willingness to bear their proper share of the taxation necessary for the preservation of our Union and Constitution, therefore

It is enacted by the General Assembly as follows:

So much of the act entitled "An act for the establishment of a college or university within this colony," passed at February session, A. D. 1764, as exempts the estates, persons and families of the President and Professors of said institution, now known as Brown University, from taxation, is hereby repealed.

NOTE.—It will be seen that this bill does not affect at all the college property, but only that of the college officers. Even on the ground of contract it can be hardly supposed that the exemption of the officers was one of the essentials of the charter, without which the college would not have accepted it.

In the Supreme Court of Vermont—January Term for Chittenden County 1862.

JOHN W. TRACY *vs.* ALONZO ATHERTON *et al.*

A right of way cannot arise from *mere necessity*, independent of any grant or reservation, express, or implied as in the case of a former unity of ownership.

This was an action of trespass *qu. cl.* The defendants pleaded in justification a right of *way of necessity* from the close occupied by them, over the plaintiff's close, to the public highway; the plaintiff's close lying between theirs and said highway; averring that at none of the said several times when, &c., could the defendants have access to their said close from said highway, or egress from their said close, to said highway, or to any other highway or public place, except over and across the close of the plaintiff, without going a greater and more inconvenient and an unnecessary distance, and over and across the closes of other persons; and therefore, that the defendants had, at said several times, when, &c., a necessary way for themselves, &c., and alleging the trespasses complained of to be the passing and repassing of the defendants upon said necessary way, as they lawfully might, &c. There was no averment of any former unity of ownership or possession of said closes, nor of any right by prescription. The plea was answered by a general demurrer. The county court, *pro forma*, ad-

judged the plea sufficient. To this exception was taken, and the case carried thereon to the Supreme Court.

The case was argued by *M. L. Bennett*, for plaintiff, and *G. F. Edmunds*, for defendants.

The opinion of the court was delivered by

BARRETT, J.—The plea justifies the alleged trespass, on the ground of a right in the defendants of a *way of necessity*, a right *created* by the necessity, and in no manner derived from *grant*, *reservation*, or *prescription*. The cases are numerous in which a *way of necessity*, as it is called, has been upheld; but in most instances, it has been on the ground of a grant or reservation implied from the necessity. There are some cases in which the reason assigned for the decision seems to favor the idea that a right of way may be *created* by the necessity, irrespective and independent of any *grant* or *reservation*, either express or implied. The one most directly to this effect is *Dutton* vs. *Taylor*, 2 Lutw. 1487. That case, in its facts, falls within the principle announced by the Court in deciding *Clark* vs. *Cogge*, Cro. Jac. 170, viz.: "If a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto but through one of those which he sold, although he reserved not any way, yet shall he have it, as reserved unto him by the law." The case of *Chichester* vs. *Lethbridge*, Willes Rep. 71, cited by counsel for the defendants, does not sustain the doctrine involved in the reason assigned for the decision in *Dutton* vs. *Taylor*, viz.: "that the public good required that the land should not be unoccupied." It was, under the 2d count, which alone was sustained, a case of *prescription*, in which the necessity was needlessly alleged as showing the origin of the *user* that had ripened into a right by *prescription*.

The case of *Clark* vs. *Cogge*, *supra*, which was also cited by defendants' counsel, was the ordinary one of an implied *grant* of a way. *Howton* vs. *Frearson*, 8 T. R. 50, was put on the same ground by Ld. KENYON, though counsel urged the right, upon the

principle and authority of *Dutton* vs. *Taylor*. The ground on which the decision in *Howton* vs. *Frearson* was put, in connection with the remarks of Ld. KENYON, casts a cloud upon the soundness, if not upon the authority, of the decision for the reason assigned in *Dutton* vs. *Taylor*. He says, "even upon the general ground, I was prepared to submit to the express authority of the case in Lutwich, though I cannot say that my reason has been convinced by it. There are great difficulties in the question; but in the other mode of considering the case" (viz.: as an implied grant), "those difficulties are gotten rid of altogether, and it falls within all the authorities, which are not controverted, even by the plaintiff."

In 1 Saund. 323 a, note 6, the cases are collated, and the doctrine educed is, that a *way of necessity*, such as the law recognises, results either from a *grant* or *reservation*, implied from the existing necessity, and that unity of possession at some former time appears to be the foundation of the right.

In *Bullard* vs. *Harrison*, 4 M. & S. 387, the third plea was, in substance, the same as the one now under consideration; and after full argument, Lord ELLENBOROUGH, with some spirit and great point, says: "Then as to this being well pleaded as a way of necessity, it is pleaded without showing any unity of possession or prescription whereby the land over which the way is claimed became chargeable. * * * It seems to suppose that whenever a man has not another way, he has a right to go over his neighbor's close. But this is not so," &c. He then refers to *note* 6 in Saunders 323 a, as containing the law of the subject and manner of pleading a way of necessity very accurately detailed; and saying "it is a thing of grant," &c.

In *Proctor* vs. *Hodgson*, 29 E. L. & E. 453, in the Court of Exchequer, the subject is involved and discussed; and the doctrine in the *note* on 1 Saunders 323 a, and as held by Lord ELLENBOROUGH in *Bullard* vs. *Harrison*, is asserted and applied by the Court. The same view of the law is explicitly stated in Woolrych on the Law of Ways, 72 *note* q., as well as in Gale & Whatley on Easements, upon a review of all the cases, p. 53 *et seq.* See also Woolrych, pp. 20–21.

The doubt expressed in Hammond's N. P. 198, as to the doctrine of that note in Saunders, would seem to be quieted by the authorities above cited.

Whatever may be the tendency of some of the cases, including that of *Dutton* vs. *Taylor*, the review we have given shows that the law of the subject is, for the present, settled in England.

So far as we have been referred to, or have been able to examine cases in this country, they seem to be uniform in holding or countenancing the doctrine that now prevails in England. In *Nichols* vs. *Luce*, 24 Pick. 102, the subject was fully discussed, and the cases were reviewed by counsel, and in the opinion of the Court delivered by MORTON, J., who says, "The deed of the grantor as much *creates* the way of necessity, as it does the way by *grant*. The only difference between the two is, that one is granted by *express words*, and the other only by *implication*. * * * It is not the necessity which creates the right of way, but the fair construction of the acts of the parties. No necessity will justify an entry on another's land," &c.

In *Collins* vs. *Prentiss*, 15 Conn. 39, the subject was thoroughly considered, and the leading cases were cited. WAITE, J., states the law, in substance, as it is stated in the *note* in Saunders, cited *supra*, and remarks, "And although it is called a way of necessity, yet in strictness the necessity does not create the way, but merely furnishes evidence as to the real intention of the parties." The same case came before the court again, and is reported 15 Conn. 423. The Court say, "A way of necessity can only be created in lands *owned* by the grantor at the time of the conveyance, and must be either reserved in the lands conveyed, for the benefit of the grantor, or created in other lands of the grantor for the benefit of the grantee. It arises from a fair construction of the deed as to the presumed intent of the parties. And it affects nobody but the parties to the deed and those claiming under them."

In *Seeley* vs. *Bishop*, 19 Conn. 134, ELLSWORTH, J., says, "In the case of *Collins* vs. *Prentiss*, 15 Conn. 39, this Court recognised fully, and to as great an extent as any other court, the doctrine of a way of necessity." The case of *Pierce* vs. *Selleck*, 18

Conn. 321, cited by defendants' counsel, does not present any view of the law different from, or in any way modifying the doctrine stated and held in *Collins* vs. *Prentiss*. In *Brice* vs. *Randall*, 7 Gill & Johns. 349, it is held that the fact that a person has no right of way except over the defendant's land, is not, of itself, sufficient to give him a right of way from necessity.

Chancellor Kent, 3 Com. 423–4, after referring to various English cases, states the doctrine contained in Sergeant Williams' *note*, cited *supra*, and says, "This would be placing the right upon a reasonable foundation and one consistent with the general principles of the law:" 3 Cruise Dig. 37. In a learned note by Professor Greenleaf, it is said, "But necessity alone, without reference to any relations between the respective owners of the land, is not sufficient to create this right." He then cites *Bullard* vs. *Harrison*, Sergeant Williams' note, Woolrych on Ways, and Kent's Com., as they are cited *supra*.

From this reference to the American cases and books, it appears that the law of the subject as now held in England, is received and adopted in this country to a sufficient extent to warrant the Court in adopting the same doctrine, so far as it is applicable, in this case. Indeed, if the question were now resting in general principles, unaffected by the discussions and decisions to which reference has been made, we should be very slow to hold that the necessity of a landowner, for a convenient way to and from his land, would *create* in him the right to encumber the land of a contiguous owner with the servitude of such way, independently of some former unity of ownership of the two parcels, and the implication of a grant or reservation of such right, and independently of any right established by prescription.

If this right, as claimed by the defendants in this case, were to be put on the ground of the requirements of the public good, as was done in assigning the reason for the decision in *Dutton* vs. *Taylor*, it might with propriety be suggested, whether the constitutional provision as to taking private property for public use without compensation, would not challenge consideration as a conclusive objection to the claim.

The provisions of the Statute for *pent* or bridle roads, seem to

have been made to answer to all the real necessities for a way, such as is claimed to be needed in this case, and at the same time to yield a due regard to the principle and spirit, as well as to the letter of that provision of the constitution.

On the whole, we are satisfied that the plea cannot be sustained either upon principle or authority.

The judgment is therefore reversed.

We are indebted to the courtesy of Mr. Justice BARRETT, for the foregoing very satisfactory opinion upon the question of "right of way of necessity." The learned judge has gone so thoroughly into an examination of the cases upon that point, that we should scarcely feel justified in occupying any more space.

I. F. R.

In the Supreme Court of Iowa.

TRUSTEES OF IOWA COLLEGE *vs.* RICHARD B. HILL.

Where L. executed and delivered to H. four blank promissory notes, and authorized him to fill the blanks with sums not exceeding $5000 each, for the purpose of negotiating them for the benefit of L.; and H. delivered to L. similar notes, to serve as receipts, or to indemnify him in case he (H.) should misuse any of the funds arising from the negotiation of L.'s notes; and H. returned the notes executed by L. to him with the blanks unfilled; and one of the notes executed by H. was filled by L. with the sum of $8629.81, and passed to the plaintiffs by indorsement as collateral security for an antecedent debt, *it was held*, that the court did not err in instructing the jury:

1. That the *onus* of showing the consideration of the note was upon the maker, the presumption being that it was sufficient.
2. That if the indorsees were *bonâ fide* holders for a good consideration, it could make no difference that it was executed in blank, or that it was accommodation paper which had been misused by the indorser.
3. That if the transaction was an exchange of notes, the indorsee could not be defeated by showing that, subsequent to the transfer, H. had delivered up and cancelled the notes of the indorser.
4. That if H.'s notes were delivered merely to stand as receipts to protect L. in case H. should misuse the funds arising from the notes given to him to negotiate, any note filled up by L. (his notes having been returned to him) would in his hands be without consideration.

5. That the presumption was that the indorsee took the note in good faith, in the usual course of business, before its maturity, and for a valuable consideration; that express or actual notice that the note was without consideration, or that it had been filled up without authority, was not necessary; that it is sufficient if the circumstances brought home to the plaintiffs are of such a strong and pointed character as necessarily to cast a shade upon the transaction and put them upon inquiry; that the indorsees are not charged with notice because of any want of diligence on their part in making inquiry, or if they took the note under suspicious circumstances, provided they had no notice actual or constructive of the equities between the original parties; that the defendant was not bound to prove that the plaintiff purchased with full and certain knowledge of the want of consideration, but if the circumstances attending the transfer of the note were such as to put them on their guard, or if they must have known therefrom that the person offering it had no right to transfer it, then they were bound to make inquiry, and if they did not, they took the note at their peril.
6. That though the plaintiffs took the note as collateral security for an antecedent debt, they are nevertheless *primâ facie*, though not *conclusively*, to be considered as holders for value, and it is on the defendant to show that they are not such holders; that if it was taken for collateral security only, the plaintiffs parting with nothing, giving no time, relinquishing no right, nor suffering damages or injury as the consideration or in consequence of receiving it, they would not be such holders.

Appeal from Scott County District Court.

James Grant, *S. F. Smith*, and *F. F. Burlock*, for the appellant.

Davison & True and *James J. Lindley*, for the appellee.

WRIGHT, J.—This case has been very fully argued by counsel: seldom have we found one more so. We have examined it with great care, and now proceed to state our conclusions without much elaboration of the points made.

Three questions of fact, under the instructions of the Court, were presented for the determination of the jury: 1st. Was the note obtained without consideration? 2d. Had the plaintiffs notice of this before taking the same? 3d. If they had not this notice, did they take it for value in the due course of trade? It is manifest that the jury must have found for the defendant upon the first question; for this determined in favor of the plaintiffs would have entitled them to a verdict. It is equally clear that

their finding must have been in favor of the defendant upon one or both of the other issues. The first, and either of the others, if decided in favor of the defendant, entitled him to a verdict. Whereas, a contrary result as to the first, or that found for the defendant, and the other two against him, would have compelled a verdict for plaintiffs.

What was the consideration, then, was the first material inquiry. Briefly, the defendant claims that at the time the note was given, he, a resident of Davenport, was about to visit Boston; that Lambrite called upon him, and left four blank notes signed by said Lambrite, which defendant had the privilege of filling up, in sums not to exceed $5000 each, for the purpose of negotiating the same in Boston for the benefit of said Lambrite; that after the notes were thus signed and delivered, the defendant, at his own instance, handed to Lambrite four similar blank notes, including the one now in suit, to serve as a receipt or to indemnify him in case the defendant should misuse any of the funds that might be raised on Lambrite's notes; that he never used the notes obtained from Lambrite, but on the contrary returned the same to him, without ever having filled them up; that Lambrite filled up one of the notes thus signed by the defendant, with the sum of $8629.81, and passed the same to the plaintiffs. On the part of the plaintiffs, it is claimed that the transaction was an exchange of notes, each party having the right to fill up and negotiate the paper thus delivered, and thus raise money for himself. To support these respective claims, the parties introduced a very great amount of testimony, after considering all of which, the jury found for the defendant. And to sustain this finding, we think the testimony is most abundant. That it was ever intended by the parties that Lambrite should use the blanks delivered to him, except to indemnify himself should the contingency arise, we do not for one moment believe. We are equally clear that Lambrite never intended to thus use them, and that he only concluded in an evil hour to thus use the defendant's name, to do what was at most but partial justice to the plaintiffs, whose funds, which had come into his hands as treasurer, he had used, and which he

hoped to be able to replace, and redeem the note without the negotiation being known to Hill. Nor do we think any just exception can be taken to the instructions on this subject. The *onus* was on the defendant. The presumption was that the consideration was right in every particular, and it was incumbent on the defendant to rebut this presumption. If the plaintiffs were *bonâ fide* holders for value, then it could make no difference that the note was signed in blank; nor that it was accommodation paper merely, and had been misused by Lambrite. If the transaction was an exchange of notes, then so far the plaintiffs could not be defeated by showing that subsequent to the transfer, the defendant had delivered up and cancelled the notes of Lambrite. If, however, the notes of Hill were delivered not as accommodation paper, but merely to answer in the place of a receipt or receipts, or to protect Lambrite in case Hill should misuse the funds arising from the notes delivered to him to negotiate, any note filled up by Lambrite (his notes not having been used) would in his hands be without consideration. All this was stated to the jury, and substantially and correctly covered the whole law of the case touching the question of consideration. Nor was there any error in refusing those asked by the plaintiffs upon the same subject. In the first place, so far as applicable, they were covered by the instructions in chief. In the next place, while some of those asked and refused, as abstract propositions, were good law, the giving of them could have answered no good purpose under the testimony submitted. We take occasion to say what we have frequently repeated—that a court is not bound to repeat an instruction previously given. Nor should an instruction be given, which, though abstractly correct, is not pertinent to the actual facts developed on the trial.

II. Did the plaintiffs take the note with notice? With the question of fact here involved we have nothing to do, more than to say that if the jury found in the affirmative, we should entertain very many doubts of the correctness of the verdict. As the discussion of this question, however, will be immaterial, from the final view we shall take of the case, we shall confine ourselves to

the law governing it as given by the Court. The jury were told that the presumption was that the plaintiffs took the note in good faith, in the usual course of business, before its maturity, and for a valuable consideration; that express or actual notice that the note was without consideration, or that it had been filled up without authority, was not necessary; that it was sufficient if the circumstances brought home to the plaintiffs were of such a strong and pointed character as necessarily to cast a shade upon the transaction, and put them upon inquiry. They are not to be charged with notice because of any want of diligence on their part in making inquiry, or even if they took the note under suspicious circumstances, provided they had no notice, actual or constructive, of the alleged equities existing between Lambrite and Hill. That the defendant was not bound to prove that the plaintiffs purchased with full and certain knowledge of the want of consideration, but if the circumstances attending the transfer of the note were such as to put them on their guard, or if they must have known therefrom that the person offering it had no right to transfer it, then they were bound to make inquiry, and if they did not, they took the note at their peril. Other instructions bearing upon this question, referring more in detail to the facts developed, were given, but the foregoing will serve to show the general view of the law, taken by the Judge trying the cause. To these we do not think the plaintiffs can have any just ground of exception. As sustaining them, see *Kelly* vs. *Ford*, 4 Iowa 140; *Clapp* vs. *Cedar County*, 5 Id. 58; Story on Notes, § 197; *Cole* vs. *Baldwin*, 12 Pick. 546. In this connection the appellants insist that certain instructions were erroneous, for the reason that they were based upon a state of facts of which there was no testimony. We recognise fully the rule that it is erroneous to instruct upon a hypothetical state of facts of which there was no evidence: *Moffitt* vs. *Crumbe*, 8 Iowa 122; *United States* vs. *Brentling*, 20 How. 252. But the rule has no application in this case, for the reason that in one instance the instruction was clearly applicable, and as to the other the appellant clearly mistakes the language used by the Court. Thus we should be very far from holding that there was no testimony as to

Lambrite's insolvency at the time of the transfer. On the contrary, we think they would have been fully justified in finding him notoriously so. This is certainly the impression the testimony makes upon our minds. And then, as to the other instruction, the objection is, that the jury were told that notice to one agent is notice to another, whereas, the instruction given is, that notice to the agent of matters coming within the purview of his agency was notice to the principal. In this part of the case, therefore, there was no error in the action of the Court.

III. The question of most importance, and that most discussed by counsel, arises under the third branch of the case. As already suggested, it is claimed by defendant, and the evidence tends to prove, that the plaintiffs received this note from Lambrite as collateral to secure a pre-existing indebtedness, and upon this subject the Court instructed that though the plaintiffs took the note as collateral security for an antecedent debt, they were nevertheless *primâ facie*, though not conclusively, to be considered holders for value, and it is on the defendant to show that they were not such holders. Other instructions on the same point were given, and some asked by the parties refused, which, however, need not be recited, for if the foregoing is law, it in our view renders the consideration of all the others unimportant, and the same is true if it is not the law.

Two propositions are said, by Justice STORY, to be laid up among the fundamentals of the law, and to require no authority or reasoning to support them. The first is, that a *bonâ fide* holder of a negotiable instrument for a valuable consideration, without notice of facts which imperil its validity as between antecedent parties, if he takes it by indorsement before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity. The second is, that the holder of negotiable paper taken before it is due, is not bound to prove that he is a *bonâ fide* holder for a valuable consideration without notice, for the law will so presume in the absence of all rebutting proofs, and therefore it is incumbent on the defendant

to overcome, by satisfactory proofs, the *primâ facie* title of the plaintiff: *Swift* vs. *Tyson*, 16 Peters 1. But, as applied to this case, the question remains, What constitutes a valuable consideration, under the general rule applicable to negotiable instruments?

It was held in this Court, in *Johnson* vs. *Baury*, 1 Iowa 531, as settled by the current of decisions, that the rights of the holder of negotiable paper are the same, whether the debt for which it is transferred is pre-existing or contracted at the time. This, of course, referred to a case where the instrument was taken in satisfaction or payment of a pre-existing debt; for, by reference to the case, it will be found that while the question of the rights of a holder who takes the paper as collateral security on a previous liability was discussed by counsel, it was not decided, as the case was disposed of on another point. At that time, however, the question was very elaborately discussed by able counsel, and the writer of this opinion, who is the only member of the present bench who heard the argument, concurred with those authorities which held in accordance with the instructions given in this case. He has serious reason to change the view then entertained, and this being the opinion of the other members of the Court, is so held. Authorities upon the subject are to be found, perhaps, in every state in the Union except our own, to say nothing of the adjudications in the Federal Courts, and those of England.

The most casual reader must be struck with the number of times the question has been determined without really arising. If the evils resulting from an indulgence in mere *obiter dicta* were ever apparent, they are peculiarly so in this instance.

Taking it for granted that taking the note in payment, and as collateral security merely, were the same in principle as affecting the rights of the assignee, cases of the first character are decided, and there it is announced, without the least necessity or occasion for it, that the same rule applies to the second. And well might Justice CATRON, in the leading case of *Swift* vs. *Tyson*, *supra*, say that what is incorporated in the principal opinion on this subject was aside from the case made by the record, or argued by counsel.

The same thing occurs in effect in *Bond* vs. *Central Bank*, 2

Kelley 106, and based upon the reasoning there used to a great extent. NESBIT, J., decided the case of *Gibson* vs. *Conner*, 3 Id. 47. So in *Allaine* vs. *Hartshorne*, 1 Zab. 665.

The note was transferred for a consideration then advanced in part, and though the question as applied to collaterals did not arise, it was discussed and decided. The case in 11 Ohio 172 is clearly one of payment, and all that is said about collaterals is *obiter*, and nothing else. So, again, the case of *Blanchard* vs. *Stevens*, 3 Cush. 162, required nothing more than the recognition of the principle that the receiving of the note in payment of a pre-existing debt will exclude all equities between the original parties, and thus we might in almost numberless cases show the truth of the general remark above made. But these will suffice. Some cases are found where the question under discussion fairly and legitimately arose, and was decided as claimed by the appellants. Of this character is the case of 3 Kelley, *supra* (but see *Mealon* vs. *Bird*, 22 Georgia 246), *Bank* vs. *Carrington*, 5 R. I. 515, and some others, referred to by counsel. The case of *Bank* vs. *Chapin*, 8 Metc. 40, does not, in its facts, come clearly within the rule. The debt for which the note in suit was pledged was not a pre-existing debt.

But, without further reference to these cases, we conclude that the correct rule is found clearly stated in *Roxborough* vs. *Meesick*, 6 Ohio St. R. 448, thus: "Where the note is transferred as collateral security, and for value such as a loan or further advancement, or a stipulation, express or implied, of further time to pay a pre-existing debt, or the like, the assignee will be protected from infirmities affecting the instrument before it was thus transferred. If, however, the note is transferred as collateral security to a pre-existing debt, without any consideration, so that the transfer is a mere voluntary act on the part of the debtor, and is received by the creditor without incurring any new responsibility, parting with any right, or subjecting himself to any delay or loss, and leaving the subsisting debt precisely in the condition it was before such transfer, the holder has not taken the note for value, nor in the usual course of trade." "To hold otherwise," says Judge SWAN,

in that case, "would be a departure from the established rules of law, governing the rights of parties to negotiable paper, and losing sight of public policy, upon which the law is founded."

And the annotator's note to *Swift* vs. *Tyson*, 1 Am. Lead. Cases 336, states this rule substantially as one that may be considered as settled, and to support it refers to cases in Pennsylvania, Connecticut, Maine, New Hampshire, Ohio, Kentucky, Illinois, Alabama, Michigan, and Delaware.

Affirmed.

Where an instrument in the general form of a bill of exchange or promissory note, but with a blank for the amount to be paid, is delivered by the apparent drawer or maker to the payee or other person, with authority to negotiate it after filling the blank up to a certain sum, it becomes, when so filled up, a valid note or bill by relation, and it will bind the maker in the hands of a *bonâ fide* holder for value, though a greater than the stipulated sum has been fraudulently inserted. The same rule applies to the indorser of a note in blank. Russell *vs.* Langstaffe, 2 Douglas 514; Collis *vs.* Emett, 1 H. Black. 313; Young *vs.* Grote, 4 Bingh. 257; Robarts *vs.* Tucker, 16 Q. B. 560; Russell *vs.* Perkins, 25 L. J., C. P. 187; Bank of Ireland *vs.* Trustees of Evans' Charity, 5 H. Lds. Cas. 410; Violett *vs.* Patton, 5 Cranch 142; Putnam *vs.* Sullivan, 4 Mass. 45; Mitchell *vs.* Culver, 7 Cow. 337; Moody *vs.* Threkeld, 13 Geo. 55; Bank of Limestone *vs.* Penick, 5 Monr. 25; Bank of Commonwealth *vs.* Curry, 2 Dana 142; Smith *vs.* Moberly, 10 B. Monroe 266; Huntington *vs.* Branch Bank, 3 Ala. 186; Kimber *vs.* Lytle, 10 Yerg. 417; Young *vs.* Ward, 21 Illinois 223; Ives *vs.* Farmers' Bank, 2 Allen, Mass. 241. In Young *vs.* Grote, 4 Bing. 257, this doctrine was carried so far that it was held that where an agent authorized to fill up a check to a certain amount, does it so carelessly as to leave a blank before the true amount, and a greater sum is fraudulently filled in by the holder, as *three hundred and* fifty for —— fifty, the maker was liable for the greater sum. This case has been a good deal commented on, but seems, to the actual extent of the decision, to be followed in England. See Robarts *vs.* Tucker, 16 Q. B. 560; Bank of Ireland *vs.* Trustees, &c., 5 H. Lds. 410; Ex parte Swan, 7 Com. B. 400. But in Worrall *vs.* Gheen, 3 Wright 388, it was held that Young *vs.* Grote, if it could be supported at all, was not applicable to bills of exchange or promissory notes, and therefore that where a note was indorsed for the accommodation of the maker, who fraudulently filled up a blank space before the real sum, so as to increase the amount, the indorser was not liable even to a *bonâ fide* holder for more than the original sum. And this is also the effect of the decision in Ives *vs.* Farmers' Bank, 2 Allen 241.

The other question raised in the foregoing case, as to whether one who takes a bill or note as collateral security for an antecedent debt is a holder for value, which has been much discussed in the United States, and on which the authorities are greatly at variance, is considered at length in the note to Le Breton *vs.* Pierce, in this volume, p. 35, and in that to Swift *vs.* Tyson, 16 Pet. 1, in 1 Am. Leading Cases 333. See also Atkinson *vs.* Brooks, 26 Verm. 378;

Bank of Republic *vs.* Carrington, 5 R. I. 519; Roxborough *vs.* Messick, 6 Ohio, N S. 448, in which the subject is discussed with great learning and ability. In addition to the cases referred to in our previous note, and in the foregoing opinion, in support of the dictum of Judge Story in Swift *vs.* Tyson, may be cited the more recent decisions of Bridgeport Bank *vs.* Welch, 29 Conn. 476; Auston *vs.* Curtis, 31 Verm. 64, *semb.;* and against it, Prentiss *vs.* Graves, 33 Barb. 622; Farrington *vs.* Frankfort Bank, 31 Id. 188; Lea *vs.* Smead, 1 Metc. Ky. 628; Alexander *vs.* Springfield Bank, 2 Id. 534. In Davis *vs.* Miller, 14 Gratt. 1, the question was left undecided.

While the courts of Pennsylvania and New York hold, beyond doubt, that one who takes a note merely as collateral security for an antecedent debt is not a holder for value, and is therefore not protected when the note has got into circulation by fraud or in violation of some agreement (Kirkpatrick *vs.* Muirhead, 16 Penn. St. 381; Prentiss *vs.* Graves, 33 Barb. 622), yet they have also held latterly that an accommodation maker or indorser cannot depend, in a suit on the note, on the ground of want of consideration alone. Appleton *vs.* Donaldson, 3 Penn. St. 381; Lord *vs.* Ocean Bank, 20 Id. 386; Moore *vs.* Baird, 30 Id. 138; Work *vs.* Kase, 34 Id. 140; Zeng *vs.* Fyfe, 1 Bosworth 335; Robbins *vs.* Richardson, 2 Id. 248. The reason assigned for this distinction is that accommodation paper is a mere loan of credit, without restriction as to the manner of its use. H. W.

New Jersey Supreme Court, June Term 1862.

THE STATE *vs.* BABCOCK & BABCOCK.

By the compact between the States of New Jersey and New York, approved by Congress in the year 1834, the State of New York has exclusive jurisdiction over all the waters of the Hudson River, and of and over the lands covered by the said waters, *to the low-water mark* on the New Jersey shore. On an indictment in New Jersey for obstructing the free navigation of the said river, by placing, sinking, and lodging in the said river certain ships, schooners, boats, and other vessels, the jury rendered a general verdict of guilty, but found as a fact that the defendants had, within the times specified in the indictment, placed and procured to be placed vessels and wrecks of vessels both above and *below* the low-water line, which were an interruption to the navigation. A new trial was granted.

Observations on the nature and ground of the compact between the States.

This case came before the court upon a special state of the case made on the trial, accompanying a general verdict of guilty. The indictment was originally found in the Court of Oyer and Terminer of the county of Hudson, which, being removed into the Supreme Court by *certiorari*, was taken down for trial at the Hudson Circuit.

The opinion of the Court was delivered by

ELMER, J.—By the compact between the States of New Jersey and New York, ratified by the legislatures of the two States, and approved by Congress, in the year 1834, the State of New York has exclusive jurisdiction of and over all the waters of Hudson river, and of and over the lands covered by the said waters, to the low-water mark on the New Jersey shore; and the State of New Jersey has the exclusive right of property in and to the land under the water lying west of the middle of the river, and exclusive jurisdiction of and over the wharves, docks, and improvements made or to be made on the Jersey shore, and on vessels aground on said shore, or fastened to any such wharf or dock, except as to quarantine regulations and the exclusive right of regulating the fisheries on the westerly side of the middle of the river. The waters of the Hudson, although exclusively within the jurisdiction of New York, are a common highway for all the citizens of the United States. Any obstruction to that highway, placed on the shore above the low-water mark, which shore remains exclusively within the jurisdiction of New Jersey, either by means of vessels, logs, stones, or other temporary obstructions placed there, or by means of a wharf or other improvements, which are injurious to the navigation, is of course indictable in this state; while obstructions below the low-water mark, where not only the water, but the land under the water, are exclusively, except as to the fisheries, within the jurisdiction of New York, can only be punished by proceedings in the courts of that state, or of the United States. If by docks as used in the compact, is meant, as I suppose, according to the American usage, the spaces between wharves, the land covered by the water within such docks is also within the jurisdiction of this state, and obstructions placed therein which are injurious to the navigation, may be indicted in our courts.

The indictment in the case before us, charges that the defendants obstructed the free navigation of the river, by placing, sinking, and lodging in said river, and upon the shore of this state, in said river, certain ships, schooners, boats, and other vessels; and it is found as a fact by the jury, according to the special case returned to us with a general verdict of guilty, that the defendants

had within the times specified in the indictment, placed and procured to be placed, vessels and wrecks of vessels both above and below the low-water line, which were an interruption to the free navigation of the river. Other facts are also found by the jury, which perhaps were meant to show that obstructions were placed in a dock; but the indictment does not charge that any obstructions were placed in a dock, nor do the facts stated enable us judicially to determine that such was the case. What is a dock, I suppose, is a mixed question of fact and law.

Had the special case explicitly stated that the obstructions placed on the shore, that is on the land covered by the tide between the high and low water lines, were obstructions to the navigation of the river, and did it sufficiently appear that the two defendants had acted jointly in placing and keeping them there, I should be of opinion that judgment ought to be pronounced for the State. As the case appears, it will be the only safe course to send down the case for a new trial, that these two questions may be distinctly submitted to the jury.

It has been earnestly insisted that the safety of property holders on the Jersey shore requires us to hold that obstructions in the river, outside of the low-water line, if injurious to the navigation of vessels coming to that shore, are offences against our laws, and indictable in our courts. But apprehensions of this kind, which are probably altogether imaginary, will not justify us in departing from the plain meaning of the compact. Although for some purposes New Jersey is bounded by the middle of the Hudson, and the state owns the land under the water to that extent, exclusive jurisdiction not only over the water, but over the land to the low-water line on the Jersey shore, is, in plain and unmistakeable language, granted to, or rather acknowledged to belong to, the State of New York. There is no reason to doubt that the tribunals of that state, which have a common interest in preventing all obstructions to the navigation of the waters surrounding their most important city, will not only punish all crimes against our citizens or their own, while in or upon those waters, but will also adequately punish all interference with the navigation. The case does not materially differ from a line between two states, on the

land which happens to be the scene of a busy population, where a manufactory near to that line in one state, may be a nuisance to the citizens of the other, whose redress will have to be obtained from the tribunals of the state in which the nuisance is situate.

As persons not acquainted with the circumstances of the dispute between the States of New Jersey and New York, in regard to the respective rights in the river and bay separating them, have sometimes complained of the compact agreed upon after a long and troublesome controversy, and after the failure of two previous attempts to terminate it by agreement, as having conceded too much to New York, it may be proper to take this opportunity of explaining the obvious motives which induced the commissioners and the legislature of this State to consent to the terms finally adopted.

The territories now forming the States of New York and New Jersey, including by name Hudson's river, were granted originally by King Charles the Second to his brother, the Duke of New York, afterwards James the Second. The Duke granted to Lord Berkley and Sir George Carteret, the territory now the State of New Jersey, and described it as "all that tract of land adjacent to New England, and being to the westward of Long Island and Manhitas Island, and bounded on the east part by the main sea and part by Hudson river, and hath upon the west Delaware bay or river." Between the date of this grant and the Revolution, the charters of New York city, and the proceedings of its authorities, showed that it had always been claimed that the whole of Hudson's river, up to the low-water mark on the westerly shore, belonged to that State. After the Declaration of Independence, it was claimed by New Jersey that the conquest from the crown extended that State to the middle of the river. These conflicting claims led to the appointment of commissioners by the two States to settle the conflicting claims in 1807, and again in 1827, without success.

In the meantime Judge WASHINGTON had decided that the grant to New Jersey limited its territory to theeastern shore of the Delaware river and bay, a decision acknowledged by this Court to be correct. *State* vs. *Davis*, 1 Dutch 386. And what was still more adverse to the claim of this State, in reference to the waters of the Hudson, the Supreme Court of the United States laid down the

doctrine that "when a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only." And upon this principle they held that the Ohio river was exclusively within the territorial limits of Kentucky, and that Indiana had no jurisdiction over or rights to the river. *Handly's Lessee* vs. *Anthony*, 5 Wheat. 360.

When the Commissioners of New Jersey and New York again met, in 1833, and it was found that those of the latter State appeared to be desirous of arranging the dispute upon fair and liberal terms, but deemed it indispensable that their great commercial emporium should have the exclusive control of the police on the surrounding waters, and full power to establish such quarantine regulations as should be found necessary, the commissioners of this state deemed it wise to secure the exclusive property in the soil to the middle of the river, and exclusive jurisdiction over the wharves, docks, and other improvements, made or to be made, on the Jersey shore, and over the vessels fastened thereto, and the right to regulate the adjacent fisheries, leaving to New York what was thought to be quite as much a burthen as a privilege, the exclusive jurisdiction over offences in or upon the water, or the land covered by the water, outside of the low-water mark. As it was thought possible that the time might come when Perth Amboy will be an important city, like exclusive jurisdiction over the adjacent waters, to the low-water mark on Staten Island, was secured to this State. Nothing has since occurred to make the propriety of this arrangement doubtful; on the contrary, there is every reason to believe that it has secured important rights to this State which otherwise might have been lost.

In further elucidation of this subject, it is to be noticed that the river Delaware was never within the jurisdiction either of this State or Pennsylvania, until, by the Revolution, the right of the Crown was extinguished, and each State then held to the middle. Under these circumstances the agreement between the two States,