The Government agent and commissioners took this view of these several claims, and but one argument was made in all of them, and that in the case of the brig Enterprise, and but one opinion delivered by the commissioners. As they disagreed, a second argument was made before the umpire.

The preparation of the claim of Pemberton, beyond the proofs of the interest of his company in the case of the Creole, was a very trifling matter; and even these proofs had been already furnished to this Government, at the time the appeal was made there for redress. And as it respects the questions of international law involved in these cases, they had been the subject of repeated discussion between this Government and Great Britain, and also in Congress, by some of the most distinguished statesmen and jurists of the country; and the preparation for the argument of the claim before the board of commissioners required little else than the labor of digesting and reproducing the principles and reasoning to be found in these discussions.

For the reasons above given, we are satisfied the agreement and proofs in the case furnish no legal or just ground for a claim to the sum of money awarded by the court below, and that the decree should be reversed, and the proceedings remitted, with directions to enter a decree dismissing the bill.

DANIEL POORMAN AND OTHERS *v.* WILLIAM A. WOODWARD AND WILLIAM C. DUSENBERRY, LATE PARTNERS UNDER THE FIRM OF WOODWARD & DUSENBERRY.

Where certain persons gave a joint and several note for the purpose of raising money, and their agent received a certificate of deposit, which certificate was afterwards duly paid upon presentation, the signers of the note cannot escape from their responsibility upon the plea that a certificate of deposit was not money.

THIS case was brought up by writ of error from the Circuit Court of the United States for the southern district of Ohio.

The facts are stated in the opinion of the court.

It was argued by *Mr. Stanbery* for the plaintiffs in error, and by *Mr. Marbury* for the defendants, upon which side there was also a brief filed by *Mr. Smythe*, which was adopted by *Mr. Swayne.*

Mr. Stanbery contended that a certificate of deposit is in no sense cash, or money; it is simply an acknowledgment of a debt, with a promise of payment. The transaction between Hood and Woodward & Dusenberry was simply *the exchange* of one form of negotiable security for another.

This was clearly a breach of trust, and a perversion of the authority to use the note for *the loan of money.*

He referred to the following cases:

Thorold *v.* Smith, 11 Modern, 71, 87.

Bartlett *v.* Pintland, 10 Barn. and Cress., 758.

Atkins *v.* Owen, 4 Ad. and Ellis, 819.

Nightingale *v.* Devisone, 5 Burr., 2589.

Mr. Marbury made the following points:

1. This was an action of assumpsit, in which the plaintiffs below, the defendants in error, Woodward & Dusenberry, recovered of the defendants below, the plaintiffs in error, Poorman et al., the sum of $4,473.76, being amount of the cash balance of $2,997.67 due to the defendants in error, with interest thereon from December, 1849, to the date of the judgment, with costs.

2. The whole amount originally loaned and advanced to Poorman et al. was the sum of $6,000. This loan was made on the joint and several note of Poorman et al. for $15,000, dated Somerset, Ohio, October 24th, 1849, and payable to the order of Woodward & Dusenberry, thirty days after date.

3. With this note in his hands, Thomas Hood, one of the joint makers thereof, applied to W. & D., in the city of New York, for a loan of $6,000, and requested them to deliver to him their certificate of deposit of that amount, to the credit of John Ritchey, Esq., cashier.

4. Thereupon the note was delivered to W. & D., and on the faith thereof the certificate of deposit was delivered to

Hood. Ritchey, the payee, duly endorsed the certificate; and when it was presented, subsequently, by the *bona fide* holders thereof, to Woodward & Dusenberry, they paid the full amount thereof in cash, according to its tenor and obligation.

5. The certificate of deposit, so granted, was in effect, as the court below correctly instructed the jury, money, and came within the authority to borrow money—an authority which Hood had expressly received from the other makers, and which, moreover, he possessed independently as one of the joint makers of the note.

6. No restriction or limitation was placed on Hood's power as to the amount of the loan, nor as to the mode, or form, or kind of funds, in which it was to be effected. He had a general authority as joint maker and holder to borrow or raise money on the note, in any way not illegal, for the benefit of himself and his associates.

7. The transaction was just the same in legal contemplation and in substance as if he had received the $6,000 in specie or bank bills, or the check of Woodward & Dusenberry, and then deposited the amount with them, and taken their certificate of such deposit.

8. The certificate was of the deposit of so much money, and in fact it yielded in money, on presentation, the full sum of $6,000, expressed on its face.

9. The makers of the note lived in Ohio, where they wanted to use their funds; and for their convenience and accommodation this negotiable certificate of deposit of cash, answering their purpose as cash, was granted.

10. The class of cases relied on by the plaintiffs in error, such as Bartlett *v.* Pintland, (10 Barn. and Cres., 758; Atkins *v.* Owen, 4 Ad. and Ellis,) merely hold that a naked agent, authorized to receive payment, cannot do so by discharging a debt due from himself to the party by whom the payment should be made. (See observations upon those cases—Dunlap's Paley's Agency, 284.)

This court has held, in a more analogous case, (Taylor *v.* Merchants' Fire Ins. Co., 9 How., 402,) that where the mode of payment is not prescribed, the agent may exercise a discretion.

11. The judgment should be affirmed, with costs.

The brief adopted by *Mr. Swayne* contained the following more extended notice of the authorities cited by *Mr. Stanbery*, and also of some American authorities:

It will not do to narrow the question to the simple proposition stated in Mr. Stanbery's brief, viz: whether the certificate is money. It is not necessary to affirm this, to show the transaction binding on all the parties, and the remedy within the count, for money had and received. Hood, having authority to borrow money on this note, had authority to receive anything which, in the usual course of business, is treated as such, and will command it. If he got the money or its equivalent, the object of himself and his principals was attained; and it does not lie in their mouths, after having acquiesced in what was done, and realized the money on the certificate, to dispute their liability, because the money, in form, was not given to Hood at the precise time that he parted with the note.

With all due respect for the learned counsel and his ancient authorities, we submit, that they do not meet this case. Thorold *v.* Smith was the case of a servant sent to collect a debt due his master, and he received a goldsmith's note and gave a discharge. The note was not paid, the maker becoming insolvent. The question was, "whether this was good payment to the plaintiff, and was held to turn on the authority conferred on the servant. And it was agreed by the court that this was a matter of evidence to the jury, and that the authority in the servant was to be presumed, if the master did not promptly return the note, and that he "was acquainted with and acquiesced in what had been done." And C. J. Holt said that "any jury at Guildhall would find payment, by a bill, to be a good payment, it being a common practice of the city."

In Bartlett *v.* Pintland, the broker, employed to secure a loss on an insurance policy, set off his own debt to the underwriters, and became bankrupt. This was held not to discharge the liability.

In Atkins *v.* Owens, the defendant was employed simply to

procure an endorsement of a time bill of exchange by a party from whom the plaintiff had received it, and he, the defendant, converted the bill to his own use, without receiving any money upon it. It was held that, though liable in trover, assumpsit for money had and received would not lie.

In Nightingale *v.* Devisone, the defendant had received from Mittivier, who was a bankrupt, the transfer of five hundred pounds East India stock. The plaintiffs, assignees of the bankrupt, brought suit for money had and received. Lord Mansfield said this was a new species of property, and was not money to be recovered in that form of action.

As to the first case cited, can there be a doubt that, even in that age, if the servant or the master had, in fact, received the money on the goldsmith's note, that the plaintiff in that case would have been estopped? So, in the last case cited, if the defendant had converted the stock into money, is there any question that the action for money had and received would lie? The other two cases do not seem to be at all analogous.

It will be observed that in England, especially in the earlier cases, there was a strong disposition to limit the evidence, under the money counts, to strict money transactions. Lord Holt strenuously resisted the then growing practice in trade of treating bankers' cash notes and promissory notes as negotiable, until they were made so by the statute of Anne. But the American authorities have liberalized the doctrine in this respect, to meet the expanded customs of commercial transactions, and have held those money securities which in the common course of business are treated as money, and even bills of exchange and promissory notes, proper evidence under the money counts. They have even gone farther, and sustained this action in cases where there was no negotiable money security received by the defendant, but where, in the nature of the transaction, he ought, in equity, to respond for money received.

Thus, in State Bank *v.* Hurd, (12 Mass., 172,) an endorsee of a negotiable note recovered against the endorser. The action was also sustained in behalf of the endorsee against the maker

(Ramsdell *v.* Soule, 12 Pick., 126.) And, even where the maker signed the note for the accommodation of the payee. (Cole *v.* Cushing, 8 Pick., 48.) So also in behalf of the holder of a note payable to bearer.

Grant *v.* Vaughan, 3 Burr., 1516.

Pierce *v.* Crafts, 12 J. R., 90.

Olcott *v.* Rathbone, 5 Wend., 490.

So it has been held that if a draft, not negotiable, be accepted by the drawee, with an agreement to pay the amount to any person to whom it is assigned, the assignee, after notice, may maintain the action for money had and received against the acceptor.

Weston *v.* Penniman, Mason, 306.

In Tuttle *v.* Mayo, (7 J. R., 132,) it was held that the taking of negotiable paper is equivalent to the receipt of money, so as to maintain this action.

So in Floyd *v.* Day, (3 Mass., 403.) If an agent compromise a demand of his principal, by receiving from the debtor a negotiable note, endorsed specially to the agent, the principal may recover of the agent the amount of the liquidated damages, in an action for money had and received.

The taking of a promissory note as payment of an execution, and endorsing it satisfied, was held equivalent to the payment of money, and that the amount of such note may be regarded as money.

Clark *v.* Pinney, 6 Cow., 297.

In Bank of Kentucky *v.* Wister et al., (2 Pet., 325,) where depreciated bank bills, passing in community at one-half their value, were deposited with the bank, and a certificate taken, this was held to be equivalent to money.

If a creditor receive of his debtor a demand against a third person, payable in money, as a pledge or collateral security for the debt, and the creditor receive payment of the demand in money or otherwise, and appropriate the proceeds to his own use, and there be more than sufficient to pay the debt, the debtor may recover the surplus, in an action for money had and received.

Randall *v.* Rich, 11 Mass., 494.

Emerson *v.* Cutts, 12 Mass., 78.

If two be jointly concerned in merchandise, to be sold for profit, and one takes and appropriates it to his own use, he is liable to the other for his proportion of the net profits, in this form of action.

Stiles *v.* Campbell, 11 Mass., 321.

Where an attorney or agent has discharged a debt due to his principal, and applied the amount to the payment which the attorney owed to his principal's debtor, the amount of the debt so discharged may be recovered in this form of action. So, where an attorney, on a judgment in favor of his client, purchased lands under the execution, and paid by discharging the judgment, this action will lie.

Beardsley *v.* Root, 11 J. R., 464.

Property paid or used as money will support the action for money had and received, the same as if money itself had been paid and received.

Ainslee *v.* Wilson, 7 Cow., 662.

In Picard *v.* Banks, (13 East., 20,) a stakeholder, who had received banker's cash notes, and had wrongfully paid them over to the losing party, was held liable to the winner in an action for money had and received; and this, upon the ground that, though the notes were not money, yet being received as such, and so treated, he should not say they were only paper, and not money.

And in Owenson *v.* Morse, (7 T. R., 64,) it is said of such notes, that, "on account of their being payable on demand, they are considered as cash; but, if presented in due time and dishonored, they will not amount to payment," unless the defendant had agreed to take them as payment.

A certificate of deposit is like a check on a banker, of which it is said, (Chitty on Bills, 323,) "in practice they are taken as cash, and it has been decided that a banker in London, receiving bills from his correspondent in the country, to whom they had been endorsed to present for payment, is not guilty of negligence in giving up such bills to the acceptor, upon receiving a check on a banker for the amount, although it turn out that such check is dishonored."

Russell *v.* Hankey, 6 T. R., 12.

If the agency of a stranger, for receiving payment for his principal, will thus authorize the receipt of such securities as money, why may not an agent, having a common interest with his principals, do the same thing?

In construing the authority conferred on Hood by the plaintiffs in error, we must look to the circumstances of the parties, their place of residence, their relations to the subject of the agency and to each other, their common interest in the transaction; and if Hood did what it may reasonably be supposed the others would have done, had they been present, it cannot be said that he exceeded his authority. And, especially, if, after it was done, they acquiesced by their silence, and availed themselves of the benefits of the transaction, they must be presumed to have authorized it. If Hood treated the certificate as money, so did they; and shall they now be permitted to say that they will not be bound by their agreement to receive it as money?

In passing upon the transactions of men, the law treats the subject-matter according to the usual understanding and usages prevailing where the transaction took place. In this view, the certificate of deposit is money. It is so treated and dealt with in the common business of life.

Mr. Justice CATRON delivered the opinion of the court.

Hood and nine others, including the defendants, made a note of hand in Ohio, dated October 24th, 1849, for fifteen thousand dollars, payable to Woodward & Dusenberry thirty days after date, at their office in New York.

For himself, and as the agent of the other makers, Hood applied to the payees, Woodward & Dusenberry, for an advance of money on the note, for the benefit of all the makers jointly. Woodward & Dusenberry agreed with Hood to advance, on a pledge of the note, as security, six thousand dollars; and Hood requested them to give to him their certificate of deposit for that sum, to the credit of John Ritchey, cashier; which was done, and Ritchey, as payee, endorsed the paper to Hood. It was subsequently presented for payment by *bona fide* holders, and

Woodward & Dusenberry paid the full amount thereof in cash.

At the time the certificate of deposit was given, and endorsed by Ritchey, and the fifteen thousand dollar note delivered to Woodward & Dusenberry, they agreed with Hood that if he should return to them the certificate of deposit, they would then surrender to him the note. The money advanced not having been refunded, except in part, this suit was brought in assumpsit to recover the balance.

In their answer to a bill of discovery, Woodward & Dusenberry admit they were advised by Hood that the $15,000 note "had been executed by himself and his friends, the other signers thereof, for the purpose of borrowing money thereon for the joint benefit of all of them;" also, "that at the time said note was delivered to the said Woodward & Dusenberry, they issued and delivered to said Hood, for the joint use and benefit of all the parties signing said note, as the respondent understood it, the certificate of deposit of said Woodward & Dusenberry for the sum of six thousand dollars, by request of said Hood, made payable to the order of John Ritchey, Esq., cashier at the office of said Woodward & Dusenberry in New York city, on the return of said certificate, and which said certificate was received by said Hood on behalf of himself and his associates as so much cash."

Upon this and other evidence in the case, the counsel for the defendants (the now plaintiffs in error) asked the court to instruct the jury, that if they should find, from the evidence, that Hood was only authorized to use the note to borrow money thereon for the joint benefit of himself and the other makers thereof, and that at the time the plaintiffs, Woodward & Dusenberry, received the same from Hood, and delivered to him the certificate of deposit, they had notice that Hood so held the note for the said purpose, then the plaintiffs were not entitled to recover of the defendants; which instruction the court refused to give, but did instruct the jury that the certificate of deposit so delivered to Hood was in effect money, and came within the authority to borrow money. Exceptions

were taken to the refusal to give the charge asked for, and to the charge as given.

They claimed that the court erred, insisting that a certificate of deposit is in no sense cash or money; it is simply an acknowledgment of a debt, with a promise of payment; that the transaction between Hood and Woodward & Dusenberry was simply the exchange of one form of negotiable security for another; and that this was clearly a breach of trust, and a perversion of the authority to use the note for the loan of money. And they refer to the following authorities in support of this position: Thorold *v.* Smith, 11 Modern, 71, 87; Bartlett *v.* Pintland, 10 Barn. and Cress., 758; Atkins *v.* Owen, 4 Ad. and Ellis, 819; Nightingale *v.* Devisone, 5 Burr., 2589. Here, Woodward & Dusenberry had six thousand dollars in bank, or a broker's office, and the cashier gave a certificate to that effect, and promised to pay the money to the holder of the certificate who should present it. Hood could have taken out the money the next hour.

A certificate of this kind was a means of advance, that in all probabillity suited these borrowers, who resided in Ohio, quite as well as the gold or silver would have done. It was to the same effect as if Hood had received the money, and deposited the specie, subject to his own check on the cashier of the bank. This certificate was actually paid in cash to the agent of the parties to the note, for such the *bona fide* holder was.

To maintain, as we are asked in effect to do, that a check on a bank, payable at sight, to order, and endorsed in blank, and which an agent, to raise *money* on negotiable paper, took as money, and which check was presently paid to a *bona fide* holder by the cashier of the bank, was not money; that the note or bill purchased was not sold for money; that no title passed to the purchaser; and that the principal was not bound by the contract of the agent, would be a startling doctrine in the marts of commerce of this country, where money is usually transferred by bank checks, and may be fairly presumed to change hands on the check being given.

We order that the judgment be affirmed.