Marine Insurance Company of Alexandria *v.* James Young.

Assumpsit.—Verdict.—Former recovery.

Assumpsit will not lie upon a policy of insurance, under the corporate seal, unless a new consideration be averred.[1]

Quære? Whether an aggregate corporation can make an express *assumpsit*, unless specially authorized by statute?

Whether an action on a policy will lie against this company, in their corporate name? Or whether the declaration must not be against the president alone?

A verdict will not cure a mistake in the nature of the action.

A judgment in *assumpsit* upon a policy, is a bar to a subsequent action of covenant on the same policy.

After verdict, every *assumpsit* in the declaration is to be taken as an express *assumpsit*.

This was an action brought in the Circuit Court of the district of Columbia, by James Young against the Marine Insurance Company of Alexandria, upon a policy of insurance on the brigantine Liberty, at and from Anacabessa, in Jamaica, to a port in the United States.

The declaration stated, that "James Young complained of the Marine Insurance Company of Alexandria in custody, &c., of a plea, for that whereas," &c., setting forth the policy in the usual form. "In witness whereof, the president and directors of the said Marine Insurance Company
*333] of *Alexandria, by William Hartshorne, their president, subscribed the sum assured, and caused the common seal, and the attestation of their secretary, to be affixed to the said presents." It then alleged the property of the vessel to be in the plaintiff, and that it was of the value of $5000, the sum insured. That the said Marine Insurance Company, in consideration of the premium to be paid by the plaintiff, "did undertake and agree, by their policy aforesaid, subscribed by their president aforesaid, with the proper hand and name of the said president thereto affixed, to assure the said vessel, &c., at the said sum of $5000, against the risks specified in the said policy." That the plaintiff had paid the premium; and that the vessel was totally lost, of which loss the company had notice; "by means of which said premises, the said Marine Insurance Company of Alexandria became liable to pay to the said plaintiff the said sum of $5000, and being so liable, the said Marine Insurance Company, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, assumed upon themselves, and to the said plaintiff then and there faithfully promised," to pay him the said sum of money, when thereunto afterwards required.

There was another count, stating, generally, that in consideration that the plaintiff would pay the premium of four per cent. upon the value of the vessel, the insurance company "undertook and agreed" to insure, &c., at the sum of $5000, against sea risks only, at and from Anacabessa, in Jamaica, &c., to a port in the United States; that he had paid the premium, and that the vessel was stranded and lost, of which the insurance company had notice; by means of which said premises, the said company became liable, &c., and so being liable, assumed upon themselves, and promised to pay, &c. Nevertheless, the said defendants, not regarding their several promises and undertakings aforesaid, but contriving, &c., refused to pay, to the damage of the plaintiff $10,000. Plea *non assumpserunt*, and issue.

[1] See January *v.* Goodman, 1 Dall. 208, and notes to that case. Also, Fresh *v.* Gilson, 16 Pet. 327.

Verdict for plaintiff on the first count, and for defendant on the other count. Motion in arrest of judgment; "because the first count is in *assumpsit* upon a sealed instrument set forth in the said count, as containing the contract whereupon *the action aforesaid is brought." Judgment for the plaintiff; to reverse which judgment the insurance company obtained the present writ of error; and the errors assigned were, 1. That *assumpsit* is brought upon a sealed contract. 2. That the Marine Insurance Company of Alexandria, being an aggregate corporation, is sued upon *assumpsit* instead of upon covenant. 3. That the judgment upon the verdict aforesaid ought to have been arrested. 4. That according to the act of incorporation, the action aforesaid, if maintainable at all, should have been commenced and prosecuted against William Hartshorne, President of the Marine Insurance Company." [*334

E. J. Lee, and *C. Lee*, for the plaintiffs in error. *Simms* and *Swann*, for the defendant.

For the *plaintiffs* in error, it was said.—1st. That the declaration states the policy to be under the common seal, and the law is clear that *assumpsit* will not lie upon a sealed instrument: the action ought to have been covenant and not case. The difference is, that when the specialty is only inducement to the promise, and a new consideration intervenes, *assumpsit* will lie; but where the only contract, which is stated as the cause of liability of the defendant, is fully and entirely contained in the specialty, and no circumstance is added, but such as is provided for by the specialty, there it will not sustain a general *indebitatus assumpsit*, which is the present form of action.

The declaration states that the insurance company, by their policy, under the common seal, insured $5000 on the brig, and that the vessel was lost, whereby the company became liable, and, being so liable, assumed to pay. *This is the whole substance of the declaration. No new consideration is alleged. [*335

The whole ground of liability of the plaintiffs in error is their policy under their common seal: and in such a case, the action must be covenant or debt. Marshall on Insurance, 596; Park 396. "The act of parliament, 6 Geo. I., c. 18, by which the two insurance companies (of England) were erected, ordered that they should have a common seal, by affixing which all corporate bodies ratify and confirm their contracts. Hence, a policy made by either of those companies is a contract under seal; and if the contract is broken, the action must be debt or covenant."(*a*) *Foster* v. *Allanson*, 2 T. R. 479; and the cases there cited. In that case, there was a new cause of action, and a separate, independent consideration. *Brett* v. *Read*, Cro. Car. 343; 1 Bac. Abr. 164. In the case of *Baird and Briggs* v. *Blaigrove*, in the court of appeals of Virginia, 1 Wash. 170, there was a subsequent new consideration and parol agreement expressly proved, and upon that ground the court decided that *assumpsit* would lie. See *Taliaferro* v. *Robb*, 2 Call 258. The case of *Pelly* v. *Governor and Company of the Royal Exchange Assurance*, 1 Burr. 341, is an action of covenant upon a policy; so is the

(*a*) By the 11 Geo. I., c. 30, § 43, which recites the inconveniences resulting from the necessity of the policies of these two companies being under seal, by reason of their being corporate bodies, they are authorized to plead generally *nil debent*, and to give the special matter in evidence, &c.

case of *Worsley* v. *Wood*, 6 T. R. 710; and *Tarleton* v. *Staniforth*, 5 Ibid. 695. *Assumpsit* will not lie upon a specialty. 1 Esp. N. P. 95; *Walker* v. *Witter*, 1 Doug. 6; *Buckingham* v. *Costendine*, Cro. Jac. 213; *Bulstrode* v. *Gilburn*, 2 Str. 1027–8; *Bennus* v. *Guyldley*, Cro. Jac. 505; *Dartnal* v. *Morgan*, Ibid. 598; *Holme* v. *Lucas*, Cro. Car. 6; *Foster* v. *Smith*, Ibid. 31; *Reade* v. *Johnson*, Cro. Eliz. 242; 1 Roll. Abr. 8; *Green* v. *Harrington*, Hutt. 34; *Pyers* v. *Turner*, Cro. Eliz. 283.

If this action is sustainable in law, then the rule requiring a plaintiff to state in his declaration his cause of action will be useless. The reason of that rule is, to ascertain whether the contract is under seal or not. Bull. N. P. 128. And if the judgment of the court below is *correct, an ac- *336] tion of *assumpsit* may be maintained upon a bond, or any other sealed instrument. The notice stated in the declaration is what the plaintiff below was bound to give, because the company were not liable, by their covenant, to pay, until proof of the loss was produced, and adjustment thereof made. This is only one of the facts necessary to produce a liability, under the covenant itself, and not any new consideration, nor is it stated as such in the declaration. The declaration does not say, "in consideration whereof," but simply, "so being liable," assumed to pay: so that the *assumpsit* alleged, is nothing more than the very agreement contained in the policy.

2d. An action of *assumpsit* upon an express contract, will not lie against an aggregate corporation. They can do no valid act, but by their common seal, by which alone the union of the wills of the several members can be testified; and the affixing of the seal makes it a covenant. Perhaps, an exception to this rule might be made by the act which creates such an aggregate body politic; but here is no such exception made as will apply to the present case. Marshall on Insurance, 596.

3d. If any action is maintainable upon this policy, it ought to have been brought and prosecuted against the president of the company, and not against the body politic.(*a*) The words of the act, which incorporates the company (Acts of Assembly of Virginia, 1797, c. 20, §§ 9, 11) are "that all policies shall be signed by the president, or, in case of his inability to attend, by the president *pro tempore*, and countersigned by the secretary." § 11. "That in case any action shall be prosecuted upon any policy so subscribed, *337] the same shall be brought against *the president subscribing the same, or his successor in office; and all recoveries had in such action or actions shall be conclusive on the company, so far as to render the stock of the company liable, and no further."

Although the 6th section of the same act enables the company to sue and be sued by their corporate name, yet, as the subsequent sections prescribe the manner of making policies, and the mode of proceeding in actions upon them, the latter sections must be considered as so far restricting the general expressions of the former. General words in one clause of a statute may be

(*a*) The *capias ad resp.* in this case was against "William Hartshorne, President of the Marine Insurance Company of Alexandria." The declaration was against the company in their corporate name. This form of proceeding, by the better opinion, seemed to be correct. By the form of proceedings in Virginia, which are in some respects similar to those in the king's bench in England, the *capias* is not considered as any part of the record of the action, which is supposed to commence upon the filing of the bill, or declaration.

restrained by particular words in a subsequent clause of the same statute, and the whole ought to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant. 4 Bac. Abr. 645.

The declaration is bad, in stating the body politic to be in custody of the marshal. 1 Bac. Abr. 507.

4th. If it should be said, that this declaration is good, after verdict; the answer is, that the verdict will not cure a declaration which shows that the plaintiff is entitled only to an action of a different nature. The title is not defectively set forth, because every fact is stated, which shows that the plaintiff is entitled to an action of covenant. A mistake in the nature of the action, is not cured by the statute of *jeofails*. In all the cases before cited, the question as to the form of action came on, upon motion in arrest of judgment, and it is not even hinted, that the error was cured by verdict. *Foster* v. *Allanson*, 2 T. R. 479; *Baird* v. *Blaigrove*, 1 Wash. 170. No *assumpsit* can be presumed, after verdict, to have been proved on the trial, but that which is alleged in the declaration. *Spieres* v. *Parker*, 1 T. R. 141.

A verdict will not aid a case, where the gist of the action is omitted. *Avery* v. *Hoole*, Cowp. 825. Nor does the clause of the Virginia statute of *jeofails*, which states that a verdict shall cure the omission of the averment of any matter, without proving which the jury ought not to have given such a verdict, extend to a case where the declaration omits to state the ground of the *assumpsit*. * *Winston* v. *Francisco*, 2 Wash. 187; *Vass* v. [*338
Chichester, 1 Call 98, 101–2; 4 Burr. 2455; *Rushton* v. *Aspinal*, 2 Doug. 654 (679). A recovery in this action would be no bar to a recovery in an action of covenant for the same loss. *Vass* v. *Chichester*, 1 Call 102; 4 Bac. Abr. 14; *Holme* v. *Lucas*, Cro. Car. 6.

For the *defendant* in error, it was contended—1st. That this policy is not a specialty. 2d. If it is a specialty, yet there was a subsequent *assumpsit* upon a new consideration. 3d. That if it be a specialty, and no new promise sufficient to support an action of *assumpsit*, yet the declaration is a good declaration in covenant, especially, after verdict.

1st. The declaration does not declare on this policy, as upon a deed. It does not say, that the company covenanted by their deed; but only that Young did, by a policy of insurance, subscribed and attested as hereinafter mentioned, make insurance, and cause himself to be insured, lost or not lost, &c., upon the body, &c., of the brigantine Liberty, &c. And so they, the assurers, were contented, and did thereby promise and bind themselves to the assured, for the true performance of the premises, confessing themselves paid the consideration, &c. In witness whereof, the president and directors of the said Marine Insurance Company of Alexandria, by William Hartshorne, their president, subscribed the sum assured, and caused the common seal and the attestation of their secretary to be affixed to the said presents, in the town of Alexandria, on the said 17th day of December 1800. The plaintiff then avers, that in consideration of the premium, &c., they did undertake and agree, by their policy aforesaid, subscribed by their president aforesaid, with the proper hand and name of the said president thereto affixed, to assure the said vessel, at the sum of $5000, &c. There is no *profert* of the policy, as of a deed. In fact, it is not a deed. To make it a deed, it must be sealed with the intent to make a deed, which would be contrary to their

act of incorporation: the company had no power to make a policy under seal.

The act prescribes the mode by which they shall make policies; *339] *which is only by the signing of the president and countersigning by the secretary. Although there are not negative words, by which other modes are expressly prohibited, yet the saying that a thing shall be done in one manner, is an implied negative of all others. The president and three of the directors are empowered by the act to make insurance, but the policies must be certified in a certain manner: they have no right to bind the company by a policy under seal. They have no right to use the common seal for any purpose, unless particular'y empowered by the constitution or by-laws of the company. If the company have improperly put a seal to the instrument, which the act of incorporation intended should be a simple contract, and not a specialty, it is their own act, and they have no right to complain. But shall it be permitted for the Marine Insurance Company to say, that by their own act, contrary to law, they have deceived the plaintiff below, and therefore, he shall not recover in this form of action? After having defeated him in this action, and driven him to bring an action of covenant, what will prevent their turning round, and saying that this policy is not a specialty? The company had no power to make a policy under seal, or if they had, the seal has been affixed by persons having no authority from the company, or perhaps, by mistake.

The objection does not go to the merits of the cause. If there was an error, it was beneficial to the company, inasmuch as it was a relinquishment of strict right on the part of the plaintiff below, and enabled the company to make their defence with much less risk, as it enabled them to give in evidence, on the plea of *non assumpsit*, those facts which must have been specially pleaded to an action of covenant. The intention of the legislature in prescribing the mode of making policies evidently was, that they should not be specialties, but only simple contracts, so as to avoid the necessity of special pleading. If the principle be correct, that the company cannot make a policy but under seal, the consequence will be extremely mischievous to their interests. They will be always involved in the intricacies of special pleading, and the merits of the case will be often lost in the subtlety of legal distinctions.

Who has the power of using the common seal? Not the president alone, *340] nor any number of the directors, but *the company only. But the declaration does not state this to be the seal of the company, but the seal of the secretary; the words are, "have caused the common seal and attestation of the secretary to be affixed."

2d. But if the policy is a specialty, yet there is a sufficient *assumpsit* alleged in the declaration to support this action. The action does not depend only upon the facts set forth in the policy. The declaration states other facts, such as the notice to the company, the proof of the loss, and an express *assumpsit* to pay. These are considerations abundantly sufficient to support the action. If the plaintiff has two remedies, he may take which he pleases. A judgment in this case would be a bar to an action upon the covenant. (*a*)

(*a*) The court said, there could be no doubt of that, if the declaration sufficiently showed it to be the same cause of action.

It is a strange position, that *assumpsit* will not lie in any case, against an aggregate body politic, upon an express contract. Such a corporation cannot act in any case, but by the intervention of agents. But by those, it may contract debts by simple contract, as well as by specialty. The East India Company have their agents all over the world, and there never was a question, whether such agents could make promises binding on the company, pursuant to powers given by the company for that purpose. By what law, are the banks authorized to bind themselves by promissory notes? Yet the gentlemen will not say, that they are not liable upon their notes. *Rex* v. *Bigg*, 3 P. Wms. 319; s. c. 1 Str. 18; *Edie* v. *E. I. Company*, 2 Burr. 1216. Where the specialty is only inducement to the action, and upon facts growing out of the specialty an *assumpsit* is made, the action of *assumpsit* will lie. *Moravia* v. *Levy*, 2 T. R. 483. The declaration states the policy, the sailing of the vessel, the loss, notice to the insurers, and thereupon an express *assumpsit* to pay the sum of $5000. These new facts bring the case within the reason of the decision in the case of *Moravia* v. *Levy*. After *verdict, every *assumpsit* alleged in the declaration is to be taken as an express *assumpsit*. (*a*) [*341

3d. But if this policy is to be considered as a specialty, and there is no new consideration sufficient to support the *assumpsit*, yet this is a good declaration in covenant. It states the policy, and the facts which constitute a breach of the agreement and create a liability on the defendants below. That part which states an *assumpsit* may be rejected as surplusage, and the residue will make a good declaration in covenant. The want of *profert* is cured by the verdict. 2 Wils. 362. (*Quære?*) Nor will the issue of *non assumpsit* render the judgment erroneous. It has been held, that in an action of *assumpsit*, and not guilty pleaded, and issue, the judgment may be entered, for it is only mispleading, and the real merits may as well be tried on that issue as on any other. 4 Bac. Abr. 84.

It is not necessary that the action should be prosecuted against the president of the company. It could not be the intention of the legislature, that the private property of the president should be liable to satisfy a judgment upon a policy made on account of the company, and that he should be left to get his money back again from the company. By the act of incorporation, the joint stock only is liable. The expressions of the act warrant the practice in this case, of bringing the *capias* only against the president, and then declaring against the company: for it only says, that the action shall be brought against the president, and not that it shall be prosecuted against him to final judgment. The intention of the act could only be, to compel an appearance, and to give the president the power of entering an appearance in the name of the company. The act says that all such recoveries shall be conclusive on the company, so far as to render the joint stock liable, and no further.

The 6th section of the act renders the company liable to actions in their corporate name; and as the writ is no part of the record, and the company have appeared and pleaded, it is now too late for them to allege this for error. *They ought not to be permitted to take the chance of a trial, and when the merits have been found against them, come forward and [*342

(*a*) This was admitted by the Chief Justice.

say, they are not the proper persons against whom the suit ought to have been brought.

In *reply*, it was said, that the policy is in the usual form: a form which is generally used, whether the policy be under seal or not: and therefore, no argument can be drawn from the peculiar expressions of the instrument. The declaration states it to be under the common seal, which is a technical name for the seal of a corporation. The act which creates this company has no negative words, by which they are forbidden to make policies under seal, if they think proper. The clause which authorizes them to make a policy, by the signature of the president, without the common seal, was introduced for their benefit, so as to enable them to defend actions, without the necessity of that special pleading which often attends actions of covenant. The general maxim of law is, that every one may waive a provision introduced for his benefit. The act of incorporation says, that when any action shall be prosecuted upon such policy, the same shall be brought against the president who subscribed the same, or his successor in office, and all recoveries in such actions shall be conclusive on the company. Not only the *capias* must be against the president, but the declaration and judgment. How the judgment is to be satisfied, is not for us now to determine, nor is it important. The mode of recovery prescribed by the law must be pursued.

March 1st, 1803. THE COURT reversed the judgment, and ordered it to be arrested, because the action is a special action upon the case on the policy, and the declaration shows that the policy is a specialty.

The court seemed to be of opinion, that an action of covenant would lie upon it against the company, in their corporate name.

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*343] *ABERCROMBIE *v.* DUPUIS and another.

Averment of citizenship.

To give jurisdiction to the courts of the United States, the pleadings must expressly state the parties to be citizens of different states, or that one of them is an alien; it is not sufficient, to say that they reside in different states.

ERROR to a judgment of the Circuit Court for the district of Georgia. The plaintiffs below (or petitioners, as they are called in the record) "aver, that they do severally reside without the limits of the district of Georgia aforesaid, to wit, in the state of Kentucky, therefore, they have the right to commence their said action in this honorable court," &c.(*a*) The defendant is called Charles Abercrombie, of the district of Georgia, Esq.

It was assigned for error, that the circuit court had not jurisdiction of the cause, because it does not appear upon the record, that either of the parties is an alien, nor that the parties are citizens of different states. And for this error, the judgment was reversed, without argument.

THE COURT said, that the question had been decided, after full argument, in the case of *Bingham* v. *Cabot*, 3 Dall. 382, and they did not think proper to overrule that case.

(*a*) This averment followed immediately after the *ad damnum*, at the foot of the declaration.