question has been solemnly settled. One legislature has taken cognisance of the construction given by the court, and has provided for the case, but another legislature has repealed that provision, and thereby given a subsequent legislative construction, or, at least, shown such a legislative acquiescence under the construction which this court formerly gave to the act, as is now conclusive.

At the request of the Attorney-General, the writ of error was dismissed.(*a*)

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*Hepburn & Dundas *v.* Colin Auld. [*321

Tender.

A tender must be unconditional; a tender, accompanied by a demand for a release, before delivery of what is tendered, is bad, unless justified by the express stipulation of the parties.

This was an action of debt, brought by Hepburn & Dundas against Colin Auld, in the Circuit Court of the district of Columbia, for the penalty of an agreement, dated 27th September 1799, between the plaintiffs, merchants of Alexandria, and the defendant, as agent for John Dunlop & Co., merchants in Glasgow.

The agreement recited, that whereas, the plaintiffs had had extensive dealings with Dunlop & Co., in the course of which the former appeared to have fallen in debt to the latter, by the accounts by them exhibited, some articles of which accounts having been objected to by the plaintiffs, they had agreed with the said agent, to submit all matters in dispute to arbitration. And whereas, the plaintiffs, by an article of agreement between them and a certain William Graham, dated 12th March 1796, did covenant with him (for the consideration of $18,000 to be by him paid to him, at certain times in the said article expressed) to convey to him, the said Graham, his heirs and assigns, 6000 acres of land on the Ohio; but the said Graham failing to make the first payment upon the day stipulated, the plaintiffs considered the said contract as thereby annulled, and in consequence thereof, brought an ejectment to recover possession of the land, which they had permitted Graham to occupy, which ejectment had been abated by his death, and another ejectment had been, or was about to be, commenced.

The indenture then witnessed, that each party covenanted to furnish their accounts to the arbitrators, so as to enable them to make their award by the 1st day of January then next, being the time stipulated by the arbitration bonds. That Auld covenanted that he, or the agent of Dunlop & Co., would, on the 2d day of January then next, accept and take of the plaintiffs the amount *which should be awarded to Dunlop & Co., in [*322
bills of exchange of a certain description, or in any money which might by law be a legal tender; and on such payment being made, in either way, give the plaintiffs a full receipt and discharge of all claims and demands of Dunlop & Co. against them. That the plaintiffs covenanted, that in case

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(*a*) Congress being in session at this time, an act was introduced and passed, containing a clause similar to the 33d section of the act of 13th February 1801, respecting writs of error and appeals in cases of equity and maritime jurisdiction, &c. (2 U. S. Stat. 244).

they did not, on the 2d of January then next, pay to the defendant, or the then agent of Dunlop & Co., the amount of the award, in bills or money, they would, on that day, assign and transfer to the defendant, or the then agent of Dunlop & Co., in the fullest manner, the aforesaid contract entered into by them with Graham, for the sale of the land, and all and every interest, right and claim, of whatever kind, of the plaintiffs, arising out of and from the said contract; with full power to proceed and act thereupon and therein, as the defendant or the then agent of Dunlop & Co. should think proper; and that they would, for that purpose, give him a full and ample power of attorney, irrevocable, to pursue in their names, if necessary, all legal ways and means, either to recover the possession of the land, or to enforce payment of the $18,000 and interest, whichever of the measures he might be inclined to pursue; and that in case they should so assign the said contract, they would not thereafter in any manner interfere with the measures he might choose to pursue, either for the recovery of the lands, or to enforce the payment of the purchase-money. And that whenever the ejectment should be judicially determined, or settled by compromise, they would convey the lands to the person who, by such determination or compromise, should be acknowledged to be entitled to them. And that in case the said purchase-money, which, with interest to the said 2d day of January, would amount to $21,112, should not prove sufficient to satisfy the award, they would, on that day, pay the balance to the defendant, or the then agent of Dunlop & Co.

And the defendant covenanted, that in case it should not be convenient for the plaintiffs to pay the amount of the award in bills or money, on the 2d day of January, he would accept and take an assignment of the said Graham's contract, at $21,112, towards the discharge of the said award; and that in case it should exceed the amount of the award, he would, at the time *323] of making the said *assignment, pay them the excess. For the faithful performance of these articles, the parties bound themselves to each other in the penal sum of $45,000. The sum of $21,112 exceeded the amount of the award, by the sum of 494*l.* 6*s.* 7*d.*, Virginia currency. For the non-payment of this excess, the present action was brought by the plaintiffs, after having tendered an assignment of Graham's contract and a power of attorney, which was refused by the defendant. There were four issues in fact, but to the 5th plea, there was a general demurrer and joinder. Judgment below being in favor of the defendant upon this demurrer, the issues in fact were not tried, and the plaintiffs sued out the present writ of error.

The fifth plea was as follows: "and the said defendant, by virtue of the act, &c., and by leave of the court, for further plea, protesting that the said deed of assignment of the contract aforesaid, with the said William Graham, so as aforesaid pretended to have been executed, sealed and tendered by the plaintiffs, on the 2d day of January, in the year 1800, was not a good, lawful and sufficient assignment thereof, according to the true intent and meaning of the said articles of agreement between the plaintiffs and defendant, he, the defendant, saith, that the said deed of assignment was not tendered to him unconditionally, but upon the condition that the said John Dunlop & Co. should first sign, seal and deliver, by the said Colin Auld, their attorney, on the same day, unto the plaintiffs, a release and acquittance of all the claims and demands of the said John Dunlop & Co. against the said plaintiffs; and the said defend-

ant then and there refused to comply with the said condition, and the said plaintiffs then and there refused to deliver the aforesaid deed of assignment to the said defendant, unless he complied with the condition aforesaid; and this he is ready to verify; wherefore, he prays judgment, whether the plaintiffs their action aforesaid against him ought to have and maintain," &c.

Swann, for the plaintiffs in error.—It will be perceived by the agreement, that the plaintiffs had the choice of three modes of paying the award; *1. By bills of exchange; 2. By cash; and 3. By an assignment of Graham's contract. It is true, that the words are, that the defendant [*324 will take the assignment "towards" the discharge of the award. But the reason of using the word "towards" is plainly, because the amount of the award not being then known, it remained an uncertainty, whether the the $21,112 of Graham's purchase-money would be sufficient in amount to meet and satisfy the award. The word towards, therefore, was not used to exclude the idea that the assignment should be a complete discharge of the award, in case the award did not exceed the purchase-money; but only to prevent Auld from being compelled to accept the assignment in full discharge of the award, if the purchase-money should fall short of the sum awarded. 1st. We contend, that the assignment was a good and sufficient assignment, within the meaning and intention of the agreement. 2d. That the plaintiffs had a right to a release of all demands, upon tender of the assignment. 3d. That the plaintiffs had a right to make such release a condition of their tender.

I. It is no objection to the assignment, that it expresses the consideration to be a release of all demands from Dunlop & Co.; for if the plaintiffs had a right to such a release, it was proper to state it, as part of the consideration. 2. The preamble of the assignment states the defendant to be agent of Dunlop & Co., and the *habendum* is to the said Colin Auld, which refers to the premises where he is styled agent; so that it is, in fact, as it ought to be, to Colin Auld, agent of Dunlop & Co.

II. As to the right of the plaintiffs to insist upon a release of all demands. 1st. It is due, by the terms of the contract. 2d. If not due by the terms of the contract, yet it was due of common right.

*1. It is due by the contract. Every contract ought to have a [*325 reasonable construction, according to the intention of the parties. Such a release is expressly agreed to be given in case of payment by bills or cash. A payment by the assignment was as complete a discharge of the award, as payment in either of the otner modes. The discharge of the amount of the award, and not the particular mode of discharge, was to be the consideration of the release: and having stipulated to give it, in the one case, it ought to be presumed to be the intention of the parties, that it should be given, in the other, unless there can be shown some difference in the consideration, or some reason operating upon the mind of the defendant which might have induced the omission of an express agreement to that effect. By agreeing to give it, in case of payment by cash or bills, he allows that the plaintiffs have a right to such a release, upon discharge of the award. The submission was of all demands; a discharge of the award, then, was a discharge of all demands; and, therefore—

2. Such a release was due of common right. A man has a right to de-

mand evidence of his payment, and of the claims which are thereby satisfied. It is true, he may call witnesses, but they may die. If a man pay money upon a specialty, he has a right to written evidence of the payment. Shep. Touch. 348.

III. The plaintiffs had a right to make the release a condition of the tender. All things were to be done on the same day: they were concurrent conditions, to be performed at the same time. If one party is ready and willing, and offers to perform, and the other will not, the first is discharged from the performance of his part, and may maintain an action against the other. *Goodisson* v. *Nunn*, 4 T. R. 761; *Jones* v. *Barkley*, 2 Doug. 684.

Such a release could not operate to the injury of the defendant, or of Dunlop & Co. It would not have released any right accruing under the agreement, as was decided in the case of *Thorpe* v. *Thorpe*, 1 Ld. Raym. 235. The covenants of the plaintiffs respecting the lands and the ejectment
*326] are all future and contingent, and therefore, *could not have been released by a release of all demands. Nor was the penalty a present duty. It could only be incurred by a future breach, and therefore, is not like a bond to pay a smaller sum at a future day. Shep. Touch. 339, 340. Bull. N. P. 160. *Carthage* v. *Manby*, 2 Show. 90; Esp. N. P. 307; *Hancock* v. *Field*, Cro. Jac. 170; *Porter* v. *Philips*, Ibid. 623; *Hoe* v. *Marshall*, Cro. Eliz. 580; *Hoe's Case*, 5 Co. 70 *b*.

E. J. Lee, contrà.—The assignment in this case tendered, was not good, because it stated part of the consideration to be a release of all demands, which the defendant was not bound to give; and if he had accepted of the assignment, in that form, it would have been an acknowledgment that he was bound to give it. Whether Auld might with safety have given such a release, is not now the question; he has not contracted to give it, and it is not for us to inquire, why he did not. He was unskilled in the law, and he might have supposed that in some way or other it would embarrass the claims of Dunlop & Co. against the plaintiffs, for a future performance of their covenants respecting the land.

2. The assignment is made to the use of Colin Auld, and not to the use of Dunlop & Co. The rents and profits are to be received to his use, and not to that of his constituents. In the operative parts of the assignment he is not named as agent.

3. The power of attorney is insufficient, because it does not give full power to act therein, as the defendant should think proper, and does not authorize him to compromise the ejectment.

But the principal question is, whether the defendant was bound to give a release of all demands. The plaintiffs only tendered the papers, but did not deliver them, so that the defendant could not see whether they were correct. They were to do the first act: they were first to make and deliver
*327] the assignment before they *were entitled to the balance: the words of the agreement plainly show this. The agreement does not require him to give such a receipt, in the case of payment by the assignment of Graham's contract. It would certainly have been as easy to have covenanted to give such a release in that case, as in the event of payment by bills or cash. The not doing so, in the former case, and the express agreement for it in the latter cases, creates the strongest presumption that it was

not intended by the parties to be given in the former case; and the intention of the parties constitutes the agreement.

Admitting that, by common right, they were entitled to a receipt, it could only be a receipt for the assignment itself. There was at least a doubt whether such a release as was demanded would not have discharged the penalty annexed to the contract, or at least, the covenants respecting the land. A release of all demands is certainly a release of all present duties, and it is said, in *Altham's Case*, 8 Co. 154 *a*, that a release of all demands is a release of all causes of demand.

As the plaintiffs have demurred to our plea, we have a right to look into their declaration; to which there are two objections. 1st. That it contains no *profert* of the award, which is the foundation of their action; and 2d. That it does not aver the difference between the amount of the award and the purchase-money due upon the contract tendered. The declaration only states that the arbitrators awarded the sum of 4379*l.* 9*s.* $0\frac{3}{4}$*d.*, sterling, to be due from the plaintiffs to Dunlop & Co., and that the plaintiffs having elected to assign Graham's contract in discharge of the award, tendered an assignment thereof, together with a power of attorney, according to the true intent and meaning of the agreement, in consequence whereof, the plaintiffs then and there became entitled *to have and receive of the said defendant the sum of 494*l.* 6*s.* 7*d.*, Virginia currency, which said sum [*328
the defendant, although required, had not paid, whereby action accrued to the plaintiffs to have $45,000, the penalty of the articles of agreement.

C. Lee, on the same side.—The *protestando* in the plea saves all objections to the sufficiency of the assignment; and we conceive the objections which have been stated are substantial.

But the principal question is, whether any release at all could be demanded. The contract does not, in any of the cases of payment of the award, require a release; which is a technical word, and means an instrument under seal. But we do not insist upon this distinction, as the law is full in our favor upon the other points. We might safely admit, that the defendant was bound to give a receipt for the assignment; but even that is not due, under the contract, nor of common right. However, such a receipt was not demanded, and therefore, it is unnecessary to inquire whether the defendant was, or was not, bound to give it.

The release required would have discharged the penalty of this agreement. Viner, tit. Release, P. pl. 18. It is not contended, that a release contained in an instrument, will release demands growing out of that instrument; this was the case of *Thorpe* v. *Thorpe*. *Hoe's case* does not apply to the present; that was a case of mere possibility of a demand. The covenant of the plaintiffs not to interfere with the ejectment, was a present duty.

This is a case of construction only, and the only question is, what was the intention of the parties. If the deed of assignment was not a proper one, or the release demanded was such a one as the defendant was not bound to give, the plea is good, and the judgment must be affirmed.

Mason, in reply.—All the instruments are to be taken together. *Crop* v. *Norton*, 2 Atk. 74. Through the whole, it appears, that what *the [*329
plaintiffs are bound to do, the defendant was bound to receive. The payment by the assignment was not more for the benefit of the plaintiffs

than of the defendant. If they did not, on the 2d of January, pay in bills or cash, they were absolutely bound to assign Graham's contract ; and the defendant might then refuse the bills or cash, and insist on the assignment ; and a court of chancery would have compelled a specific assignment, if they had refused. The discharge of the award by the assignment, was the same thing as the discharge by bills of exchange or cash. It would have been a complete discharge of the award, and there is no reason why he should not give a release as well in the one case as the other.

It is alleged, that the release would have discharged the other covenants, and the penalty of the agreement. But the case cited from Viner shows that the covenants would not have been discharged by the release, nor would it have discharged the penalty. The covenant not to interfere was not a present duty ; the covenant of the plaintiffs is, that after the assignment they would not interfere. But a release of all demands does not discharge a covenant, before it is broken ; until that time, it is no demand. The same observation applies to the penalty; it is not a present duty, until a breach of the covenant. A bond in the penalty of 200*l.* to pay 100*l.* at a future day, is a present duty. But in a bill penal, the penalty is not a duty until after the day appointed for the payment of the smaller sum. The difference in declaring upon the two instruments shows their different nature. On a bond, you only declare that he bound himself in the penalty ; and you take no notice of the condition. But on a bill penal, you declare that the defendant having failed to pay the smaller sum, an action has accrued to recover the penalty. To support these positions, he cited Esp. N. P. 307; Bull. N. P. 166 ; *Hancock* v. *Field*, Cro. Jac. 170; *Tyman* v. *Bridges*, Ibid. 300 ; *Porter* v. *Philips*, Ibid. 623 ; *Thorpe* v. *Thorpe*, 1 Ld. Raym. 662 ; and *Hoe* v. *Marshall*, Cro. Eliz. 579.

The plaintiffs having offered to perform their part of the agreement, are
*330] entitled to their action. Esp. N. P. *284 ; *Jones* v. *Barkley*, 2 Doug. 684 ; *Goodisson* v. *Nunn*, 4 T. R. 761.

As to the *protestando*, it is only an estoppel, or, as Lord Coke says, it is an exclusion of a conclusion. It does not put in issue the validity of the assignment ; but if it did, the objections are not well grounded. Whether the release ought to have been mentioned as part of the consideration, depends upon the question whether the defendant was bound to give such a release ; and the objection that the assignment is made to Colin Auld, and not to Colin Auld, as agent of Dunlop & Co., is not grounded in fact : for in the preamble of the assignment, he is named as agent for Dunlop & Co., and throughout the residue of the instrument, he is called the said Colin Auld, which refers back to the premises, to show in what capacity he was to take the assignment. In the premises, a complete interest is conveyed to Auld, as attorney in fact of Dunlop and Co., and the *habendum* cannot, in this case, control the premises. 2 Bl. Com. 298.

February 28th, 1803. The Chief Justice, after stating the case, delivered the opinion of the court.—To entitle themselves to the money for which this suit was instituted, it is incumbent on the plaintiffs, to show that they have performed the very act, on the performance of which the money became payable ; or that they are excused by the conduct of the defendant for its non-performance. The act itself has not been performed : but a ten-

der and refusal is equal to a performance; and it is contended, that there has been such a tender and refusal in this case.

The pleadings show that the tender was not unconditional; but the plaintiffs insist, that the condition, annexed to the tender, was such as they had a right to annex to it, and on their correctness in this opinion, depends the judgment now to be rendered. The plea does not contest the sufficiency of the deed of assignment and power of attorney, which were tendered; *and consequently, no question concerning their sufficiency can arise [*331 in the present case. The only cause relied on, as doing away the operation of the tender, is, that it was made on condition that a release of all the claims and demands of the said John Dunlop & Co., on the said Hepburn & Dundas, should first be signed, sealed and delivered to them by Colin Auld.

The only question in the case is, whether Hepburn & Dundas had a right to insist on this previous condition; and it is admitted, that this question depends entirely on the agreement of the 27th of September 1799. That an acquittance should be signed, sealed and delivered, before the act itself was performed, which entitled the party to such acquittance, is a mode of proceeding very unusual, and which certainly could only be rendered indispensable by express stipulation. There is in this case no such express stipulation. If the payment had been made in bills or money, the release of all the claims and demands of John Dunlop & Co. against them, was to have been given, not previous thereto, but upon receiving such payment. If, then, as has been argued, the deed of assignment and power of attorney are substituted for the payment in money, or in bills, and to be made on the same conditions on which payment in either of those articles was to have been made, yet there could exist no right to demand a delivery of the receipt, before the payment. If we inspect those covenants which relate to the deed of assignment of Graham's contract, we find no stipulation respecting a release of any sort. The agreement is, that he will receive the said deed of assignment at $21,112, towards the discharge of the award, but he does not engage to give any release whatever.

It is contended, that upon the general principles of justice and of law, Hepburn & Dundas had a right to the evidence of the payment they had made, without expressly contracting for such evidence; and this is true, so far *as to entitle them to a receipt for the deed and power delivered; [*332 but neither the general principles of justice, nor of law, give Hepburn & Dundas a right to insist upon any release as a previous condition.

The case has been argued at bar as if the condition of the tender of the deed of assignment and power of attorney had been a release of all claims and demands, to be given at one and the same time with the delivery of such deed and power, but this is not the case as presented in the pleadings. According to the plea, Hepburn & Dundas required the delivery of the release, as a condition precedent to their delivery of the deed of assignment. This demand seems not to have been countenanced by the contract; and of consequence, the tender was not such as it was incumbent on Hepburn & Dundas to have made, in order to entitle themselves to the money for which they have brought this suit.

Judgment affirmed, with costs.