Supreme Court of Maine.

JACKSON *vs.* THE Y. & C. RAILROAD COMPANY.

Without some statutory provision, no action can be maintained in the name of an assignee, upon interest coupons, which contain no negotiable words, nor language from which it can be inferred, that it was the design of the corporation issuing them, to treat them as negotiable paper, or as creating an obligation distinct from, and independent of, the bonds to which they were severally attached when the bonds were issued.

The negotiability of such coupons is a question of law, to be determined, from the papers themselves, by fixed and well-settled rules; and proof of custom, as to the negotiability of them, is inadmissible.

The bonds being specialties, the remedy for breaches thereof, is by an action, not of assumpsit, but of debt or of covenant broken; not being *legally* assignable, no action is maintainable in the name of the holder, though he be assignee. GOODENOW, J., dissenting.

It is indispensable to its maintenance that the cause of action exist at the time the action was commenced. The statute of 1856, c. 248, does not remedy this defect.

This case was reported in full in the August number of the LAW REGISTER, p. 585, to which we refer the reader. In the following supplemental note, several decisions of great interest and importance are added.

ADDENDUM.—Since preparing the note to the above case, we have discovered a considerable number of cases bearing upon the questions before discussed, of the existence of which we either were not aware, or else the fact had escaped present recollection. In Beaver Co. *vs.* Armstrong, Sup. Ct. Penna., February 1863, a learned and elaborate decision was delivered by Mr. Justice READ, in which the cases bearing upon the question were thoroughly reviewed, and the conclusion arrived at, that the coupons of railroad bonds are negotiable instruments, and may be sued by the holder separate from the bonds, and interest recovered from the date of the demand and refusal. This very point was also decided in Knox Co. *vs.* Aspinwall, 21 How. U. S. R. 539; and seems to have been recognised in Zabriskie *vs.* C. C. & C. Railway, 23 How. U. S. R. 381, 400. This affords very satisfactory confirmation of the views already expressed by us, and can scarcely fail to convince the Court in Maine, that the present weight of American authority is very decidedly in favor of the views maintained by Mr. Justice GOODENOW.

I. F. R.

Supreme Court of New York.

IN THE MATTER OF WILLIAM J. JORDAN; SAME OF JOSEPH ECK; SAME OF JOHN HEDGES.

1. Where on a return to a writ of *habeas corpus*, a state Judge or Court is *judicially apprised* that the party is in custody under the authority of the United States, such Judge or Court can proceed no further. The prisoner is then within the dominion and exclusive jurisdiction of the United States.
2. Under the second section of chapter 24 of the Laws of Congress of 1862, it is declared that "hereafter no person under the age of eighteen years shall be mustered into the United States service, and the oath of enlistment taken by the recruit shall be conclusive as to his age." The prisoner having been mustered into the United States service, and having, at the time of enlistment, made a declaration under oath that he was twenty-one years of age, and these facts having been stated in the return to the writ of *habeas corpus* by the party claiming to hold him in custody under color of the authority of the United States: *Held*, that the state Judge was "judicially apprised" that the prisoner was in custody under the authority of the United States, and that he was ousted of his jurisdiction.
3. The case of *Ableman* vs. *Booth*, 21 How. U. S. 506, approved and followed.

At Chambers, August 8, 1863, before E. DARWIN SMITH, Judge, &c.

Cases of *habeas corpus*. The facts appear in the opinion.

C. Nash and *G. Parker*, for petitioners.

Job Hedges, for respondents.

E. DARWIN SMITH, J.—In these three cases writs of *habeas corpus* had been issued returnable, and coming on to be heard upon the returns thereto together, on the 8th of August, instant. After argument, I dismissed the proceedings for reasons then stated orally, but as these applications are quite frequent, I thought it would be useful to state my reasons for such decision, and the principles governing the allowance of writs of *habeas corpus* more formally, and announced at the time that I should do so at my earliest convenience.

These writs of *habeas corpus* were respectively allowed upon the

allegation that the parties whose imprisonment was complained of, were minors under the age of eighteen years, and were unlawfully held and restrained of their liberty by military officers, on the pretence that they were duly enlisted as soldiers into the service of the United States.

When the writs were allowed, I intimated to the parties applying for them, that I thought they would be unavailing, but I could not refuse to allow them.

According to the Habeas Corpus Act of this State, the Judges of this Court and other State Judges authorized to entertain proceedings under the act, and to inquire into the cause of the imprisonment of any person restrained of his liberty within the State, have no discretion in respect to the allowance of such writs, if petitions are presented to them for that purpose in the form prescribed by the statute. The petitions in these three cases were in such form.

It has been held in some of the States, that it is not the duty of the Judge or Court applied to for the allowance of a writ of *habeas corpus*, to allow the same if he is satisfied upon the petition and commitment annexed that it will be their duty to remand the prisoner.

In the case of *Passmore Williamson*, 3 Am. Law Register 741, Chief Justice LEWIS, of the Supreme Court of Pennsylvania, so held and refused the writ, and the Supreme Court of that State, in the same case, on an application to the Court for the writ, so held: 26 Penn. R. (2 Casey) 9.

Whether the Habeas Corpus Act of Pennsylvania is the same as the statute in this State, I am not apprised; but, under this decision, as it is the decision of the highest Court in that State, it would doubtless be entirely safe and proper for any Judge in that State to refuse the writ when, upon the face of the papers, he was of the opinion that it ought not to be granted, for the above-mentioned reasons. But the statute of this State prescribes a different rule. Its language is as follows: "Any Court or officer empowered to grant any writ applied for, &c., to whom such petition shall be presented, shall grant such writ without delay:" sect. 40,

2d Rev. Stat. p. 564; and sect. 46 is as follows: "If any Court or officer authorized by the provisions of this article to grant writs of *habeas corpus* or *certiorari* shall refuse to grant such writ, when legally applied for, every member of such Court who shall have assented to such refusal, and every such officer, shall severally forfeit to the parties aggrieved one thousand dollars."

I think it was the intention of the Legislature in these provisions to preclude any pretence for delay or evasion in granting the writ, for the double purpose of providing for a prompt examination in all cases of the grounds of imprisonment of any person restrained of his liberty, and of having such examination in such form as to allow a record to be made up for review in a superior tribunal, that no man should be concluded by the decision of any single Judge upon the question of the legality of his imprisonment.

Upon the return of the writs issued in these cases, the persons upon whom the same were served having omitted and refused to obey the same by producing the party named in such writs respectively, claimed to be excused from such neglect or refusal, upon returns in each of said cases similar to that made in the case of Jordan, which is in substance as follows:

1st. That the person making such returns upon whom such writ was served was a military officer in the service of the United States, at Rochester, and engaged in organizing a regiment of volunteers in such service.

2d. That said Jordan, the party named in said writ, was detained as an enlisted soldier in the service of the United States, and was so detained and held at the time of the service of said writ.

3d. That the production of said Jordan would be inconsistent with and in violation of his duty as a military officer under the orders of his superior officer.

4th. That the said Jordan is held under the authority of the United States, and for this reason, and without intending any disrespect to the honorable Judge who issued the process, the said returning officer declined to produce said Jordan or to subject him to the process of the Court.

This return I held and consider insufficient. The person upon

whom a writ of *habeas corpus* is served must obey the writ by producing the body and making return of the cause of the impressment or detention, or show a "sufficient *excuse for such refusal or neglect.*" This return was obviously made to present such excuse. If no sufficient excuse is shown, the Judge must issue an attachment against the party refusing to produce the body, which was moved for in these cases, and which I held must issue unless the returns were amended.

It is the duty which State Courts owe to the citizens of the State, to see to it, when their judicial powers are invoked for that purpose, that no one is unlawfully imprisoned or restrained of his liberty. Every citizen of adult age has the absolute right to be free from any restraint upon his person, and any person claiming a right to exercise restraint over another must, when questioned in respect to the exercise of such power by judicial proceedings, show a lawful ground or authority for such restraint. He must show that it is under color of law and of an apparent legal right.

The petition in each of these cases states that the party restrained of his liberty was an infant under the age of eighteen years. In the second section of an Act of Congress, chapter 25, passed February 13, 1862, it is declared as follows: "That hereafter no person under the age of eighteen years shall be mustered into the United States service, and the oath of enlistment taken by the recruit shall be conclusive as to his age."

Assuming the facts of the petitions to be true, the return in these cases shows no apparent right to hold Jordan and the other parties in question as enlisted soldiers in the United States service.

These returns were doubtless made under the authority of the case of *Ableman* vs. *Booth*, 21 How. U. S. 506, in which Judge TANEY used the language following: "But after the return is made, and the State Judge or Court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further."

The State Judge, in my opinion, cannot be *judicially apprised* that the party is in custody under the authority of the United States, until, by a proper return, the *facts* are stated or presented

for his consideration, which, upon their face, show a case of apparent lawful detention or imprisonment under the authority of the United States. The mere general assertion as made in the return in these cases that the parties were held under the authority of the United States is not sufficient. Almost any wrong or outrage might be covered up by such a return. It would substitute a military, or ministerial, or other officer of the General Government, or any private person claiming to act in its behalf in the place of the Judiciary Department, to judge of the character and rightfulness of his authority. This clearly cannot be allowed. Every person is amenable to the law of the land, as interpreted by the Courts, State or National.

In accordance with these views and upon leave granted, the respondents in these several cases amended their returns as follows respectively:

"5th. That the said Jordan was regularly enlisted into the service of the United States, according to the rules and regulations of the recruiting service for enlisting volunteers, by his signing the paper, statement, or declaration directed for recruits to sign, and by his taking the oath required for recruits to take; and that the paper hereto annexed, marked A, is one of the triplicate enlistments in this case; that the oath was regularly administered by an officer authorized to administer oaths, and that he was regularly examined by the surgeon appointed for that purpose."

DECLARATION OF RECRUIT.

I, James Jordan, desiring to volunteer as a soldier in the army of the United States, for the term of three years, do declare that I am twenty-one years and —— months of age; that I have never been discharged from the United States service on account of disability or by sentence of a court-martial, or by order before the expiration of a term of enlistment; and I know of no impediment to my serving honestly and faithfully as a soldier for three years.

JAMES JORDAN.

Given at Rochester, N. Y., the 4th day of July, 1863.
Witness: F. WARNER.

VOLUNTEER ENLISTMENT.

STATE OF NEW YORK,
CITY OF ROCHESTER.

I, James Jordan, born in the town of Pittsford, in the State of New York, aged

twenty-one years, and by occupation a farmer, do hereby acknowledge to have volunteered this fourth day of July, 1863, to serve as a soldier in the army of the United States of America, for the period of three years, unless sooner discharged by proper authority; do also agree to accept such bounty, pay, rations, and clothing, as are, or may be, established by law for volunteers. And I, James Jordan, do solemnly swear, that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies or opposers whomsoever; and that I will observe and obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War.

JAMES JORDAN.

Sworn and subscribed to, at Rochester, this 4th day of July, 1863, before J. M. Bardwell, Commissioner of Deeds.

I certify, on honor, that I have carefully examined the above-named volunteer, agreeably to the General Regulations of the Army, and that in my opinion he is free from all bodily defects and mental infirmity, which would, in any way, disqualify him from performing the duties of a soldier.

H. MULLEN,
Surgeon 13th N. Y. V. Artillery, Examining Surgeon.

I certify, on honor, that I have minutely inspected the volunteer, previously to his enlistment, and that he was entirely sober when enlisted; that, to the best of my judgment and belief, he is of lawful age; and that, in accepting him as duly qualified to perform the duties of an able-bodied soldier, I have strictly observed the Regulations which govern the recruiting service. This soldier has blue eyes, brown hair, light complexion, is five feet eight inches high.

JOHN WEED,
Captain 13th Regiment of N. Y. Artillery Vols.,
Recruiting Officer.

The return of the respondents in these cases, thus amended, I held and consider, presented a case of imprisonment under the authority of the United States—*primâ facie*, lawful. Upon the face of these enlistment papers, the United States officers authorized to make enlistments were clearly entitled to receive the enlistment of the said Jordan, and to muster him into the United States service. He distinctly declares that he is twenty-one years of age, and in the recital to the oath reasserts this declaration, and, for aught that appears on the face of these papers, he was lawfully enlisted, and is legally held as a soldier in the volunteer service. As the office of the writ of *habeas corpus* under the statute is primarily to discharge the party from unlawful imprisonment, this recruit himself cannot be discharged under this writ,

because he is not unlawfully restrained of his liberty. He has voluntarily enlisted and subjected himself to the restraint of military rule. He is not restrained against his will, but with his express consent.

But it was urged that the petitioner, the father of the prisoner, is not concluded by these enlistment papers, but may controvert the same, and show that the enlistment was not valid, for the reason and upon the ground that his son was, in fact, at the time of his enlistment, under the age of eighteen years. And the petitioner claimed the right to traverse the return, and show this fact.

On the contrary, it was insisted by the respondent that the return ousts me of jurisdiction, and that I must dismiss the proceedings under the authority of the case of *Ableman* vs. *Booth*. This presents a point of great delicacy, and of much public importance.

The question whether the Judges of the State Courts have jurisdiction in this class of cases, when it distinctly appears that the petitioner, or person in whose behalf the writ is applied for, is held under the authority of the United States, has been much discussed in the State Courts. In this State, an application for a writ of *habeas corpus* to the Supreme Court, for the discharge of a soldier enlisting, &c., was made in 1799, in the case of *Husted*, vide Johns. Cases 136, where it was denied—two of the Judges saying if the facts stated were returned to the *habeas corpus* it would be conclusive against his discharge, and one said the motion ought to be denied because the Court had no jurisdiction of the case, and the two other Judges were in favor of allowing the writ.

During the war of 1812, a like application was made to the Court in the case of *Ferguson*, 9 Johns. 298, when the writ was denied. This was an application by the father, and the affidavits state his son's age to be seventeen years. In this case, Judge KENT, in a very careful opinion, held that the State Courts had not jurisdiction of the case. He said: "The present case being one of an enlistment under color of authority of the United States, and by an officer of that government, the Federal Courts have complete jurisdiction in the case;" and he said further, "to interfere would be exercising power without any jurisdiction."

The other Judges all concurred in denying the writ, on the ground that the Judges of the United States Courts, having complete jurisdiction of the case, the application ought to be made to that Court.

This Court has however since in several instances claimed and exercised jurisdiction in such cases. It did so in the case of *Carlton*, 7 Cow. 471; following several cases in the Massachusetts Courts; and also assumed the right to exercise it in the case of *Wyngall*, 5 Hill 16.

In neither of these cases was the question discussed by counsel or by the Court. The case of *Carlton* arose upon a submission of the point to the Court by the Recorder of New York, who had exercised jurisdiction in the case of a soldier held at West Point. No opinion was written by the Court. The Chief Justice, in brief terms, affirmed the jurisdiction of the Recorder in such cases. In the case of *Wyngall*, 5 Hill, a Supreme Court Commissioner had exercised jurisdiction in such a case, and discharged a soldier enlisted, &c., on the ground that he was an alien. The Court reversed the decision, but did not discuss the question of jurisdiction.

Under these cases, I think the Judges of this Court would have generally claimed and exercised jurisdiction in such cases, as such jurisdiction has been exercised in many of the other State Courts before the decision in the case of *Ableman* vs. *Booth*.

This is a case in the Supreme Court of the United States, whose decisions upon questions arising under the Constitution and laws of the United States are conclusive authority upon all State and inferior Courts.

In this case, it is conceded, in the opinion of Judge TANEY, that the State Judges may issue the writ of *habeas corpus* upon a proper application showing an illegal restraint, and inquire in this mode of proceeding by what authority and for what cause any party is imprisoned or restrained of his liberty within the territorial limits of the State sovereignty; and he holds also that it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the Judge or Court by a proper return the authority by which he holds him in custody.

He says: "But after the return is made, and the State Judge or Court *judicially apprised that the party is in custody* UNDER THE AUTHORITY OF THE UNITED STATES, they can proceed no further. They THEN know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of *habeas corpus* nor any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the dominion and EXCLUSIVE jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, THEIR judicial tribunals can release him and afford him redress."

This case, in its *facts*, is not precisely the same as the cases under consideration. It presents a case where the writ of *habeas corpus* was used to wrest from a United States marshal a prisoner held under judicial process from a United States Commissioner, and also in effect to review and annul the decision and judgment of a United States District Court upon the trial and indictment for an offence under a law of Congress, on the ground that the law was unconstitutional. A more palpable perversion of the writ could hardly be imagined.

But this case of *Ableman* vs. *Booth*, in *principle*, covers the cases in hand, I think, very clearly and conclusively.

The theory of our Government, asserted in this able opinion of Chief Justice TANEY, which was obviously prepared with great care and deliberation, and received the assent of all his brethren upon the bench in the year 1858, consisting of Associate Justices MCLEAN, WAYNE, CATRON, DANIEL, NELSON, GRIER, CAMPBELL, and CLIFFORD, is that the powers of government in this country are divided between, and are intrusted to, two distinct sovereignties —the National and State Governments; that each in its particular sphere is independent, exclusive, and supreme. That each of these sovereignties has its particular executive legislative and judiciary departments. That each of these departments of government is limited to its particular sovereignty, and that neither the National Government nor the State Governments can authorize its Courts to exercise judicial power within the jurisdiction of the other

sovereignty. That in this particular they stand to each other in the relation of independent governments.

Judge TANEY says: "The power of the General Government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State Judge in a State Court as if the line of division was traced by landmarks and measurements visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its Judge and Courts than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned."

Upon this theory every citizen owes to his country a divided duty—to the National Government he owes allegiance and the duty of submission and obedience to its laws, and to the State Government, obedience and submission to its laws; each in the proper sphere. Within the sphere of the National Government, its Judiciary protects his rights and vindicates his wrongs; and within the sphere of the State Government, its Judiciary enforces his duties, protects his rights, and gives redress for the injuries he may receive in person or property.

When the citizen whose normal condition is under the State Governments, passes the boundary which separates the State and National sovereignties, he subjects himself to the judicial power of the National Government, which is entitled to interpret and enforce the law of its sovereignty exclusively, except in such particulars as under the Constitution of the United States, the State and National Judiciary possess concurrent jurisdiction. Such is the clear doctrine of this case.

It proceeds from a Court, which, by the Constitution of the United States, is entitled to decide and finally determine all questions and controversies relating to the respective powers of the United States and the States.

If I doubted in respect to its correctness, it would be my duty, nevertheless, to acquiesce in and submit to it as the authoritative exposition of the law governing the cases under consideration.

But it seems to me that the doctrine asserted in this case of *Ableman* vs. *Booth* is very essential to the maintenance of the national authority, especially in a time of war. No government could maintain and exercise its powers in their full vigor when its acts could be controlled by the Judiciary of another sovereignty, or by a Judiciary owing its appointment and authority to another government. If every act of the General Government affecting the personal liberty of the citizen can be overhauled upon *habeas corpus* by the Judges of the State Courts, incalculable embarrassments and mischief might be the inevitable result.

Judge LOWRIE, in his able opinion in the *Passmore Williamson* case, *supra*, says, in respect to such mischief: "Any man arrested or imprisoned by warrant, or execution, or sentence from District, Circuit, or Supreme Courts, or either House of Congress, might have relief from any friendly county Judge wielding the power of *habeas corpus*.

"A Judge impeached, convicted, and sentenced—a traitor tried and condemned, may still have hope from the *habeas corpus*, if a Judge can be found ignorant or insubordinate or degraded enough to declare that his superiors acted without jurisdiction."

The present condition of this country illustrates much more than in times of peace the importance and necessity of this doctrine, to enable the Government properly to perform its high functions.

In many localities in this country aside from the States which have professedly renounced the National authority, it is notorious that there are some evil-disposed persons in sympathy with the enemies of the country, who are opposed to the war, and who evince a spirit of hostility to the Government by hindering enlistments and volunteering—by enticing enlisted men to desert—in secreting deserters—and resisting by force their arrest and return to the army, and who by opposition to the draft and various other modes of proceeding are seeking to defeat the operations of the

Government in conducting the war. It would be surprising if such men could not find some convenient Judge who would issue writs of *habeas corpus*, and by this process discharge all persons brought before him, on the ground that the laws of Congress authorizing enlistments, or the draft and the arrest of deserters, and perhaps the war itself, was unconstitutional, and thus give the color of law to their disloyal acts and proceedings.

It is no answer to this view that the Supreme Court of the United States has finally decided in this case of *Ableman* vs. *Booth*—the question still in dispute in England and much discussed heretofore in this country—that a writ of error will lie to the final decision and judgment in cases of *habeas corpus*. No such writ or error to the Supreme Court of the United States would lie except to the Court of last resort in the respective States. The proceedings upon *habeas corpus* are summary. Upon the decision of the Judge entertaining these proceedings, if it be that the prisoner is unlawfully restrained of his liberty, it would be ordered that he be discharged from such imprisonment. By this process the army might be depleted by desertion, and the deserters discharged by *habeas corpus*. Proceedings to reverse such decision would be quite idle and useless for all practical purposes, for in the ordinary course of judicial proceedings several years would elapse before the case could reach the Supreme Court of the United States for review, and a reversal of the *erroneous* decision of the Judge even by the Supreme Court of the State could not be had in time to prevent the mischief.

Independently of their concurrence in the decision of *Ableman* vs. *Booth*, Judge NELSON asserted the same doctrine in his charge to the Grand Jury in the Circuit Court in the city of New York, at the April Term, in 1851—vide Hurd, on *Habeas Corpus*, 198 and 199—and Judge MCLEAN asserted the same doctrine in substance in the case of *Ninis* vs. *Newton*, 5 McLean Rep. 92.

Since the decision in this case was made, and since most of the foregoing was written, the August number of the American Law Register has come to hand, containing the report of the case of *Jacob Spangler*, p. 598, decided by the Supreme Court of Michi-

gan, in which a writ of *habeas corpus*, issued to a Draft Commissioner in that State, was dismissed upon the same views herein expressed, and in which the case of *Ableman* vs. *Booth* is cited with approbation and followed.

Some inconvenience will undoubtedly result from the inability of the State Judges to give relief in this class of cases. The State Judges and local officers authorized to allow writs of *habeas corpus* are more numerous than the United States Judges, and more accessible; and I doubt not if the officers acting under United States authority were allowed to obey these writs by producing the body and making a proper return thereto without raising this question of jurisdiction, that it would rarely happen in this State, at least, that the State Judges would do anything needlessly to embarrass the action of the General Government. I think the Judges of this Court would unhesitatingly recognise their duty as loyal citizens to support and maintain the Constitution of the United States and the laws of Congress as the supreme law of the land, with as much fidelity as though they were in fact acting under the authority and commission of the General Government.

But while the difficulty of obtaining ready redress for this class of grievances in the United States Courts may be, as it is, matter of regret, this consideration cannot affect the question of law. As the point is here distinctly made, and the officers of the General Government having the prisoners in custody refuse to produce them in obedience to the writ, under instructions from the United States authorities, there is no other course but to dismiss these proceedings. But if it were doubtful whether the returns in these cases were sufficient to oust me of jurisdiction, as such jurisdiction could only be asserted by proceedings which would involve a conflict between the State and National Governments, I should be quite unwilling, and should hardly think it my duty, to initiate such proceedings at a time of great national peril, and when the Government is struggling for existence with a gigantic rebellion.

The attachments must be denied and the proceedings dismissed.

Supreme Court of Pennsylvania.

DE BARRY *vs.* WITHERS & PETERSON.

An accommodation acceptor having paid a bill for which no funds are provided by the drawer, is entitled to recover the amount from him.

The suit must be in the name of the payee to the use of the acceptor.

But if the drawer make an express promise to the acceptor to pay the debt to him, he may sue in his own name.

Semble, that this is the general rule in the United States, but in England some new consideration is required to enable the acceptor to sue in his own name.

The opinion of the Court was delivered, March 2d 1863, by

READ, J.—An accommodation acceptor having paid a bill for which no funds are provided by the drawer, is entitled to recover the amount from the drawer; for the law, in the absence of any express contract, implies a contract to indemnify. But whether the action be for money paid or specially for not indemnifying the plaintiff, still it is only a chose in action which is assignable in equity, and therefore the suit must be in the name of the assignor for the use of the assignee. But as the assignee is the real owner, it would seem but just if the debtor chooses expressly to promise to the assignee to pay the debt to him, that the assignee might sustain an action against him, in his own name; and this was the view taken in the early English cases of *Fenner* vs. *Meares*, 2 W. Bl. Rep. 1269, and *Israel* vs. *Douglass*, 1 H. Bl. Rep. 239. It would seem, however, that in England the rule at present is to require the consideration of forbearance, or some other new consideration, to enable the assignee to proceed in his own name: 1 Chitty's Pl. 15; Addison on Contracts 984.

In America, however, the early English doctrine has been adopted, and this is clearly the sound rule, for it is a promise to pay to the real owner of the debt, requiring no other consideration than the fact that the debtor is morally and equitably bound to pay it to his actual creditor, and is not allowed to discharge himself by paying it to any other person. This was the decision in Massachusetts, as early as 1813, in *Crocker* vs. *Whitney*, 10 Mass. 316, and reaffirmed in *Mowry* vs. *Todd*, 12 Id. 281. In Maryland, in *Allston* vs.