March 5th, 1805.—Marshall, Ch. J., declined giving an opinion, conceiving himself to be, in a remote degree, interested in the stock of the insurance company.

*192] *The other three judges delivered their opinions *seriatim*, as follows:

Washington, J.—It does not appear upon the record, that any other evidence was offered, to prove the vessel unsound on the 24th of October, than the report of the surveyors. No parol testimony appears to have been offered, to explain the report, or to apply it to the time of commencing the risk. The bill of exceptions is repugnant. It asks an opinion, predicated upon the unsoundness of the vessel on the 24th of October, and relies upon the report of the surveyors, which applies only to the 31st of October. If it was intended to bring before this court, the propriety of admitting parol evidence to explain the report, that question does not appear to arise from the record. I see no reason for reversing the judgment.

I do not, however, mean to be understood, that if parol evidence had been offered, it would have been proper to receive it. I give no opinion upon that point.

Paterson, J.—No parol evidence appears upon the record to show that the report of the surveyors referred to the 24th of October. The conclusiveness of the report, therefore, did not come before the court. It is not a point in the cause.

Cushing, J.—This is an action on a policy of insurance. The defence set up is, that the vessel was unsound and rotten on the 24th of October, when the risk commenced; and it is alleged, that the report of the surveyors is conclusive evidence of that fact. But the report does not apply to that time. Let the judgment be affirmed, with costs.

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*193] Wilson *v.* Codman's Executor. (*a*)

Pleading—Set-off.—Death of party.

In a declaration, the averment that the assignment of a promissory note was for value received is an immaterial one, and need not be proved.

If the defendant plead the bankruptcy of the indorser in bar, a replication, stating that the note was given to the indorser, in trust for the plaintiff, is not a departure from the declaration, which alleges the note to have been given by the defendant, for value received.

Claims against an agent cannot be set off against the principal.

Upon the death of a plaintiff, and appearance of his executor, the defendant is not entitled to a continuance.[1]

But he may insist on the production of the letters testamentary, before the executor shall be permitted to prosecute.

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

This was an action of debt, originally brought by John Codman, as as-

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(*a*) Present, Marshall, Ch. J., Cushing, Paterson and Washington, Justices.

[1] Alexander *v.* Patten, 1 Cr. C. C. 338.

signee of a promissory note, made by the defendant, Wilson, to Andrew and William Ramsay. (*a*) The declaration was as follows, viz:

"John Codman, assignee of Andrew Ramsay and William Ramsay, complains of William Wilson, in custody, &c., of a plea that he render unto him the sum of $1038.80, which to him he owes, and from him unjustly deains, &c., for this, to wit, that whereas, the said defendant, on the 26th. day of June, 1799, at Alexandria, in the county aforesaid, by his certain note in writing, subscribed with his proper hand and name, and to the court now here produced, the date whereof, &c., did promise to pay to the said Andrew and William Ramsay, or order, forty-five days after date, $1038.80, for value received, negotiable in the bank of Alexandria; and the said Andrew and William Ramsay, afterwards, to wit, on the 23d day of October, in the year of our Lord 1802, at the county aforesaid, by their certain writing indorsed on the said note, and subscribed with their proper hands and names, assigned the said note to the said plaintiff, for value received, of which assignment the said defendant, afterwards, to wit, &c., had notice; by means whereof, and by force of the act of assembly of Virginia in such case made and provided, before the year 1801, action accrued," &c.

There was an office judgment against the defendant, and his appearance bail, *to set aside which, the latter pleaded *nil debet* for his principal, at June term 1803. At December term 1803, the suit was entered [*194 abated by the plaintiff's death. Afterwards, at the same term, on the motion of Stephen Codman, by his attorney, it was ordered, "that the said Stephen Codman, executor of John Codman, deceased, be made plaintiff in this suit, with leave to prosecute the same." At June term 1804, the defendant gave special bail, and "moved the court for a rule upon the plaintiff to grant *oyer* of his letters testamentary, to enable the defendant to answer the plaintiff, which was opposed by the plaintiff's attorney, and the motion was refused by the court;" whereupon, the defendant took a bill of exceptions.

The plea put in by the appearance bail, for the principal, was withdrawn, and the latter pleaded, 1st. *Nil debet*, upon which issue was joined: and 2d. That before the 23d day of October 1802, the time stated in the declaration, when A. & W. Ramsay are supposed to have assigned the said note to the said John Codman, the said A. & W. Ramsay had been declared bankrupts, &c., and on the ——— day of March 1802, had duly obtained their final discharge, &c.

To this plea, the plaintiff replied, that on the 20th of June 1799, the defendant was justly indebted to John Codman, the testator, in the sum of $1038.80, and in consideration thereof, on that day, made and executed the promissory note in the declaration mentioned, for that sum, to A. & W. Ramsay, as the agents of, and in trust for the use of, the said John Codman, the testator; and concluded with a verification.

To this replication, the defendant demurred specially; 1st. Because it is a departure from, and is inconsistent with, the declaration, in this, that the declaration affirms that the said note was payable to Andrew and William Ramsay, for value received, and was by them assigned, for value received,

(*a*) An act of assembly of Virginia authorizes an assignee of a promissory note to maintain an action of debt, in his own name, against the maker of the note.

to the said John Codman; and the replication affirms, that the said note was executed and delivered to the said A. & W. Ramsay, as the agents of, and in trust for the use of, the said John Codman: 2d. Because the plaintiff, in
*195] his replication, ought to *have traversed the plea, and tendered an issue thereupon, and ought not to have replied the said special matter, and concluded with a verification: 3d. Because the said replication is informal and insufficient, &c. Upon this demurrer, the court below adjudged the issue in law for the plaintiff.

Upon the issue in fact, the jury found a verdict also for the plaintiff; and on the trial, four bills of exception were taken by the defendant. The 1st was to the refusal of the court to instruct the jury, that the plaintiff ought to produce in evidence his letters testamentary, to enable him to maintain the issue on his part.

The 2d bill of exceptions stated, "that the defendant produced testimony to the following facts, viz., that A. & W. Ramsay, on the 13th of August 1799, when the note in the declaration mentioned became due, were indebted to him, on their own account, in a large sum of money, to wit, in the sum of $8000, and continued indebted to him always thereafter, to that or a greater amount, until they became bankrupt, in November 1801. That they had taken the said note, for the use and benefit of John Codman, and not for their own, and were authorized, as his agents, to receive payment of the said note, for his use, from the date thereof, until the —— day of May 1800. That the said John Codman urged payment to be made; and during this period of time, sundry payments in money were made to the said A. & W. Ramsay, by the defendant, who, at the time of making such payments, did not mention any definite purpose or use for which they were made. That the said Andrew & William Ramsay, during the period aforesaid, viz., from the 13th of August 1799, to the time of their bankruptcy, had authority to receive no other debt from the said William Wilson, except the debt due on the note aforesaid, and on another note, for about the same sum, due for the use of said John Codman. And the defendant moved the court to direct the jury, that if they should be of opinion, that, at the times respectively, when Wil-
*196] liam Wilson, the defendant, made payments in money to *Andrew & William Ramsay, of sundry sums, after the note became due upon which this action is brought, they, the said A. & W. Ramsay, were indebted to him on their own account, always after the said note became due, to an amount exceeding $8000, and were not authorized, during the whole of the time, from the 13th August 1799, until their bankruptcy, to receive any other debt due from W. Wilson, the defendant, for the use of any other person, except the debt due on the note, which is the ground of this action, and another note for about the same sum, which they held as the agents of John Codman, and in trust for his use; in such case, those payments of moneys may be applied to the discharge of those two notes; unless the jury shall be satisfied by testimony, that the said defendant did make those payments, or any of them, for some other purpose or purposes respectively.

"The plaintiff had offered to prove, by the testimony of Andrew Ramsay, that the payments or advances of money to him and William Ramsay, charged in the account offered by the defendant, William Wilson, in the words and figures following:" [here was inserted an account-current made out by the defendant against A. & W. Ramsay, containing among others,

sundry debits and credits of cash, subsequent to the time when the notes became payable, and before the bankruptcy of the Ramsays; by which it appeared, that they had paid to the defendant, during that time, more cash than he had paid to them, without specific appropriation; but the balance of the whole account (which commenced in April 1797, and continued to October 15th 1801) was against the Ramsays, to about the sum of $10,000] "were not made on account of the notes due to John Codman, or either of them, and that they were not received by the said A. & W. Ramsay on account of the said notes, or either of them; and had also offered in evidence two letters from the defendant, admitted to be in his handwriting, in the words and figures following:" [here were inserted two letters from the defendant to John Codman, the first dated 21st January 1800, saying, that he had paid a small part of the notes to A. & W. Ramsay, and would gladly settle the remainder, if it was in his *power; the second dated 25th February 1800, offering to pay the notes in real estate or to give a mortgage] [*197 "whereupon, the court refused to give the instruction as prayed;" to which refusal the defendant excepted.

The 3d bill of exceptions was to the opinion of the court, that it was necessary for the plaintiff to prove the assignment of the note, but that it was not necessary for him to prove that the same was made for value received, by the said A. & W. Ramsay from the said John Codman.

The 4th bill of exceptions was to the admission of the note and indorsement in evidence to the jury, the indorsement being in these words: "We assign this note to John Codman, without recourse," and signed by A. & W. Ramsay, the payees of the note; inasmuch as the indorsement varied from that set forth in the declaration; the former being "without recourse," and the latter "for value received."

E. J. Lee, for the plaintiff in error, made the following points: 1st. That the defendant below was entitled to *oyer* of the letters testamentary at the time he demanded it. 2d. That the plaintiff was bound to produce them on the trial, upon the issue of *nil debet*. 3d. That the plaintiff was bound to prove the assignment to have been made for value received, according to the averment in the declaration. 4th. That the defendant below had a right, at any time, to apply the payments of money made to A. & W. Ramsay, to the account of the notes in question; the Ramsays being, at that time, personally his debtors, and having no right to demand of him money upon any other account. 5th. That the replication to the second plea was bad upon special demurrer.

*1st. The executor was bound to produce his letters testamentary, and the defendant was entitled to *oyer*, at any time. In Virginia, if [*198 the plaintiff dies before office judgment, the suit abates, and the executor must proceed *de novo*. If the plaintiff dies after judgment, the executor must take out a *scire facias*, in which he must make a *profert* of his letters testamentary. When the *scire facias* issues, the cause goes to the rules, and the defendant has a month to plead. In the present case, the change of parties was made in court, and the defendant had not yet appeared; he had, therefore, time until the next term to appear and plead, and had then a right to demand *oyer*. *Adams* v. *Savage*, 6 Mod. 134; *Smith* v. *Harman*, Ibid. 142. By the act of congress (1 U. S. Stat. 90, § 31), a *scire facias* is to issue

in case of the death of a party before judgment. The law of Virginia (Rev. Code, p. 117, § 20) is nearly the same. The act of congress does not do away the necessity of an executor's showing his letters testamentary, nor deprive the defendant of his right of *oyer*.

PATERSON, J.—Under the act of congress, do not the proceedings go on of old? Are there to be any proceedings *de novo?*

E. J. Lee.—There is no doubt, that the executor must show his letters testamentary, on admission to prosecute, and the defendant has a right to demand *oyer* at some time.

MARSHALL, Ch. J.—The question is, whether, under the act of congress, a *scire facias* is necessary?

WASHINGTON, J.—There is another question, whether the defendant did not crave *oyer* in due time?

E. J. Lee.—The plaintiff ought to produce his letters testamentary, at the time he is admitted, or when *oyer* is prayed, or at the trial, to support his title.

*199] *MARSHALL, Ch. J.—No doubt, the defendant was entitled to *oyer*, but the question is, has he demanded it in proper time?

E. J. Lee.—3d. The plaintiff ought to have proved that the note was assigned, for value received. The assignment on the note is expressed to be "without recourse." There was, therefore, a variance between the assignment on the note, and that set forth in the declaration. The court, therefore, ought either to have prevented the assignment from being produced in evidence, or have compelled the plaintiff to prove it was really for value received. By thus admitting the assignment to go in evidence, they have prevented the defendant from his right to set off his payments to A. & W. Ramsay, before the assignment.

If there be a variance between the evidence and the declaration, it is fatal, how trivial soever it may be. If the plaintiff undertakes to recite an instrument, although he is not bound so to do, and misrecites it, he must fail. Thus, in trover for a debenture, the plaintiff must prove the number of the debenture, as laid in the declaration, and the exact sum to a farthing, or he will be nonsuited But he need not set out the number (any more than the date of a bond for which trover is brought), for being out of possession, he may not know the number, and if he should mistake, it would be a failure of his suit. Buller's N. P. 37. So, in the case of *Bristow* v. *Wright*, Doug. 665, it was held, that in an action against the sheriff, for taking goods, without leaving a year's rent, the declaration need not state all the particulars of the demise; but if it does, and they are not proved as stated, there shall be a nonsuit.

MARSHALL, Ch. J.—You consider the declaration as setting forth the indorsement *in hæc verba.*

E. J. Lee.—I do.

MARSHALL, Ch. J.—The only question upon this point is, whether the

plaintiff has undertaken to set forth the indorsement *in hæc verba;* for if so, and there is a variance, there is no doubt, it would be fatal.

**E. J. Lee.*—4th. The defendant below had a right to apply all the cash paid by him to A. & W. Ramsay, to the discharge of the notes. [*200 They had no right to say it was a gift or a loan, and they had no other right to demand money of him, than for those notes. If the appropriation was not made, at the time of the payment, yet it could not be applied to the single debt due.

5th. As to the demurrer. 1st. The declaration states the assignment to be "for value received." The replication, instead of fortifying the declaration, states, that it was not for value received, which, being repugnant, is a departure in pleading. Thus, if the plea be conditions performed, and the rejoinder shows matter in excuse for not performing, it is a departure. 4 Bac. Abr. 123, Departure in Pleading, L. If a note is given to me, as agent for another, it is not given to me for value received. 2d. There is no traverse, denial or confession of the matter of the plea. 4 Bac. Abr. H. 70.

C. Lee, on the same side.—If the plaintiff is not the true executor, a judgment in this suit would be no bar to an action by the rightful executor. Hence, it is necessary, that he should produce his letters testamentary. It does not appear, that he ever produced them in the court below, at any time. He ought to have been compelled to produce them at the trial, on the issue of *nil debet*, to support his title. The plea of *nil debet* put the plaintiff on the proof of everything necessary to entitle him to recover. It has been considered as law in Virginia, that, on that plea, the defendant may give in evidence the statute of limitations, which he could not do on *non assumpsit;* because the latter plea is in the past tense, and the statute does not prove that he never promised. But the plea of *nil debet* is in the present tense, that he does not now owe, and therefore, if the debt is barred by the statute, the plea is well supported. If an executor bring an action of *assumpsit*, the defendant pleads *non assumpsit* in manner and form as the plaintiff has declared, that is, he did not assume to pay to the testator in his lifetime. The plaintiff, in such case, is only bound to prove that the defendant promised to pay the testator, and his own title as executor does not come in question. But if an executor bring an action of debt, and the defendant *pleads [*201 *nil debet*, he says, that he owes nothing to the present plaintiff, who sues as executor, and if the plaintiff be not the true executor, the plea is supported; the defendant, in truth, owes him nothing. Hence arises the difference, between the necessity of producing letters testamentary in evidence on the trial, in actions of *assumpsit*, and in those of debt on simple contract.

Simms, contrà.—In this case, there was an office judgment against Wilson and his appearance bail. The bail came in and set aside the office judgment, by pleading for his principal (as he had a right to do, under the act of assembly of Virginia), in the lifetime of John Codman, and the issue was made up. Afterwards, John Codman died, and Stephen Codman, his executor, appeared, and had leave to prosecute the action.

We differ from the opposite counsel as to the construction of the act of congress. They seem to think, that the pleadings must be *de novo*. But it

is in the discretion of the court, what pleas to admit, after the issue had been made up.

It is said, Wilson was not in court. But it was his own fault to suffer judgment to go against him. No man can take advantage of his own neglect. It was a matter of discretion with the court, to admit the principal to appear and plead, after the issue had been made up by the bail. It is to be presumed, that the executor produced his letters testamentary, and that the court was satisfied, when they admitted him to prosecute as plaintiff. If the defendant did not then pray *oyer*, it was his own neglect. He can only demand *oyer* at the term when the letters were produced. *Wymark's Case*, 5 Co. 74 *b*. But letters testamentary need not remain in court, even during the whole of that term. *Roberts* v. *Arthur*, 2 Salk. 497.

As to the demurrer, two causes are assigned. 1st, that the replication is a departure; and 2d, that it does not traverse the matter of the plea.

*202] *1st. Unquestionably, if it is a departure, it is bad. But if it is the only fortification of the declaration against the plea, it must be good. Co. Litt. 304 *a*. The replication is not repugnant to, nor inconsistent with, the declaration. It is the same, in substance, with that in the case of *Winch* v. *Keely*, 1 T. R. 619, which was adjudged good on demurrer.

2d. It is said, that the replication ought to have traversed the matter of the plea. What part could the plaintiff have traversed? The bankruptcy is impliedly admitted in the replication.

Washington, J.—Part of the objection is, that the replication does not confess the matter of the plea.

Simms.—That is not set down as a cause of demurrer, and it is but matter of form. But it is no cause for demurrer, even if it had been specially shown. In a plea of the statute of limitations, the defendant does not confess that he ever promised at all. So, in a replication to such a plea, that the plaintiff was out of the country, he does not confess, that the five years have elapsed. So, in pleading a release, it is not necessary to admit the execution of the bond, &c. No authorities can be produced in support of such an objection.

As to payments of money, it appears from the account itself, that Wilson, after the notes became due, received more cash from A. & W. Ramsay than they received from him; and it is evident, that the cash transactions were mere matters of mutual accommodation, by loans of small sums, for short periods of time.

As to the first bill of exceptions, it is said, that the plaintiff ought to have produced his letters testamentary on the trial; and that a judgment in this suit, would not be a bar to an action by the rightful executor. This we deny. In a suit brought by the name of John, it is not necessary, on the trial of the

*203] general issue, *to prove that the plaintiff was baptized by that name. So, if the plaintiff sue as executor, when he is only administrator, and no advantage taken by plea in abatement, it is not necessary, on the trial, to produce letters testamentary.

The 3d and 4th bills of exception raise two questions. 1. Whether the assignment ought to have been proved, on the trial, to be for value received. 2. Whether the assignment on the note varies from that stated in the declaration.

It is said, that the *probata* and the *allegata* must precisely agree. This is not the law. It is sufficient, if they agree in substance. In an action of assault and battery, the declaration, alleging it to be done with sticks, staves and swords, is sufficiently supported by evidence that the defendant pulled the plaintiff's nose. So, if the declaration allege that goods were sold and delivered at the request of the defendant, it is sufficient to prove, that the defendant reluctantly received them at the solicitation of the plaintiff. It is only necessary to prove the material averments to be substantially true.

The substance, in the present case, is the note and the assignment. The manner is totally immaterial. No form of assignment is prescribed by the act of assembly; and it is not necessary, under the act, to state the precise words of the assignment. If the assignment had been in consideration of a horse received, it would have been sufficient to have stated, generally, that it was for value received. The words "without recourse" do not imply "without value," nor do they alter the effect of the assignment, as it regards the defendant. The declaration does not pretend to set forth the assignment *in hæc verba;* and therefore, the case from Doug. 665, does not apply. *Holman* v. *Borough*, 2 Salk. 658; *The King* v. *May*, Doug. 159.

*Marshall, Ch. J.—Does not your defence rely on there being no value received? [*204

Simms.—I contend not. I shall presently take the distinction.

Washington, J.—The departure is alleged upon that ground.

Simms.—A moral obligation upon the part of A. & W. Ramsay is a sufficient consideration for the assignment. They were bound, in honesty and good faith, to assign, and that is sufficient to support the allegation of value received. The maker of the note has no right to inquire into the consideration which passed between the assignor and assignee. If the note had not been, from the first, held in trust for Codman, the defendant might have set off all his claims against the Ramsays, which were due before notice of the assignment. No set-off against the trustee can be set up against *cestui que trust.* The authorities cited in *Winch* v. *Keely* can be produced, if the court should require it.

Marshall, Ch. J.—There is no necessity to produce authorities. There can be no question on that point. If the agent, appointed to collect a debt, is indebted to the debtor, the latter cannot set off, against the debt due from him to the principal, claims against the agent. It cannot be contested. No man ever thought that a person who employs an agent to collect his debts, by this agrees to take on his hands the debts owing by his agent to his debtors, instead of looking to the original debtors themselves.

C. Lee, in reply.—1st. As to the letters testamentary. *The act of congress does not take away the necessity of giving notice to the other party. [*205 It does not essentially alter the law on that subject. By that law, a *scire facias* must have issued, and would have been returnable to the next term. One of the clauses of each act is in the same words. The act of congress is equally applicable to the death of plaintiffs and defendants. A *scire facias* must issue in both cases. And if it had issued, the defendant would have been in time.

2d. The plaintiff ought to have produced his letters testamentary, at the trial, to support his title, on the issue of *nil debet*. This has been spoken to before.

3d. As to the demurrer. It is an answer to the case of *Winch* v. *Keely*, 1 T. R. 619, that in our case, the demurrer is special, in the other, it was general. It will also appear, that in that case, the facts of the pleas were expressly admitted in the replication. The demurrer there was for the purpose of bringing into consideration an important question of law.

The 1st cause of demurrer assigned is, that the replication is a departure. It is only necessary to know what the declaration is. The expression, for value received, means value received by the defendant of the Ramsays, and by them of the plaintiff. The declaration states it to be Ramsay's debt; the replication alleges it to be Codman's debt.

4th. The variance between the declaration and the note offered in evidence is material. If they had produced a note, assigned for value received, the plea of bankruptcy of the Ramsays would have been good. If they had proved their declaration, they would have defeated their action. It is admitted, however, that it would be a question of some doubt, whether the variance would be absolutely fatal, if the action were on a *parol agreement, upon the authority of the note at the end of the case of *Bristow* v. *Wright*, Doug. 669 (3d edition), which confines this strictness of pleading to records and written contracts. But the present action is upon a written contract, and therefore, according to all the authorities, a misrecital is fatal.

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5th. As to the bill of exceptions respecting the testimony, it is only necessary to read the prayer of the defendant to the court (without intermixing the testimony offered by the plaintiff, which only confuses the question), to show the impropriety of the court's decision. The amount of the prayer is, that the payments ought to be presumed to be made on the notes, unless it is proved that they were made for some other purpose, or on some other account; it having been proved that the Ramsays had no right to demand money from the defendant, except on account of those notes.

March 6th, 1805. MARSHALL, Ch. J., delivered the opinion of the court.—The first question which presents itself in this case is, was the defendant entitled to *oyer* of the letters testamentary at the term succeeding that at which the executor was admitted a plaintiff in the cause?

It is contended, on the part of the defendant, that on the suggestion of the death of either plaintiff or defendant, a *scire facias* ought to issue, in order to bring in his representative; or, if a *scire facias* should not be required, yet, that the opposite party should have the same time to plead and make a proper defence, as if such process had been actually sued.

The words of the act of congress do not seem to countenance this opinion. They contemplate the coming in of the executor, as a voluntary act, and give the *scire facias* to bring him in, if it shall be necessary, and to enable the court "to render such judgment against the estate of the *deceased party," "as if the executor or administrator had voluntarily made himself a party to the suit." From the language of the act, this may be done *instanter*. The opinion that it is to be done, on

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motion, and that the party may immediately proceed to trial, derives strength from the provision that the executor or administrator, so becoming a party, may have one continuance. This provision shows that the legislature supposed the circumstance of making the executor a party to the suit, to be no cause of delay. But as the executor might require time to inform himself of the proper defence, one continuance was allowed him for that purpose. The same reason not extending to the other party, the same indulgence is not extended to him.

There is, then, nothing in the act, nor is there anything in the nature of the provision, which should induce an opinion, that any delay is to be occasioned, where the executor makes himself a party, and is ready to go to trial. Unquestionably, he must show himself to be executor, unless the fact be admitted by the parties; and the defendant may insist on the production of his letters testamentary, before he shall be permitted to prosecute; but if the order for his admission, as a party, be made, it is too late to contest the fact of his being an executor. If the court has unguardedly permitted a person to prosecute, who has not given satisfactory evidence of his right to do so, it possesses the means of preventing any mischief from the inadvertence, and will undoubtedly employ those means.

The second point in the case is the demurrer of the defendant to the plaintiff's replication. Two causes of demurrer are assigned. 1st. That it is a departure from the declaration: 2d. That the plea ought to have been traversed, and an issue tendered thereon.

On the first cause of demurrer, some difference has existed in the court, but the majority of the judges concur in the opinion, that the replication fortifies, and does not depart from the declaration. *The averment, [*208
that the assignment was for value received, is an immaterial averment. The assignee, without value, can as well maintain his action as the assignee on a valuable consideration. It is, therefore, mere surplusage, and does not require to be proved; nor does it affect the substantial part of the declaration. It is also the opinion of a part of the court, that the duty created by the trust, and which was discharged by the assignment, may be considered as constituting a valuable consideration to support the averment, and prevent the replication from being a departure from the declaration.

2d. The second case of demurrer is clearly not maintainable. The matter of the replication does not deny, but avoids the allegations of the plea, and consequently, the conclusion to the court is proper. It has, indeed, been argued, that the replication is faulty, because it does not confess the matter alleged in the plea; but this is not assigned as a cause of demurrer, and it is, therefore, not noticed by the court.

The demurrer having been overruled, several exceptions were taken at the trial to the opinion of the court. The first was to the admission of the note as evidence. This was objected to, because the declaration averred the note to be assigned for value received, and the assignment contained no expression of a valuable consideration, but was declared to be made "without recourse." As the assignment is not set forth *in hæc verba*, this exception is so clearly unmaintainable, that it will require only to be mentioned.

The 2d exception requires more consideration. It is, that although the averment that the assignment was made for value received, was immaterial, yet the plaintiff, having stated the fact in his declaration, is bound to prove

it. In support of this position, *Bristow* v. *Wright*, Doug. 665, has been quoted and relied on. The strictness with which, in England, a plaintiff is *209] bound to prove the averments of his declaration, although *they may be immaterial, seems to have relaxed from its original rigor. The reasons stated by Lord MANSFIELD, in the case reported by Douglas, for adhering to the rule, do not apply in the United States, where costs are not affected by the length of the declaration.

Examining the subject, with a view to the great principles of justice, and to those rules which are calculated for the preservation of right and the prevention of injury, no reason is perceived for requiring the proof of a perfectly immaterial averment, unless that averment be descriptive of a written instrument, which, by being untruly described, may, by possibility, mislead the opposite party. Where, then, the averment in the declaration is of a fact *dehors* the written contract, which fact is in itself immaterial, it is the opinion of the court, that the party making the averment, is not bound to prove it.

In this case, the averment, that the assignment was made for value received, is the averment of a fact which is perfectly immaterial, and which forms no part of the written assignment ; nor is it averred to be a part of it. It is an extrinsic fact, showing how the right of action was acquired, but which contributes nothing towards giving that right of action. The party making this useless averment ought not to be bound to prove it. No case which has been cited at bar, comes up to this. The averments of the declaration, which the plaintiff has been required to prove, are all descriptive of records, or of written contracts ; not of a fact, at the same time, extrinsic and immaterial. The court is, therefore, unanimous in the opinion, that this exception cannot be maintained.

In the progress of the trial, the counsel for the defendant in the court below, also required that court to instruct the jury, that unless the plaintiff *210] could show that the Ramsays, who were his agents, had the power *to collect some other debt from the defendant, the payments made by him, to them, should be credited on the notes given to them in trust for Codman, which instruction the court very properly refused to give.

Independent of the proof made by the plaintiff, that the sums of money received by the Ramsays from Wilson, were really on their own account, the instruction would not have been proper, as this case actually stood. There was a running account between the Ramsays and Wilson, who had large transactions with each other, and who reciprocally advanced large sums. This running account is not stated by the defendant, in the proposition for the opinion of the court. The effect it produces is to make it proper for Wilson to prove, that advances made by him to the Ramsays were not designed to satisfy their particular engagements with each other, but were intended to discharge the debt due to Codman. Terms are improperly used in the bill, which imply a fact contradicted by the testimony. The word " payment " is used instead of the word " advance," and this, at first view, may produce an obscurity, which is dissipated on investigating the record.

The judgment is to be affirmed, with costs.