of grace, to pay the bill, consequently, the protest could not be made until the day after. But Buller held, that the acceptor was bound to pay the bill, on demand, on any part of the third day of grace, and that the bill ought to be protested on that day, and it is believed, that such is now the established custom in England. Kyd 120, 121 (79, 80).

But the custom of merchants in the United States differs in some respects from the custom of merchants in England. *Brown* v. *Barry*, 3 Dall. 365, 368. It is believed, that in the United States, the custom is to protest on the day after the last day of grace. Such is the custom in the banks of Alexandria and Columbia, in the case of promissory notes; and no difference is known in that respect between promissory notes and bills of exchange. There is no reason why a difference should exist, as the three days of grace are allowed in one as well as in the other.

But in this case, the bill was protested for non-acceptance, and the defendant thereupon became liable to the action of the plaintiff. In an action brought upon the non-acceptance, it is not necessary to aver a demand or protest for non-payment, on the day when the bill becomes due; and what it is not necessary to aver, it is not necessary to prove; *Dunstar* v. *Pierce*,

Lilly's Ent. 55 ; which was a case on a demurrer to the declaration ; demurrer overruled, and judgment affirmed in the exchequer.

But had the bill been accepted, then a protest for non-payment would have been absolutely necessary. Evans 66 ; Kyd 140 ; *Milford* v. *Mayor*,
*271] 1 Doug. 55 ; *Bright* v. *Parrier*, Bull. N. P. 269 ; *Kyd 110, 111 ; 3 P. Wms. 16, 17.

III. Under the circumstances of the present case, the plaintiffs were not bound to give the defendant notice at all ; the jury having found, in substance, that at the time the defendant indorsed the bill, he knew that the drawer had no effects in the hands of the drawees ; and was, therefore, guilty of a fraud on the plaintiffs' intestate, in selling him the bill. The plaintiffs, therefore, had a right to recover on the count for money had and received. Besides, the reason of the rule which dispenses with notice to the drawer, when the drawees have no effects, applies as strongly to the indorser, who knows that fact, as to the drawer. Notice to such an indorser can be of no benefit, because he knew, at the time of indorsing, that the bill would not be paid, and therefore, must have taken security from the drawer ; or, if he did not, it was his own fault. By knowing, at the time of indorsing, that the drawees had no funds of the drawer in their hands, he virtually had notice of the non-acceptance and non-payment. The rule which requires notice to an indorser, is made for his protection and benefit ; and ought not to be converted into the means of enabling him to practise a fraud.

The opinion of the court below, that although notice might be necessary, in order to support an action on the bill, upon the first count, yet it was not necessary, to maintain the count for money had and received, was certainly correct, and fully warranted by the case of *Bickerdike* v. *Bollman*, 1 T. R. 408, 409, 410. In that case, Ashhurst, Justice, says, that notice is not necessary to the drawer, when he has no effects in the hands of the drawee ; "for it is a fraud in itself, and if that can be proved, the notice may be dispensed with." Kyd 129 (82) ; Evans 59. Every indorser is, to his indorsee, as the drawer of a new bill. Kyd 113 (72); *Harry* v. *Perritt*, 1 Salk. 133 ; *Claxton* v. *Swift*, 2 Show. 501 ; and in *Heylin* v. *Adamson*, 2 Burr. 674, Lord Mansfield says, "that when a bill of exchange is indorsed by the person to whom it was payable ; as between the indorser and indorsee, it is a
*272] new bill of exchange, and the indorser *stands in the place of the drawer." If, therefore, the indorser, at the time he transfers a bill, knows that the drawer has no effects in the hands of the drawee, he is as guilty of fraud as the drawer himself; and in all cases where money is obtained from another by fraud of any kind, it may be recovered back, in an action for money had and received. *Moses* v. *Macferlan*, 2 Burr. 1012; *Hasser* v. *Wallis*, 1 Salk. 28. And in the case before cited, of *Bickerdike* v. *Bollman*, 1 T. R. 410, Buller, Justice, says, "Besides, in the present case, as the plaintiff's counsel have truly argued, the question is not whether an action could be maintained on the bill itself, but whether the want of notice extinguishes the debt. As to which, the case is this : A. not having any effects in C.'s hands, draws a bill of exchange for 100*l.* on him, in favor of B., for value received. Now, if C. does not accept, and B. does not give notice to A., there is an end of the bill. Then, how does the case stand ? A. has 100*l.* of B.'s in his hands, without any consideration, which, therefore, B. may undoubtedly recover. in an action for money had and received."

The reasoning in that case applies exactly to the present. Here, the defendant, Fenwick, by his indorsement of the bill, acknowledges that he has received its amount. He has received of the intestate $350, without any consideration, and, therefore, even although the remedy on the bill might have been lost, he ought to recover the amount of the consideration, on the count for money had and received.

It is true, that in the case of *Goodall* v. *Dolley*, 1 T. R. 712, it is said, that the fact of the drawer's having no funds in the hands of the drawee, would not discharge the obligation of the holder to give notice to the indorser, to whom he meant to resort; yet it is also expressly stated, that the indorser was ignorant of all the circumstances of the case. That opinion, therefore, cannot affect the present case, in which the indorser knew the circumstances.

As to the question, whether reasonable notice is matter of law to be determined by the court, or matter of fact to be determined by the jury; the practice in England, until lately, was for the jury to determine, by the circumstances *of each particular case, what time was reasonably to be allowed either for making demand, or giving notice. Kyd 127 (77); [*273 *Russel* v. *Langstaffe*, Doug. 515 (497); *Rushton* v. *Aspinall*, Ibid. 681. In the case of *Tindall* v. *Brown*, 1 T. R. 167, Lord MANSFIELD says, that "what is reasonable notice is partly a question of fact, and partly a question of law. It may depend in some measure on facts; such as the distance at which the parties live from each other, the course of the posts, &c. But whenever a rule can be laid down with respect to this reasonableness, that should be decided by the court, and adhered to by every one for the sake of certainty." And ASHHURST, Justice, said, it was "of dangerous consequence, to lay it down as a general rule, that the jury should judge of the reasonableness of time. It ought to be settled as a question of law. If the jury were to determine this question in all cases, it would be productive of endless uncertainty." It appears to have been the opinion of both these judges, that there were certain cases, in which it was proper for the jury to determine on the reasonableness of notice; but that in cases where a rule can be laid down, the court ought to decide the question. No certain rule can be laid down, except in cases where the parties live in the same place, or where there is a constant and regular communication by post between them.

In a much later case, 2 H. Bl. 569, it was determined, that what was reasonable time must depend on the particular circumstances, and it must be always for the jury to determine whether any *laches* is to be imputed to the plaintiff. In the case of *Mackie* v. *Davis*, 2 Wash. 231, CARRINGTON, Justice, says, "whether due diligence had been used by the assignee, to recover against the obligor, would necessarily be a matter in issue between the parties; and would, upon all the circumstances of the case, be decided by the jury." 1 Dall. 252, is to the same effect. A case to the same *effect [*274 also has been mentioned as having been decided in the circuit court of the United States, in Virginia, by Judge WILSON.

The instruction of the court below to the jury, that reasonable notice was necessary, to charge the defendant on the first count, was not objected to by the plaintiffs' counsel; but the court not having instructed them whether the notice was or was not reasonable, and a general verdict for the plaintiffs having been given, it is to be presumed, that the jury thought the notice

was reasonable, under all the circumstances: and they were certainly competent to decide that question.

The decisions, that notice must come only from the indorsee or the holder, have been since overruled. Evans 57.

III. As to the letters of administration. An administrator, in the United States, ought not to be considered precisely in the same point of view as in England. In England, he is the servant or agent of the ordinary, and acts in his place and stead. In the United States he is the representative of the intestate; and all the rights and credits of the intestate are vested in him.

Formerly, in England, the goods of an intestate were disposed of by the bishop or ordinary to pious uses. It was not until the statute of 13 Edw. I., c. 19, that the bishop or ordinary was compelled to satisfy the debts of the intestate, so far as the goods, which came to his hands, would extend. After this statute, an action might be brought against the ordinary, in the same manner as against an executor; but he was not compellable to grant administration, until the statute of 31 Edw. III., c. 11.

From this relation between the ordinary and the administrator, the power
*275] of the latter was necessarily limited *by the jurisdiction of the former. But the act of congress concerning the district of Columbia puts the question out of doubt. By that act, the laws of Maryland are continued in force in this part of the district; of course, all rights acquired under the laws of Maryland remained valid. It was not the intention of congress to divest any rights which had been acquired under those laws. If the separation of the district from Maryland took away the right which the plaintiffs before possessed of taking possession of the property, and collecting the debts of the intestate, in this part of the district, under their letters of administration granted in Baltimore county, it would have the same effect upon letters granted by the orphans' courts of Montgomery and Prince George's counties, before the separation, to persons resident in the district, so that their acts, done since the separation, are unauthorized, and they cannot lawfully act, until new administration has been taken out from the orphans' court within the district. The inconvenience, expense and oppression of such a construction, are too obvious, to admit the supposition that it was within the intention of congress. These letters were taken out from the proper authority, and at the time, vested a right in the plaintiffs to administer the assets within this part of the district.

C. Lee, on the same side.—I. As to the letters of administration. Admitting that letters of administration, granted out of the state of Maryland, will not authorize an administration of assets, within the state, yet in this case, the letters were granted in Maryland, while this district was part of Maryland, before the 1st Monday of December 1800, and did once authorize an administration of the assets here. A right was completely vested in the plaintiffs. The laws of Maryland are as fully in operation in this district, as they were or are in the state of Maryland. Congress could not mean to divest rights completely vested.

II. As to the second bill of exceptions.—It is admitted, that Hanson was duly appointed notary, but the objection is, that he had not taken the
*276] oath. The *exception is not to the opinion of the court, that he was not duly qualified to act; but simply, that it was not competent for the

defendant to give the evidence offered to prove that he had not taken the oaths. The intention of an oath is only to impose an additional obligation on the officer. It is a matter between the officer and the government; and generally, a penalty is imposed for not taking it; but the not taking the oath does not make the act void. Suppose, a member of the legislature should not take the oath prescribed; this would not vacate a law to which he had given his assent: such a doctrine would produce infinite inconvenience. No time is limited for making the objection; and twenty years after an act has been done, it may be offered to be proved, that the officer did not take the oath; if the court would do right in refusing such evidence in that case, they were right in refusing it in the present.

III. The third bill of exceptions is, that the court admitted the protest for non-payment to go to the jury, when it was not made in due time. The action being for non-acceptance, and not on the protest for non-payment, it was not necessary to produce that protest at all. The objection is, that it was not made on the last day of grace, but on the day after. The custom is different in different countries. From the general practice of the banks, it may be considered as the general rule in this country, to protest on the day after the last day of grace. The protest for non-acceptance is not objected to; it was made on the day on which the bill was presented. The court only refused to give the direction as prayed, but gave no opinion, that the protest was a good one.

IV. As to the fourth bill of exceptions. This record does not state the whole evidence in the cause. It is true, it is said, that this is all the evidence given of notice; but it does not state what other evidence there might be, to excuse the want of notice. This exception *may be divided into three points; 1st. As to the opinion prayed; 2d. As to the conduct [*277 of the court in not giving an opinion as to part of the prayer; and 3d. As to the opinion which the court did give.

The prayer is, to instruct the jury, that it was necessary to prove notice of non-payment as well as of non-acceptance. The plaintiffs, if anybody, had a right to complain of the opinion of the court, inasmuch as it did not declare notice of non-payment to be unnecessary. But they have waived their right to except. The opinion given is what is excepted to, and that was given only on the count for money had and received.

The bill and indorsement are stated to have been made in France. The law of France, then, is the *lex loci* by which this cause is to be decided, and by which the liability of the indorser is to be ascertained. By that law, no notice is necessary to the drawer or indorser, if there are no effects of the drawer, or of the indorser, in the hands of the drawee. Evans 60, 62. And what is meant by funds, is not securities lodged for raising money, upon which the money has not been raised; but is money in account. 2 Esp. 515; Evans 62.

As to the ground of fraud, the court left it to the jury, to decide whether the defendant knew that the drawer had no funds in the hands of the drawees. If he did know it, is it not as much a fraud, as in the case of a drawer drawing without funds? It is, in fact, an accumulated fraud. If, according to Justice Ashhurst, one is a fraud, the other must be a greater fraud.

As to due diligence, the exception is not, that no notice was given, but

that it was not given in due time. No doubt, but that by the laws in England, due notice is necessary as a general rule; but to this there are exceptions. There is an American law on this subject, which is, that in some cases the jury, and not the court, is to decide what is *laches*. When a particular case
*278] arises, and a variety of circumstances are given in evidence in excuse *for not giving notice sooner, there, by the American practice, the jury are to decide. This appears by the decisions in Pennsylvania down to the year 1795. *Robertson* v. *Vogle*, 1 Dall. 252; *Bank of North America* v. *McKnight*, 2 Ibid. 158; Ibid. 192, 233; *Mc Williams* v. *Smith*, 1 Call 123.

In this country, the line is more distinctly drawn between court and jury than it is in England. By the 9th article of the amendments to the constitution, a matter once tried by a jury shall not be otherwise re-examined than by a jury, according to the rules of the common law. If the court now make a rule as to what is due diligence in this case, they will, without a jury, try a fact which has once been decided by the jury in the court below. If the question involve matter of fact with the law, the jury must decide the facts; and it is no error in the court, to suffer them to decide the law also at the same time. When a rule can be laid down, then the court is to state the rule; but where that cannot be done, then it may be left with the jury. This is all that Lord MANSFIELD says in the case of *Tindall* v. *Brown*.

V. The fifth is an exception to the opinion which the court gave, and not to the conduct of the court in not giving an opinion. The opinion given was against the plaintiffs below, and they alone had a right to except to it. There was a decision of Chief Justice JAY, given upon the circuit, similar to that given by Judge WILSON, that the jury, and not the court, were to judge of the validity of excuses for giving notice. The judgment ought not to be reversed, because the court below did not give an improper instruction to the jury. It is hoped, that the court will decide the question of notice, as it is of great importance, that a general rule should be established and understood.

*279] *Mason*, in reply.—I. As to the letters testamentary. Antecedent to the revolution, the testamentary affairs in the state of Maryland were under the superintendence of a commissary-general, who had a deputy in each county. If there were *bona notabilia* in several counties, the administration was granted by the commissary-general. But if the goods of the intestate were all in one county, it might be granted by the deputy-commissary of that county. By the new system of testamentary laws, 1798, c. 101, § 3, the assets in Maryland cannot be administered but by letters of administration granted in Maryland.

In the district of Columbia, if a man now die intestate, the administration must be granted in the district. The laws of Maryland do not operate in the district as laws of Maryland, but as laws of the United States. Their obligatory force is not derived from the state of Maryland, but from the United States.

Does the fact that the letters were granted, before the separation of the district from Maryland, make any difference? If any right had vested, what was it? Was it a right to sue Fenwick, who was then in France, and who came to the district after its separation? But no right at all had vested in the plaintiffs. If the separation had not taken place, and Fenwick had

come, they might have sued; but as it had taken place before he came, they cannot. By the laws of this part of the district, the administrator must give bond duly to administer the estate, and to pay the debts *pari passu*. He must advertise in a certain manner, &c. The only evil resulting from this construction of the law is, that plaintiffs must take out letters of administration here.

II. As to the second bill of exceptions. The question is, whether Hanson was a notary, before he took the oath *prescribed by the law of 1779. [*280
The constitution says, that before he enters upon the duties of his office, he shall take the oath of allegiance. The law of 1779 says, he shall take the other oath therein prescribed, and if he acts without taking it, he shall be subject to a penalty. The constitution and the law are to be coupled together, and then the taking the oath prescribed by the act of 1779, becomes a prerequisite to his capacity to act as notary.

III. The third bill of exceptions is, that the protest for non-payment was not a proper one to go to the jury. It was not, in itself, evidence. It is no answer to say, that no protest for non-payment was necessary; the counsel below did not choose to risk their cause without it. If the opinion of the court is erroneous, and if the protest was improperly admitted to go to the jury, the judgment must be reversed. It may be a good reason why the court should refuse to let it go to the jury, that it was not necessary. It is, therefore, unimportant to decide whether it was necessary or not. But that it was necessary appears in Kyd 120, 137, 138 (77, 87).

As to the case of the notary who refused six pence for noting the bill. 4 T. R. 173. It is the opinion of Lord Kenyon only, that the acceptor had until the last moment of the last day of grace to pay the bill; and that was the case of an inland bill, and decided expressly upon the statute of William. But Buller states the law to be otherwise on a foreign bill, and that, by the custom, the bill is payable at any reasonable time of the last day of grace, when demanded. And the law is so stated in Kyd 121 (78). The practice in Alexandria may be as stated, but in Baltimore, they protest on the third day, in banking hours. There is a difference between the law respecting inland and foreign bills; and this difference arises from the statute of William, which gives the protest on inland bills, and requires it to be made after the expiration of the three days. Kyd 151 (91). It is upon this statute, which is in force in Maryland, that the banks have adopted the practice of protesting promissory notes on the day after the expiration of the three days of grace. A promissory note, as soon as it is indorsed, becomes an inland bill of exchange.

*IV. It is objected to the fourth bill of exceptions, that it does not contain the whole evidence. But if a bill of exceptions states [*281
evidence, it has been decided by this court, that it is presumed to state the whole evidence. *Bingham* v. *Cabott*, 3 Dall. 19, 38.

It is said, that the exception is not to the refusal of the prayer, but to the opinion which was given. If the opinion prayed was correct, and the court refused to give it, or, by being divided, failed to give the instruction to the jury as prayed, it is error. The court will disregard the inaccurate form of words, and come at the substance of the exception.

As to the want of funds in the hands of the drawees, the court are to presume, that the whole evidence is stated in the exception. We deny the

principle, that such funds can be only money in account. There was reason for Fenwick to believe that the drawees had funds, and he ought, therefore, certainly to have had notice. There is not the least ground for a suspicion of fraud in Fenwick.

As to the count for money had and received, it is a common-law count; but upon that count, the plaintiffs cannot recover, by means of evidence resulting from that bill, unless they have done everything to entitle them to recover upon the bill itself, by using due diligence, giving due notice, &c.

It is said, that the indorsement was made in France, and therefore, the law of France is to decide the responsibility of the indorser; and that by that law, notice is not necessary to the indorser, if neither the indorser nor the drawer has funds in the hands of the drawee; and Evans is cited as the authority. It is doubted, whether Evans is correct in that position; but whether correct or not, it does not apply, because the money was to be paid here, and the contract is personal. If Fenwick had been sued in France, it might have applied; but being sued here, the law of this country must decide his case.

As to the questions, what is due notice? and whether it be a matter of fact or of law? the decisions cited from Dallas are no authorities in this case.
*282] They all turned *upon the laws of particular states. This court is to be governed by the law of the place where the transaction happened, unless where the laws of the United States apply. The court, in this case, are to decide by the laws as they exist in Maryland; and there the laws of England respecting bills of exchange and promissory notes have always been the rules of decision. We are not, in Maryland, to be governed by whimsical opinions drawn from either Pennsylvania or Virginia. Virginia has not been remarkable for her progress in commerce; and were I to form a system of commercial law, I should certainly not draw it from the fantastical opinions adopted in either of those states. In England, what is due notice has been and is settled and determined to be matter of law to be decided by the court.

On the 25th of February, THE COURT gave the following judgment:

"It is decreed by the court, that the defendants Stricker and Payson, not having obtained letters of administration in the district of Columbia, were not competent to maintain this action; and that the circuit court of the United States in and for the said district erred in overruling the demurrer.[1] It is, therefore, considered by the court, that the judgment of the said circuit court, on the said demurrer, be and the same is hereby reversed, and that judgment thereon be rendered for the defendant in the original action.(*a*)

(*a*) The reporter was not in court when this judgment was entered, but he has understood, that the court did not assign the reasons upon which their opinion was grounded; and gave no opinion upon the other points. See Evans on Bills, 67, 68, 69, 70, 71, as to notice.

[1] So, a foreign executor cannot maintain an action in the District of Columbia, without first taking out letters testamentary there. Dixon *v.* Ramsay, 3 Cr. 219. Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and does not, *de jure*, extend to other countries; whatever oper-

Thompson *v.* Jameson.

Debt on decree in chancery.— Variance.

An action of debt for 860*l.* 12*s.* 1*d.*, founded on a decree in chancery, is not supported by a decree for 860*l.* 12*s.* 1*d.*, with interest from a certain day to the day of rendering the decree; but the variance is fatal.

Upon an attachment in chancery, under the laws of Virginia, the record stated that "I. T., in open court, became security that I. H. (the absent debtor) shall perform the decree of this court if against him:" *Quære?* Whether an action of debt will lie against I. T., for the amount decreed against I. H.?

Thompson *v.* Jameson, 1 Cr. C. C. 295, reversed.

Error from the Circuit Court of the district of Columbia, sitting in Alexandria.

*Thompson, in the year 1795, being indebted to Hadfield, a person residing out of the jurisdiction of the commonwealth of Virginia, [*283 and Hadfield being indebted to Jameson & Brown, as partners in merchandise, the latter obtained from the county court of Fairfax, an attachment in chancery, in the nature of a foreign attachment, to stay the effects of Hadfield, in the hands of Thompson, under an act of assembly of Virginia, entitled "An act directing the method of proceeding in courts of equity against absent debtors, or other absent defendants, and for settling the proceedings on attachments against absconding debtors." (Rev. Code, p. 122, c. 78.) This act directs, "that if in any suit which hath been or hereafter shall be commenced for relief in equity, in the high court of chancery, or in any other court, against any defendant or defendants who are out of this country, and others within the same, having in their hands effects of, or otherwise indebted to, such absent defendant or defendants, and the appearances of such absentees be not entered, and security given, to the satisfaction of the court, for performing the decrees; upon affidavit that such defendant or defendants are out of the country, or that upon inquiry at his, her or their usual place of abode, he, she or they could not be found, so as to be served with process; in all such cases, the court may make an order, and require surety, if it shall appear necessary, to restrain the defendants in this country from paying, conveying away, or secreting the debts by them owing to, or the effects in their hands, of such absent defendant or defendants; and for that purpose, may order such debts to be paid, and effects delivered, to the said plaintiff or plaintiffs, upon their giving sufficient security for the return thereof, to such persons, and in such manner, as the court shall direct." It further provides, that the court shall appoint some day in the succeeding term, for the absent defendant to enter his appearance, and give security for performing the decree; and shall order notice to be published, &c.; and if the absent debtor shall not appear and give such security, within the time limited, the court may proceed to take such proof as the complainant shall offer; and if they shall thereupon be satisfied of the justice of the demand, they may order the bill to be taken as

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ation is allowed to it, beyond the original territory of the grant, is mere matter of courtesy. Vaughan *v.* Northup, 15 Pet. 1. If an administrator desire to prosecute a suit in another state, he must first obtain a grant of administration therein, in accordance with its laws. Noonan *v.* Bradley, 9 Wall. 394; Brownson *v.* Wallace, 4 Bl. C. C. 465. And see Graeme *v.* Harris, 1 Dall. 456; Sayre *v.* Helme, 61 Penn. St. 299.