

UNITED STATES *v.* GURNEY and others.*Damages.—Pleading.*

B. in Philadelphia, agreed to pay to A.'s agent 170,000 guilders, in Amsterdam, on the 1st of March; and if he should fail so to do, then to repay to A. the value of the said guilders, at the rate of exchange current in Philadelphia, at the time demand of payment was made, together with damages at twenty per cent., in the same manner as if bills of exchange had been drawn for the said sum, and they had been returned protested for non-payment; and lawful interest for any delay of payment that might take place after the demand; B. paid the 170,000 guilders, in Amsterdam, to the agent of A., on the 13th of May, instead of the 1st of March: A. is not entitled to the twenty per cent. damages, but may, in a suit upon the bond given to perform the contract, recover interest on the 170,000 guilders, from the 1st of March to the 13th of May.

It is not a good plea, for the defendants to say, that they paid the 170,000 guilders to A.'s agent, for the use of A., at Amsterdam, on the 13th of May, without averring it to be the whole sum then due.

THIS case was certified from the Circuit Court for the district of Pennsylvania, the judges of that court being divided in opinion upon the question, whether, upon the state of the pleadings, the judgment ought to be rendered for the plaintiffs?<sup>1</sup>

It was an action brought by the United States against Gurney and others, upon a bond conditioned to comply with a certain written agreement between them and the secretary of the treasury of the United States, of the same date, "to pay the sum of 500,000 guilders, at Amsterdam," "in the manner and form, and on or before the particular days and times in the said agreement mentioned; or in case the said sums shall not be paid as aforesaid, at either of the said places, then to repay to the United States the value of the said 500,000 guilders, at the rate of exchange current in Philadelphia, at the time demand of payment is made, together with damages at twenty per cent., in the same manner as if bills of exchange had been drawn for the \*334] said sum, and they had been returned protested for non-payment, and lawful interest for any delay of payment which may take place after the demand."

After *oyer* of the bond and condition, the defendants set forth the written agreement, by which, in consideration of \$205,000, to be immediately advanced to them by the United States, the defendants agreed, to pay to the bankers of the United States, at Amsterdam, 500,000 guilders, in manner following, viz., 230,000 guilders on or before the first of February; 170,000 guilders, on or before the first of March; and 100,000 guilders, on or before the first of June 1803; and in case the said payment should not be made at the times and in the manner aforesaid, they would pay to the United States "twenty per cent. damages for their non-compliance with this agreement, for the whole of the sum so agreed to be paid, or such parts thereof as they shall not actually pay, at the times, place and manner aforesaid, together with interest from the day of demand of repayment on behalf of the United States," "in the same manner as for bills of exchange returned with protest for non-payment."

The defendants then pleaded, that on the 1st of February 1803, they paid, at Amsterdam, to Willink & Van Staphorst, bankers of the United States, to and for the use of the United States, the said 230,000 guilders; and on the 13th of May, the said 170,000 guilders; and on the 16th of May,

<sup>1</sup> See 1 W. C. C. 446.

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the said 100,000 guilders in the said articles of agreement mentioned ; “and this they are ready to verify,” &c.

To this plea, the United States replied, that although the defendants, on the 1st February 1803, paid to the said Willink & Van Staphorst, bankers of the United States, for the use of the United States, the said sum of 230,000 guilders, in the said articles of agreement mentioned ; and although the defendants, on the said 13th of May, at Amsterdam, paid to the said Willink & Van Staphorst, bankers of the said United States, to and for the use of the said United States, the sum of 170,000 guilders ; and although the defendants at Amsterdam, on the said 16th of May, paid to the said Willink & Van Staphorst, bankers of the said United States, to and for the use of the said United States, the further sum of \*100,000 guilders, in the said articles of agreement mentioned ; yet the said United States deny that the said [\*335 last-mentioned sum of 170,000 guilders, so as aforesaid paid by the defendants, to the said Willink & Van Staphorst, bankers of the United States at Amsterdam, on the said 13th of May, was, by the United States, accepted, received and allowed in payment and satisfaction of the said sum of 170,000 guilders, which, by the said agreement, the defendants were bound to pay on or before the 1st of March 1803, and this the said United States pray may be inquired of by the country. And the said United States in fact say, that the defendants did not pay, or cause to be paid, to the said Willink & Van Staphorst, bankers of the United States, at Amsterdam, to and for the use of the said United States, the said sum of 170,000 guilders, in the said articles of agreement mentioned, on or before the said 1st day of March 1803, being the time prescribed by the said articles of agreement for payment of the same. Nor have the defendants, at any time since the 1st of March 1803, paid to the United States twenty per cent. damages for their non-compliance with the said agreement for the payment of the said sum of 170,000 guilders, part of the said sum of 500,000 guilders in the said agreement mentioned, to the said Willink & Van Staphorst, bankers of the said United States, at Amsterdam, to and for the use of the said United States, on the 1st of March 1803, together with interest from the day of demand of repayment on behalf of the United States, in the same manner as for bills of exchange returned with protest for non-payment, although afterwards, viz., on the 14th of June 1803, at Philadelphia, demand of repayment of the said sum of 170,000 guilders, together with the said twenty per cent. damages, was made on behalf of the said United States, by Albert Gallatin, secretary of the treasury of the United States, from the defendants, but to pay the aforesaid sum of 170,000 guilders, together with twenty per cent damages, and interest on any part or parcel thereof, to the said United States, the defendants have hitherto refused, and still refuse, contrary to the form and effect of the said condition of the said writing obligatory, and the agreement therein referred to, and in the plea set \*forth, [\*336 and this the said United States are ready to verify, wherefore they pray judgment, &c.

To this replication, the defendants demurred specially. 1st. For duplicity : 2d. Because they could not take issue on the replication, without a departure from their plea : and 3d. Because the United States have, by their replication, endeavored to put in issue matters foreign and irrelevant to said plea. This demurrer was joined on the part of the United States.

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*E. Tilghman*, for the defendants, and in support of the demurrer.—The replication is clearly double ; it first denies that the 170,000 guilders, paid on the 13th of May, were received by the United States in satisfaction of the 170,000 guilders due on the 1st of March, and then, after concluding to the country, goes on with a new averment that the defendants did not pay the 170,000 guilders on the 1st of March ; and again further avers, that the defendants did not pay the United States the twenty per cent. damages for failing to comply with the agreement ; and again, that the defendants did not repay to the United States the 170,000 guilders, with twenty per cent. damages, &c. A plaintiff cannot reply two separate matters. 5 Bac. Abr. 457 (Gwillim's edition).

The replication confesses the payment, but does not avoid it. Even if the plea were bad in form, which is not admitted, yet as payment is acknowledged by the replication, at a time when no more was due than was \*337] paid, the United States cannot recover. \*If the defendant pleads a bad plea, and the plaintiff shows in his replication that he has no cause of action, the judgment must be for the defendant. 2 Ld. Raym. 1080; Hob. 128; 8 Co. 120 *b*, 133 *b*. If, then, we show that, on the 17th of May, the United States were not entitled, under the contract, to more than 170,000 guilders, they cannot recover in this action.

The object of the United States was to have the money paid in Amsterdam. The twenty per cent. was the stipulated damages for not paying the money in that place. By referring to the law respecting bills of exchange, the parties meant to be governed by that law ; and by stipulating for interest, in a certain event only, they are to be understood, as not claiming it in any other case. By the law of Pennsylvania respecting foreign bills of exchange, drawn in that state, and returned under protest, the principal sum is to be repaid in Pennsylvania, with twenty per cent. advance thereon. If the principal sum cannot be claimed, the advance thereon cannot be claimed. It is an incident to the principal, and cannot be demanded without the principal. If a bill be protested for non-payment, but the acceptor afterwards pay it, and the holder receives the money in the place where it ought to be paid, he cannot afterwards come upon the drawer for damages, re-exchange, &c. By receiving the money, he waives the objection to the time of payment. The twenty per cent. damages are the price of the risk, trouble and expence of transportation of the money. If the defendants have actually transported the money, and the plaintiffs have received it, at the place appointed, they are not entitled to be repaid the expence of the transportation ; and to charge the defendants with that expence now, would be to charge them twice.

The meaning of the agreement is, that if the United States are obliged to receive their money, in this country, they shall receive the twenty per cent. advance thereon ; if, therefore, they have no right to demand repayment of the money, in this country, they have no right to the twenty per cent. After having received the principal sum in Amsterdam, they clearly have no right to demand payment of it here. By the non-payment \*338] at the \*day, the United States had only an inchoate right to the twenty per cent. They might have refused to receive the 170,000 guilders, afterwards, in Holland, and insisted on their right to repayment of the money in America. But they did not, and actually received the money

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in Holland, before any demand on the defendants in America. The liquidated damages can be recovered only in the case specified by the parties in their contract; and this is, upon demand of payment in America, of the value of the sum remaining unpaid in Europe, at the time of the demand. The condition of the bond is "to repay to the United States the value of the said 500,000 guilders, at the rate of exchange current in Philadelphia, at the time demand of payment is made, together with damages at the rate of twenty per cent.," &c. The damages could only be demanded, and were only to be paid, "together with" the principal. If the plaintiffs had no right to demand payment of the principal, they had no right to demand payment of the damages. By the terms of the contract, interest could only be demanded from the time of demand of repayment on behalf of the United States, the United States having a right to demand such repayment. "Advance" and "interest" are relative terms; they must refer to a principal sum. If there be no principal sum due, there can be no advance nor interest thereon.

The liquidated damages were the damages for the entire breach of the contract on the part of the defendants, in failing to pay altogether in Amsterdam; not for a mere delay of payment for a few days. According to the construction which the United States contend for, they would be entitled to twenty per cent. damages, even if they had received the 170,000 guilders on the 2d of March. Such a construction would make the contract highly penal, and therefore, is to be avoided, if possible. Doug. 504.

In the case of *Peter Blight*, a bankrupt, his bills on Europe were protested for non-payment; after protest, the holder received the principal money, and sent the bills back to Pennsylvania, duly protested, and with legal notice, in order to recover the twenty per cent. damages \*out of Blight's estate. But the commissioners rejected the claim, after full argument. We consider this as a very respectable authority, as the commissioners were gentlemen of good legal and commercial information, and of sound judgment. [\*339]

*Rodney* (Attorney-General), contra. The rule upon demurrers is, to go back to the first fault. If our replication is bad, their plea is bad also. The defendants could only plead payment, at or before the day. This is not a bond within the statute of Anne, the payment of which, after the day, may be pleaded. It is a bond to perform covenants. But if payment after the day might be pleaded under the statute, yet it must be pleaded as payment of the principal sum, with all interest then due thereon. *Perkins v. Kenton*, 2 W. Black, 1106; 1 Atk. 251; Esp. N. P. 264; Pleader's Assistant 360. The plea does not aver that Willink & Van Staphorst were agents of the United States to receive the money after the day.

The demurrer admits the truth of the replication, which states that the United States did not receive the 170,000 guilders in satisfaction, &c. At all events, the United States were entitled to interest on the 170,000 guilders from the 1st of March to the 13th of May.

The agreement does not require notice of non-payment, and all the forms of protest, &c. A demand is only required, to entitle the United States to interest on the twenty per cent.

The plea is to be considered as three pleas, and therefore, the United

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States were obliged to make three replications. The statute of William allows a plaintiff to reply as many breaches as he thinks proper. 1 Tidd's Prac. 637; Bull. N. P. 163; 2 Str. 994.

\*340] \**Rawle*, in reply.—The question is, whether, on the whole record, the United States are entitled to recover.

The contract is, that the parties should stand in the relation of drawers and payees of a bill of exchange. The contract was made at Philadelphia, and must be governed by the laws of Pennsylvania; and under those laws, the twenty per cent. cannot be recovered, until the bill be returned. If the defendants had drawn a bill, payable on the 1st of March, and it had then been protested, but afterwards, on the 13th of May, taken up by the acceptor, it could never have been returned by the payees; and consequently the twenty per cent. damages could not have been recovered.

It was not necessary for the defendants to aver in their plea, that Willink & Van Staphorst had authority to receive the money; it is averred by the plea, and admitted by the replication, that the money was paid by the defendants, to Willink & Van Staphorst, bankers of the United States, to and for the use of the United States. It is, therefore, admitted to be a payment to the United States, as much as if it had been so expressed.

If no interest was due on the 13th of May, it was not necessary in the plea to aver payment of interest.

The bond is virtually for payment of a sum less than the penalty; and therefore, within the statute which authorizes a plea of payment after the day.

It was not necessary to plead that it was received in satisfaction. That is a fact for the consideration of the jury, on the plea of payment. The demurrer does not admit the fact, that it was not received in satisfaction, for the demurrer admits nothing but what is well pleaded; and to a plea of payment, it is a bad replication, to say that the money was not received in satisfaction. Pleader's Assistant 360; 2 Burr. 945; 1 Str. 691.

\*341] \*March 8th, 1808. MARSHALL, Ch. J., delivered the opinion of the court as follows, viz:—This case comes on upon a special demurrer to a replication filed by the plaintiffs to a plea of payment after the day. The replication is double, and consequently ill. But it is a known rule, that a demurrer brings all the pleadings before the court; in consequence of which, judgment must be rendered against him who has committed the first fault; or, which will most generally produce the same result, for him who, upon the whole record, shall appear to be entitled to their judgment. It, therefore, becomes necessary, to examine the plea of the defendants. By their agreement with the secretary of the treasury, they were bound to pay to the bankers of the United States, in Amsterdam, the sum of 500,000 guilders in the following manner, viz., 230,000 guilders on or before the first day of February; 170,000 guilders on or before the first day of March; and the remaining 100,000 guilders on or before the first day of June, in the year 1803. The first payment was made on the day, and the last before the day, but the second payment was made on the 13th day of May, instead of the first day of March. On the effect of this payment, the whole case depends.

The defendants plead, that they did, on the 13th day of May, at Amsterdam, pay to the bankers of the United States, for the use of the United

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States, the sum of 170,000 guilders. The replication admits this payment as pleaded, but denies that it was accepted, received and allowed by the United States in payment and satisfaction of the same sum which was payable on the first of March. The replication proceeds to aver that the said sum of 170,000 guilders was not paid on the first day of March, nor had the defendants paid the damages of twenty per cent. which were stipulated, in case of failure to pay on the day.

The fact, upon these pleading, appears to be, that the payment was received by the United States, without any \*stipulation respecting the effect of that receipt, upon their agreement with the defendants. [\*342 If payment to the bankers of the United States, the persons to whom by agreement the money was to be paid, was not payment to the United States, it would not be a payment to the use of the United States, which the plea avers, and the replication in terms admits. In such case, the replication, instead of averring that this sum was not accepted in satisfaction of the same sum, payable at an earlier day, would have averred, and ought to have averred, that it was not accepted at all, and was not a payment to the use of the United States, in which case, instead of a special replication, issue might have been tendered on the plea. The court, then, understands the fact, as stated in the pleadings, to be, that the money was received without any agreement whatever, and the law must determine the effect of such a payment.

The payment made to the bankers, in Amsterdam, being, then, an actual payment to the United States, the inquiry is, whether it was such a payment, and is so pleaded, as to bar this action? It is admitted, that the statute of Anne, which allows payment after the day to be pleaded, is in force in Pennsylvania, but it is contended, that this bond is not within that statute; or, if it is, that this plea is not good under it. If this be a bond within the statute of Anne, on which the court gives no opinion, yet by that statute, the payment must be of the whole sum actually due, or the action for the penalty is not barred. In this case, the sum due on the first of March was paid on the 13th of May, without interest or damages.

By the United States, it is contended, that damages at the rate of twenty per centum on the sum of 170,000 guilders were then due; by the defendants, it is contended, that no interest was due. \*The words of the contract, to which each party refers, are not precisely the same in [\*343 the condition of the bond, and in the articles of agreement which are referred to by the bond. There is no contradiction between them; but there is a variance in this, that the condition of the bond expresses more fully than the articles, the idea of the parties, that in case of failure to perform the contract at Amsterdam, the demand for payment was to be made in Philadelphia. The words of the condition are, "or in case the said sums shall not be paid as aforesaid, then to repay to the United States the value of the said 500,000 guilders, at the rate of exchange current in Philadelphia, at the time demand of payment is made, together with damages at the rate of twenty per cent., in the same manner as if bills of exchange had been drawn for the said sum, and they had been returned protested for non-payment, and lawful interest for any delay of payment that may take place after the demand."

The defendants were merchants, residing and carrying on trade in Philadelphia, in which place the contract was made, and by the law of the state,

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bills of exchange returned unpaid, under protest, are liable to twenty per cent. damages. It is sufficiently obvious, from these circumstances, and from the words of the condition, that the parties contemplated a repayment in Philadelphia, in the event of non-payment in Amsterdam.

It is contended by the plaintiffs, that the instant the failure to pay the 170,000 guilders, on the first of March, had taken place, a full and complete right to the stipulated damages was vested in the United States, without any further act on their part; and that a payment of the principal sum on the succeeding day would not have relieved the defendants from those damages. In this opinion, the court does not concur with the counsel for the United States.

Contracts are always to be construed with a view to the real intention of the parties. In this contract, the object of the United States was to remit \*<sup>344</sup>] to their bankers in Amsterdam a sum of money, for which they had \*occasion in Europe. The heavy damages to be incurred by the defendants, in the event of their failing to make their stipulated payments in Amsterdam, were considered as a compensation for the disappointments produced by the non-payment of the money at that place, in such time as to answer the purposes of the contract. Whether payment at the same place, on a subsequent day, would answer these purposes, was for the United States to determine. They might accept it, or they might reject it, and claim whatever the law of their contract would give them. In the event of non-payment in Amsterdam, at the time stipulated, the defendants are to repay to the United States the value of the guilders they shall have failed to pay in Amsterdam, "at the rate of exchange current in Philadelphia, at the time demand of payment is made, together with damages at the rate of twenty per cent." The fair interpretation of this agreement is, that the demand is to be made in Philadelphia, that the money is to be repaid in Philadelphia, and that the damages are upon the money there to be repaid. Had a part of the sum of 170,000 guilders been paid on the first of March, it will scarcely be contended that damages would have accrued on that part. A repayment of it could not have been demandable in Philadelphia. It appears to the court, that the acceptance of any part of the sum due in Amsterdam, on a subsequent day, is a waiver of the claim to damages, in Philadelphia, on the sum so accepted, for that sum cannot be demanded in Philadelphia.

This reasoning, to which the majority of the court would strongly incline, from the nature and circumstances of the contract, derives much additional force from the reference to bills of exchange. The repayment of the value of the guilders, "at the rate of exchange current in Philadelphia, at the time demand of payment is made, together with damages at the rate of twenty per cent.," is to be made "in the same manner as if bills of exchange had been drawn for the said sum, and they had been returned protested for non-payment." Why is this reference made to bills of exchange?

\*<sup>345</sup>] The stipulation that damages at the rate of twenty per centum should be incurred on those sums which the defendants might fail to pay, at the time and place mentioned in their contract, did not require it, unless the law of bills of exchange was either to explain or to give validity to that stipulation. To a majority of the court, it is satisfactory evidence, that the parties intended this contract, if not as a complete substitute for bills of exchange, to operate between themselves as if bills had been drawn.

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The law of Pennsylvania regulating bills of exchange was well understood. If those drawn on any part of Europe are returned back unpaid, with a legal protest, the drawers and indorsers are subjected to damages at the rate of twenty per centum. But the right to these damages is not complete, until the bill be returned back under protest. Until then, they are not demandable.<sup>1</sup> Consequently, payment before the bill returns, does away the right to demand them. By receiving payment, the holder waives his right to damages. The express reference to bills, which is made in this contract, and the terms in which that reference is made, being considered by the majority of the court as explanatory of the intention of the parties that the right to damages should be put on the same footing as if bills had been drawn, form an additional reason for their opinion, that an acceptance in Amsterdam, after the day, before a demand in Philadelphia, amounts to a waiver of any right the United States might otherwise, perhaps, have had to demand the stipulated damages.

But whether the sum agreed to be paid as a compensation, for a failure to pay at the time and place mentioned in the contract, be considered merely as a penalty, or as stipulated damages, of which the law will coerce the payment, a forfeiture took place on the non-performance of the condition of the bond, and a right to something more than that condition vested immediately in the obligees. If the reservation of damages in the condition of the bond is in law only a double penalty, then interest is the legal compensation for this breach of the covenant contained in the condition of the bond. If it be even of the character given to it by both parties in argument, the amount of damages settled by the parties themselves, the majority of the court \*is not satisfied, that in waiving those damages, the [ \*346 obligee has, without any agreement on the subject, relinquished that right to interest which is attached to all contracts for the payment of money, which is only displaced by the agreement to receive a larger sum in damages, and which a mere tacit implied waiver of those stipulated damages might reinstate. The majority of the court, therefore, is of opinion, that under the circumstances which have taken place, the United States ought to receive, under this contract, interest on the sum of 170,000 guilders, from the first of March, the day on which that sum ought to have been paid, until the 13th of May, the day on which it was actually paid. Judgment, therefore, on the pleadings, must be rendered for the plaintiffs.

By the 26th section of the judicial act, it is directed, that in cases of this description the court shall render "judgment for so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury."

In this case, it is the opinion of the majority of the court, that judgment ought to be rendered for so much as remains due of the sum of 170,000 guilders, calculating interest thereon from the first of March in the year 1803, and if either of the parties request it, that a jury be impanelled to ascertain the value of this sum in the money of the United States.