between the assignor and his remote assignee. The implied promise, growing out of the indorsement, is not considered as having been made assignable by the act of assembly, and therefore, the assignee of that promise cannot maintain an action of *indebitatus assumpsit* on it.

*It is, therefore, the opinion of the court, that this action is no [*299
maintainable, and that the judgment ought to be reversed."(a)

Stuart *v.* Laird.

Constitutional law.—Courts.

Congress has power to establish such inferior tribunals as it thinks proper, and to transfer pending proceedings from one such tribunal to another.

It is not required, that the judges of the supreme court should have distinct commissions as judges of the circuit courts.

A contemporaneous construction of the constitution, practiced under and acquiesced in, for a period of years, fixes the construction, and the courts will not shake or control it.[1]

Error from the Fifth Circuit, in the Virginia district.

An action of covenant was brought in January 1801, in "the court of the United States for the middle circuit, in the Virginia district," by John Laird, a citizen of the state of Maryland, for and on behalf of Laird & Robertson, of Port Glasgow, and subjects of the King of Great Britain, against Hugh Stuart, a citizen and inhabitant of the state of Virginia.

At the rules, in February 1801, there was an office judgment against the defendant for damages, &c., "which damages," said the record, "are to be inquired of and assessed by a jury to be summoned by the marshal, and empannelled before the next court of the United States for the middle circuit, in the Virginia district, which commences on the 22d day of May next ensuing; and so the cause aforesaid stood continued, by virtue of the statute in such case made and provided, until the court of the United States for the fourth circuit, in the Virginia district, continued by adjournment, and holden at the capitol in the city of Richmond aforesaid, on Thursday, the 17th day of December 1801; at which day, to wit, at a court of the United States for the fourth circuit, in the eastern district of Virginia, continued by adjournment, and holden at the capitol, in the city aforesaid, before the honorable the judges of the said court, came as well *the plaintiff," &c.; and the [*300
office judgment being set aside, and issue joined upon the plea of covenants performed, there was verdict and judgment for the plaintiff; upon which a *fieri facias* issued, reciting, in the usual form, the judgment recovered "in the court of the United States for the fourth circuit, in the eastern Virginia district," and returnable "before the judges of the said court, at Richmond, in the eastern Virginia district, on the 26th day of April next." "Witness, Philip Barton Key, Esq., chief judge of the said court." The return on this execution was as follows, viz:

"Executed on Maria and child, Paul, Jenny, Selah, Kate and Anna, and a bond taken with Charles L. Carter, security, for the delivery thereof at the

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(a) See note (A) in the appendix to this volume, p. 367.

[1] See Martin *v.* Hunter, 1 Wheat. 304; Cohen *v.* Virginia, 6 Id. 264; Prigg *v.* Pennsylvania, 16 Pet. 621; Cooley *v.* Board of Wardens, 12 How. 315.

Eagle tavern, in the city of Richmond, on the 20th day of April 1802, the condition of which was not complied with.

BEN. MOSLEY, D. M.,
for JOS. SCOTT, M., E. V. D."

The record then went on to state, "that heretofore, to wit, at a court of the United States for the fifth circuit, continued by adjournment, and held at the capitol, in the city of Richmond, in the district of of Virginia, before the Honorable the Chief Justice of the United States, on Thursday, the 2d of December 1802, came John Laird, on behalf of Laird & Robertson, by Daniel Call, gent., his attorney, and moved the said court for judgment and award of execution against Hugh Stuart and Charles L. Carter, upon a bond entered into by them for the forthcoming and delivery of certain property therein mentioned, to the marshal of the eastern Virginia district, on the day and at the place of sale, which was taken by virtue of a writ of *fieri facias* issued from the court of the United States for the fourth circuit, in the eastern Virginia district, against the estate of the defendant, Hugh Stuart, which bond is in the words and figures following, to wit," &c., the condition of which referred to the *fieri facias* sued out of the court of the United States for the fourth circuit, in the eastern Virginia district.

*301] *The defendants appeared and "showed as causes why the said execution should not be awarded—

"1. That the motion is authorized by no law of the United States, and by no part of the common law, and hath been hitherto, in similar instances, or such as are nearly similar, used and admitted, and awards of execution, such as that now prayed for, made in the courts of the United States upon the construction of an act of congress approved on the 24th day of September 1789, by virtue of which awards of execution, in such cases, have heretofore been made in the said courts, agreeable to an act of the general assembly of Virginia, passed on the 10th day of December 1793: and the said defendants do aver, that the said act of congress doth not make the laws of the several states rules of decision in the courts of the United States in any case whatever, except in trials at common law; and that no decision which can be given on the said motion, will be a decision in a trial at common law.

"2. That the said act of the general assembly of Virginia is in derogation of the common law, and deprives the citizen of trial by jury, and that the terms in all such acts prescribed should be regularly and strictly observed by all such as would entitle themselves to the benefit thereof, which hath not been done by the plaintiff in the present motion; 1st. Because agreeable to the said act, on forfeiture of such bond, the officer who hath taken the same, shall return the same to the office of the court from whence the execution issued, the levying whereof gave him authority to receive the same; and that such court may, upon motion of the person to whom it is payable, after the obligor hath failed in the performance of the condition thereof, award an execution thereon; but neither the said act of assembly or congress, nor any other act of assembly or congress, or part of the common law, doth give such power to any other court; and the said defendant avers, that it appears on the face of the notice grounding the plaintiff's motion, that the execution whereon the same was taken, was issued from the office of the United States for the fourth circuit, in the eastern Virginia district, where the judgment ground-

ing the same is there said to have been obtained; and 2d. Because *that court doth not now exist, and this honorable court is a different court from that court; 3d. That the act of congress passed on the 29th day of April 1802, entitled 'an act to amend the judicial system of the United States,' in so far as it annihilated the court of the United States for the fourth circuit, in the eastern Virginia district, wherein the said judgment was rendered, is unconstitutional and void, and doth not authorize this court to award an execution on the said bond on motion. All which matters and things the said defendant doth aver as causes why this honorable court ought not to award execution on the said bond, on the present motion, and is ready to prove the same as this honorable court shall direct; wherefore, they pray 'judgment whether the court here will take further cognisance of the said motion."

To this plea, there was a general demurrer, and joinder; and the court below being of opinion, that the plea was insufficient, gave judgment for the plaintiff. To reverse that judgment, the defendant Stuart sued out the present writ of error; and the errors assigned were, in substance, similar to those alleged in bar of the motion.

C. Lee, for the plaintiff in error.—The act of assembly of Virginia, which gives this summary remedy upon forthcoming bonds, allows the motion for judgment to be made only to the same court from which the execution issued. In this case, the execution issued from the court of the United States for the fourth circuit, in the eastern Virginia district, composed of Judges Key, Taylor and McGill. The motion was made to the court of the United States for the fifth circuit, in the Virginia district, holden by the Chief Justice of the United States.

This is not the same court from which the execution issued. The motion, therefore, in this court, was not regular, unless it be made so by the acts of congress of March 8th, 1802, c. 8, and 29th April, 1802, c. 31. The process in this case was summary, and the pleadings, although in *this instance they happen to be reduced to writing, are in fact *ore tenus*. A [*303 position will be taken, the direct reverse of that contained in the second point of the plea mentioned in the transcript of the record.

The court of the fifth circuit ought not to have taken cognisance of the motion; because the court of the fourth circuit did exist, and not because it did not exist, as alleged in the plea. If the acts of 8th March and 29th April 1802, are constitutional, then it is admitted, there is no error in the judgment; because, in that case, the courts ceased to exist, the judges were constitutionally removed, and the transfer from one court to the other was legal. But if those acts are unconstitutional, then the court of the fourth circuit still exists, the judges were not removed, and the transfer of jurisdiction did not take place. The legislature did not intend to transfer causes from one existing court to another. If, then, the courts still exist, the causes not being intended to be removed from existing courts, were not removed.

But we contend that those acts were unconstitutional so far as they apply to this cause. 1st. The first act (March 8th, 1802) is unconstitutional, inasmuch as it goes to deprive the courts of all their power and jurisdiction, and to displace judges who have been guilty of no misbehavior in their offices. By the constitution, the judges, both of the supreme and the infe-

rior courts, are to hold their offices during good behavior. So much has been recently said, and written, and published upon this subject, that it is irksome to repeat arguments which are now familiar to every one. There is no difference between the tenure of office of a judge of the supreme court and that of a judge of an inferior court. The reason of that tenure, to wit, the independence of the judge, is the same in both cases; indeed, the reason applies more strongly to the case of the inferior judges, because to them are exclusively assigned cases of life and death.

*304] *It is admitted, that congress have the power to modify, increase or diminish the power of the courts and the judges. But that is a power totally different from the power to destroy the courts, and to deprive them of all power and jurisdiction. The one is permitted by the constitution, the other is restrained by the regard which the constitution pays to the independence of the judges. They may modify the courts, but they cannot destroy them, if thereby they deprive a judge of his office. This provision of the constitution was intended to place the judges not only beyond the reach of executive power, of which the people are always jealous, but also to shield them from the attack of that party spirit which always predominates in popular assemblies. That this was the principle intended to be guarded by the constitution, is evident, from the contemporaneous exposition of that instrument published under the title of The Federalist, and written, as we all know, by men high in the esteem of their country. Federalist, vol. 2, No. 78. (*a*)

Mr. Lee also cited and read the speeches of Mr. Madison, in the convention of Virginia (Debates, vol. 1, p. 112), of Mr. Nicholas (vol. 1, p. 32, and vol. 2, p. 152), and of Mr. Marshall (in p. 125).

The words during good behavior cannot mean during the will of congress. The people have a right to the services of those judges who have been constitutionally appointed, and who have been unconstitutionally removed from office. It is the right of the people that their judges should be independent; that they should not stand in dread of any man who, as Mr. Henry said, in the Virginia convention, has the congress at his heels.

*305] *It is admitted, that the powers of courts and judges may be altered and modified, but cannot be totally withdrawn. By the repealing law, the powers of both are entirely taken away.

But the laws are also unconstitutional, because they impose new duties upon the judges of the supreme court, and thereby infringe their independence; and because they are a legislative, instead of an executive appointment of judges to certain courts. By the constitution, all civil officers of

(*a*) To show that such writings are to be regarded in forming the true construction of the constitution, he read from a newspaper what was said to be an answer from the President of the United States to an address from sundry inhabitants of Providence, in which the president is supposed to have said, "The constitution on which our Union rests, shall be administered by me according to the safe and honest meaning contemplated by the plain understanding of the people of the United States, at the time of its adoption; a meaning to be found in the explanations of those who advocated, not of those who opposed it; and who opposed it merely lest the construction should be applied which they denounced as possible. These explanations are preserved in the publications of the time, and are too recent in the memories of most men, to admit of question."

the United States, including judges, are to be nominated and appointed by the president, by and with the advice and consent of the senate, and are to be commissioned by the president. The act of 29th April, 1802, appoints the "present Chief Justice of the supreme court," a judge of the court thereby established. He might as well have been appointed a judge of the circuit court of the district of Columbia, or the Mississippi territory. Besides, as judge of the supreme court, he could not exercise the duties or jurisdiction assigned to the court of the fifth circuit, because, by the constitution of the United States, the supreme court has only appellate jurisdiction; except in the two cases where a state or a foreign minister shall be a party. The jurisdiction of the supreme court, therefore, being appellate only, no judge of that court, as such, is authorized to hold a court of original jurisdiction. No act of congress can extend the original jurisdiction of the supreme court, beyond the bounds limited by the constitution.

A party in this court has a right to have his cause tried by six judges. He has a right to an unbiased court, whether the whole six sit or not. A judge, having tried the cause in the court below, and given judgment, must be, in some measure, committed; he feels an anxiety that his judgment should be affirmed. The case of *Clark* v. *Nightingale*, 3 Dall. 415, will illustrate this principle. The suit was first tried before Chief Justice Ellsworth, whose opinion upon the merits was in favor of the plaintiff. A writ of error was brought, and the judgment reversed for error in pleading, and the cause remanded to be again tried. Judge Cushing held the court on the second trial, and his opinion also was in favor of the plaintiff upon the merits. A second writ of error was brought and tried in the supreme *court before Chief Justice Ellsworth, Judges Cushing, Paterson, [*306
Washington and Chase, and the judgment was reversed by the three last-mentioned judges, who made a majority of the court.

A degree of respect is certainly due to precedents and past practice. If it be said, that the practice from the year 1789 to 1801 is against us; we answer, that the practice was wrong, that it crept in unawares, without consideration and without opposition; congress at last saw the error, and in 1801 they corrected it, and placed the judicial system on that ground upon which it ought always to have stood. By the act of February 13th, 1801, the precedent was broken, so that now precedents are both ways. If there are twelve years' practice against us, there is one year for us. There has never been a judicial decision upon the subject. The time has now come when the true construction ought to be settled. If the construction is as we contend, then the court below had no jurisdiction. The power of congress to transfer causes from one court to another is admitted; but if the acts of March and April 1802, are totally unconstitutional, they are void; the causes have not been transferred, and the court of the fourth circuit still exists, with all its powers and jurisdiction.

Gantt, contrà.—This suit was originally instituted in the circuit court which existed under the law of 1789, and was transferred, by the act of February 13th, 1801, to the new circuit court by that act established. It was afterwards, by the act of 1802, re-transferred to the circuit court, under the act of 1789, so that if the transfer by the act of 1801 was constitutional, the re-transfer by the act of 1802 must be equally constitutional.

No error is relied on but the want of jurisdiction. It is admitted, that congress have power to transfer the jurisdiction of causes from one inferior court to another; and therefore, the question whether they have the power
*307] to deprive a judge of his office, does not belong to this *case: it has nothing at all to do with it. But admitting, for the sake of argument, that congress have not the latter power, yet an act may be constitutional in part, and unconstitutional in part. Congress have an express power, by the constitution, to constitute, and from time to time to ordain and establish tribunals inferior to the supreme court. The tenure of office may be a restraint in part to the exercise of this power, but cannot take away altogether the right to alter and modify existing courts.

There are not more instances of independent decisions by the judges, in England, since they have become independent of the crown, than before; for before that time, we find, that judges have been sent to the tower for the independence of their opinions. The provision of the constitution respecting tenure by good behavior was not intended to protect the judge; but for the benefit of the people, that judges might, by the permanence of their offices, be always men of experience and learning. It is admitted by Mr. Lee, that if any power remained in the circuit court of the fourth circuit, the act was constitutional. But even if the whole powers were taken away, yet new powers and new duties might have been given. It does not follow, that because the court is abolished, the office of the judge is taken away. And if the act of 1802 is unconstitutional, because it abolishes the circuit courts then existing, the act of 1801 is equally so, by abolishing the old circuit courts. But, as was before observed, there is no necessity or wish to go into this argument; it is not pertinent to the present cause; for the only question here is, whether congress had power to transfer the cause from the fourth to the fifth circuit court, and not whether the fourth circuit court, or its judges, are still in existence.

As to the objection that the law of 1789 is unconstitutional, inasmuch as it gives circuit powers, or original jurisdiction, to judges of the supreme court; it is most probable, that the members of the first congress, many of
*308] them having been members of the convention which *formed the constitution, best knew its meaning and true construction. But if they were mistaken, yet the acquiescence of the judges, and of the people, under that construction, has given it a sanction which ought not now to be questioned.

Lee, in reply.—The acts of 1801 and 1802 were not alike, in abolishing the circuit courts. The former, in abolishing the then existing courts, did not turn the judges out of office, nor in any degree affect their independence; but the act of 1802 strikes off sixteen judges, at a stroke, drives them from their offices, and assigns their duties to others. An error was committed in 1789. That act was unconstitutional, but the act of 1801 restored the system to its constitutional limits. We now contend for the pure construction of the constitution, and hope it will be established, notwithstanding the precedent to the contrary.

March 2d, 1803. The Chief Justice, having tried the cause in the court below, declined giving an opinion.

Stuart v. Laird.

PATERSON, J. (Judge Cushing being absent on account of ill health), delivered the opinion of the court.—On an action instituted by John Laird against Hugh Stuart, a judgment was entered in a court for the fourth circuit, in the eastern district of Virginia, in December term 1801. On this judgment, an execution was issued, returnable to April term 1802, in the same court. In the term of December 1802, John Laird obtained judgment at a court for the fifth circuit, in the Virginia district, against Hugh Stuart and Charles L. Carter, upon their bond for the forthcoming and delivery of certain property therein mentioned, which had been levied upon by virtue of the above execution against the said Hugh Stuart.

Two reasons have been assigned by counsel fer reversing the judgment on the forthcoming bond: 1. That as the bond was given for the delivery of property levied on by virtue of an execution issuing out of, and returnable to, a court for the fourth circuit, no other court could legally *proceed upon the said bond. This is true, if there be no statutable provision to direct and authorize such proceeding. Congress have constitutional authority to establish, from time to time, such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the constitution to prohibit or restrain the exercise of legislative power. The present is a case of this kind. It is nothing more than the removal of the suit brought by Stuart against Laird, from the court of the fourth circuit to the court of the fifth circuit, which is authorized to proceed upon and carry it into full effect. This is apparent from the 9th section of the act entitled, "An act to amend the judicial system of the United States," passed the 29th of April 1802. The forthcoming bond is an appendage to the cause, or rather a component part of the proceedings. [*309

2d. Another reason for reversal is, that the judges of the supreme court have no right to sit as circuit judges, not being appointed as such, or, in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.

Judgment affirmed.

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