BILLS OF EXCHANGE UNDER THE SECURITIES LAWS: MACANDREWS & FORBES CO. v. AMERICAN BARMAG CORP.

The facts of the case indicated a conventional commercial transaction: plaintiff, a textile manufacturer, had purchased certain machinery that proved to perform disappointingly. That claims were brought on theories of common law fraud and of breach of both expressed and implied warranties was hardly unusual. But in invoking the federal securities laws,1 on the theory that the bills of exchange2 serving as partial payment for the machinery constituted securities, plaintiff urged a novel, if not far-fetched, position. Still more surprisingly, the court in MacAndrews & Forbes Co. v. American Barmag Corp.3 accepted that theory in denying defendants'4 motion to strike the securities law claims.

MacAndrews, this Comment will argue, was erroneously decided on the narrow issue whether bills of exchange employed as payment media in a commercial transaction are embraced by the federal securities laws; if followed by other courts, the precedent would bring about substantial changes in the conduct5 and outcome6 of commercial litiga-

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2 A bill of exchange (or "draft"), the reader will recall, is a negotiable instrument by the terms of which the drawer (here, the seller of the machinery) orders the drawee (in this case, the buyer-plaintiff) to pay a sum certain either to the bearer or (as was the case here) to the order of a named payee. Uniform Commercial Code § 3-104 (hereinafter cited as UCC). The most commonly encountered form of draft is the check—a draft payable on demand and having a bank named as drawee, see id. §§ 3-104(2)(b); other drafts are either payable on demand (sometimes known as "sight drafts") or at a definite time ("time drafts"), see id. §§ 3-104(a), -108, -109. The case under discussion involved a time draft that named the seller's parent company as payee. See note 4 infra. By his "acceptance" of the draft, see UCC § 3-410, the drawee-buyer engaged to honor the instrument, see id. § 3-413(1). Such an accepted time draft on a buyer is sometimes called a "trade acceptance." See generally Farnsworth, Documentary Drafts Under the Uniform Commercial Code, 22 Bus. Law. 479, 488-89 (1967).


4 Named as defendant with American Barmag was the company's German parent, Barmag Barmer Maschinenfabrik A.G., to whom the bills delivered to American Barmag had been made payable.

5 Jurisdiction, venue, and service of process could all be affected by the presence of a securities law claim. A federal forum would become available (indeed, mandatory, in cases under the 1934 Act) irrespective of diversity of citizenship or the amount in controversy; further advantages would ensue, even as against other litigants with federal claims, since the introduction of the securities laws would bring considerably enhanced venue and worldwide service of process. Compare 1933 Act § 22(a), 15 U.S.C. § 77v(a) (1970), and 1934 Act § 27, 15 U.S.C. § 78aa (1970), with 28 U.S.C. § 1332 (1970) (jurisdictional amount for diversity actions), id. § 1391 (venue), and Fed. R. Civ. P. 4(f) (service of process). See also 28 U.S.C. § 1331 (1970) (jurisdictional amount for federal-question cases generally), id. § 1337 (jurisdiction over commerce-power cases without regard to amount). And, of course, plaintiffs with no claim whatsoever to a federal forum might find their venue and service-of-process options still more restricted.

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tion. But rather more disturbing, in a larger sense, than the facts that an error may have been made in this isolated case or that its practical ramifications may be grave, is MacAndrews' deeper significance as an object lesson in contemporary understanding of the federal securities laws (and, especially, of rule 10b-5\(^7\)) on the part of judges and litigants alike. The case may be read as symptomatic of widespread mystification and overexpectation—mystification in the absence of a clear, workable guideline from the Supreme Court to the appropriate breadth of the securities laws,\(^8\) and overexpectation bred of self-fulfilling prophecy as to rule 10b-5's ubiquity of application.\(^9\) When a court not be-

In MacAndrews itself, plaintiff might well have found such procedural advantages to be valuable, if not essential. If, as seems reasonable, the German equipment manufacturer would more likely be capable of satisfying a judgment than its American sales subsidiary, a premium may have been put on securing the former's presence in the suit. However, litigation of a simple contract claim in federal court (on diversity grounds) would have forced plaintiff to rely for service of process on a state long-arm statute and, since it had enjoyed no direct contact with the German parent, it would be required to argue that the American subsidiary had served simply as an agent for the other company. It is not difficult to understand why plaintiff probably preferred to press a securities-law claim, with its readily available procedural benefits.

Such differences in result might be particularly obvious where the greater venue authorized under the securities laws, see note 5 supra, makes available statutes of limitation (taken from the forum states, see A. Bromberg, Securities Law—Fraud: SEC Rule 10b-5, § 2.5(1) (1968)) more generous than those obtaining in the (presumably) more limited number of states where a state-law claimant might find a forum.

Subtler (and more limited) substantive differences may exist between common-law and securities-law fraud claims. Under the latter, proof of scienter may be more readily satisfied or held unnecessary, compare id. § 2.6(1) with Jennings, Insider Trading in Corporate Securities: a Survey of Hazards and Disclosure Obligations under Rule 10b-5, 62 Nw. U.L. Rev. 809, 817-19 (1968), and mere nondisclosure qualifies as misrepresentation, see, e.g., List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir.), cert. denied, 382 U.S. 811 (1965), although, of course, it is unlikely in any event that a seller of goods would have been completely silent as to the qualities of his merchandise. Yet, however uncertain the substantive advantages of alleging a securities-law claim, a plaintiff would at least have nothing to lose thereby. He can do no worse than under a common-law fraud claim, and (even if the substantive result on the merits, objectively considered, would be precisely the same) might well benefit intangibly, if he is able to establish his claim to the favored status of one suing under the aegis of federal securities law.

Finally, the buyer-plaintiff who can successfully invoke the securities laws in a commercial context may enjoy certain advantages over the buyer relying on the Uniform Commercial Code. Where oral misrepresentations have been made, the latter (but not the securities-law plaintiff) may find the parol evidence rule an obstacle, compare, e.g., Jennings, Remedies Under Rule 10b-5, 45 St. John's L. Rev. 733 (1971), with Peters, Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code, 73 Yale L.J. 199 (1963); this factor, if no other, should prompt serious doubt whether the federal securities laws should be allowed to encroach upon a code intended to bring uniformity and predictability to commercial law and planning, cf. UCC § 1-102.


\(^9\) Cf., e.g., A. Bromberg, supra note 6, § 2.5(b) ("by now such a dominant factor ... that one is surprised when it does not turn up"); 4 L. Loss, Securities Regulation vii (Supp. 1969) ("the veritable explosion of Rule 10b-5 in the 'insider trading' area"). 1972 Duke L.J. 465, 465 ("the ubiquitous 10b-5").
numbed by repeated and heavy exposure to the securities laws can offhandedly extend their application as was done in MacAndrews, the time is ripe to replace gentle sarcasm or amused tolerance with outspoken indignation.11

This Comment will leave the farther-ranging criticism to others; it will narrow its focus at this point to the specific issue presented in MacAndrews: are bills of exchange "securities" under the 1934 Act?12

It should be noted at the outset that although substantially the same question could arise under the 1933 Act's definitions,13 that act would ultimately be unavailable to plaintiff in any event. In order to maintain its action under either section 1714 or [had it been alleged] 12,15 plaintiff

11 To date, probably the loudest (certainly, the most persistent) voice crying in this wilderness has been that of Professor Ruder. See, e.g., Ruder, Civil Liability Under Rule 10b-5: Judicial Revision of the Legislative Intent, 57 NW. U.L. REV. 627 (1963).
12 This Comment will not, of course, consider the validity of the claims of misrepresentations as to the performance of the machinery and as to the safety of plaintiff's accepting bills payable in deutschemarks (which defendant allegedly knew would soon be substantially devalued upward). It may be worth observing, however, that assuming arguendo that the bills were securities—the latter fraud would go to the value of the security itself and hence would not raise the fraud-in-the-"consideration" problem posed with respect to the former. Cf. note 21 infra & accompanying text.

In the course of the combination, the draftsmen narrowed the earlier definition's reach in at least one respect relevant here: they no longer included the term, "any . . . evidence of indebtedness." Although the relatively few cases dealing with this language typically concern instruments and writings somewhat more exotic or less formalized than bills of exchange, see, e.g., Llanos v. United States, 206 F.2d 852 (9th Cir. 1953), cert. denied, 346 U.S. 923 (1954), and while it is possible Congress intended that its application be limited to such unusual items, the phrase, plainly read, would instead appear to have been intended as the broadest possible generic reference, embracing not only peculiar evidences of indebtedness but also more conventional notes, bonds, debentures—and, quite possibly, bills of exchange for the simple reason that they would be argued that only "ordinary instruments, cf. note 32 infra, serve to evidence indebtedness, but one hesitates to rely on this distinction where, as in MacAndrews, the order instrument has been accepted by the drawee. See also notes 16, 33 infra.) Wrote the MacAndrews court: "Initially, it cannot be denied that the bills of exchange were 'certain evidences of indebtedness,'" 339 F. Supp. at 1406.

In other words, a literal reading of the 1933 Act would probably result in our considering bills of exchange to be securities (a conclusion which a careful reading of the 1934 Act would not support, see notes 22-35 infra & accompanying text). But careful literalism cannot be relied upon to produce the best interpretation of the federal securities laws. It is thought that the introduction of a modicum of situation-sense, cf. K. Llewellyn, The Common Law Tradition 60, 268-69 ("What is not necessity is that the courts should wind up accepting any particular legal category as the controlling pattern unless it proves to be a category with sense-significance as well as doctrinal significance . . . ."), 371-82, et passim (1960), will lead us to conclude that under the 1933 Act, as under the 1934 Act, bills of exchange should only in rare circumstances be deemed securities. See notes 36-44 infra & accompanying text.

15 15 U.S.C. § 77l (1970) (providing civil remedies for purchasers of securities, with respect to which the act's registration requirements were violated, or as to which any misrepresentations were made in certain types of written or oral communications); this would appear about equally useful as § 17 for plaintiffs in a MacAndrews context. Some courts, however, would refuse to imply a private right of action under § 17, thus leaving § 12
would be required to characterize defendant as the seller of a security. Defendant had, to be sure, drawn the bills of exchange, but—the bills being payable to the defendant’s parent—their acceptance by the plaintiff is of far greater legal and economic significance. Assuming for the sake of argument that the bills were securities, it would seem much more reasonable to say that defendant had purchased from plaintiff the bills in accepted form, giving the machinery as consideration, than to say that defendant had sold the bills. At no time did plaintiff acquire title to the bills; at no time, therefore, could it have acquired, as a purchaser of “securities,” a cause of action under the 1933 Act. However, section 10(b) of the 1934 Act and rule 10b-5 are not as limited in their application. They may be invoked when fraud is perpetrated “in connection with the purchase or sale” of any security, and the case law countenances their application whether the alleged fraud goes to the value of the security or [as in MacAndrews] of the “consideration.”

The relevant inquiry at this juncture, then, is whether the 1934 Act’s definition of a “security” embraces bills of exchange.

16 The drawer’s liability on the draft arises only upon its dishonor by the drawee, see UCC § 3-413(2), and where, as here, the payee in whose favor that liability would arise is the drawer’s parent company, this liability, it must be conceded, is relatively inconsequential in the normal course of events. The drawee, for his part, is not liable on the instrument until he accepts it. See id. § 3-409(1). Unless accepted, then, the practical import of such a draft is minimal. Upon acceptance, however, the drawee-acceptor becomes liable on the instrument, see id. § 3-413(1), with the result, in this case, that a more significant movement of funds can be contemplated. See note 2 supra.

17 Granted, this would be a peculiar way of describing the transaction; indeed, this Comment will submit that this sense of peculiarity is itself a factor militating against application of the securities laws, see note 21 infra. The immediate point nevertheless appears valid, that this characterization of the transaction—however eccentric it may sound—is more sensible than the alternative approach that plaintiff would be required to pursue.

18 More precisely (and more sensibly), one would say that plaintiff had never been a “holder” of the bills. See UCC § 1-201(20).


20 17 C.F.R. § 240.10b-5 (1972) (emphasis added).


Save where capital structure is undermined by the issuance of new shares for inadequate consideration, cf. Fleischer, “Federal Corporation Law”: An Assessment, 78 Harv. L. Rev. 1146, 1161 (1965), one is strongly tempted to disapprove application of the securities laws to fraud-in-the-“consideration” cases (or, generally speaking, to cases where securities are only incidentally present in a transaction), even if on policy grounds alone, cf. 9 Stan. L. Rev. 589, 593-97 (1957). Yet most would probably conclude that no basis for such criticism can be found in the statute itself; the “in connection with” language seems inconsistent with drawing lines between strong and tenuous connections. And many courts, rightly, would be disinclined to adopt a policy-oriented interpretation in the absence of an arguable statutory basis, cf. K. Llewellyn, supra note 13, at 374-75. It might be useful, however, to examine the language, “purchase or sale of a security.” It would seem not an unreasonably strict construction to read this as requiring that a security be the subject matter, and not merely the consideration, in a purchase or sale transaction. (This position, of course, would be untenable if the language were broader—
The draftsmen of section 3(a)(10)\(^2\) were not sparing of words:

The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; ...
A fairly comprehensive definition. Still, it would not do to characterize it (as the MacAndrews court described the 1933 Act's counterpart definition23) as "all-embracing." For one thing, it makes no mention of bills of exchange. Though the general rule24 may be that such definitions must be read as nonexclusive,25 there appears good reason to regard the omission as significant, and not merely inadvertent, in this case. Congress, it is clear, was not unacquainted with bills of exchange; it in fact went on to refer specifically to them (and, perhaps redundantly, to "drafts") in the next clause of section 3(a)(10):26

... but [the term "security"] shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

The express exclusion from a definition, of something not included within that definition in the first place, can most easily be attributed to an excess of caution27—a trait no more foreign to the draftsmen of the securities laws28 than to securities practitioners today. To treat the

23 339 F. Supp. at 1406, citing Movielab, Inc. v. Berkey Photo, Inc., 321 F. Supp. 806 (S.D.N.Y. 1970), aff'd per curiam, 452 F.2d 662 (2d Cir. 1971). In Movielab, Judge Mansfield referred to the 1934 Act's definition as "unequivocal and all-embracing," and felt bound by its "plain language, literally read." 321 F. Supp. at 808. There, however, long-term promissory notes were involved, with the result that plainer language availed, and a more literal reading sufficed, than in MacAndrews.

Parenthetically, it should be noted that the MacAndrews court commonly referred to the 1933 and 1934 Acts, taken together, as "the Securities Act," see, e.g., 339 F. Supp. at 1404-05 & n.5; this, however, may have been occasioned by like confusion apparent in paragraph 21 of the complaint (quoted, id. at 1403-04 n.2).


25 Cf. Llanos v. United States, 206 F.2d 852, 854 (9th Cir. 1953), cert. denied, 346 U.S. 923 (1954); "In defining the word 'security' in Section 2(1) of the [1933] Act, Congress intended to include all interstate transactions which were the legitimate subject of its regulation and the section should not be construed narrowly."


27 Here, there is also reflected the urgency of the commercial-paper lobby—and the Federal Reserve Board—in distinguishing investment instruments from temporary instruments and, accordingly, in calling for the clear exemption of short-term notes from the registration provisions of the 1933 Act, see Comment, The Commercial Paper Market and the Securities Acts, 39 U. CHI. L. REV. 362, 381-85 (1972). The resultant provision, § 3(a)(3) of the 1933 Act, 15 U.S.C. § 77c(a)(3) (1970), formed the basis for the exclusory clause quoted from § 3(a)(10) of the 1934 Act. "Commercial paper," though it had earlier included bills of exchange, see N. Baxter, The COMMERCIAL PAPER MARKET 2 (1966), by 1933—as today—was a term essentially limited to promissory notes, see id. 7, of substantial face-amount value and short-term maturity, placed—whether directly or through intermediaries—with large financial institutions (principally banks) in order to fund current operations. Though one might argue that recent changes in the commercial-paper market—particularly, the sale, increasingly, of commercial paper to non-banks as short-term investment media—call for reassessment of § 3(a)(3)'s desirability, see, e.g., Comment, supra, no such shift appears to have taken place so far as the discounting of bills of exchange is concerned, cf. Farnsworth, supra note 2, at 485-86, 488-89. And, certainly, MacAndrews does not itself present a case of accepted bills of exchange having been held out as possible investments. Cf. note 43 infra & accompanying text.

28 Indeed, supererogatory drafting—giving rise, on occasion, to possible misleading
exclusion as containing a negative pregnant (here, to the effect that
bills with a maturity exceeding nine months, as those in MacAndrews,
are securities) would appear methodologically suspect in light of the
highly specific definition with which the exclusion is conjoined.

The MacAndrews court, however, did not feel required to de-
cide whether any inference could be drawn from the omission of
the term "bill of exchange" from the definition, or—on the other
hand—whether a negative pregnant could be inferred from the qual-
ified nature of the exclusion. Rather, the court simply observed that
the securities laws "are to be read flexibly and broadly," and that
the terms of section 3(a)(10) "are to be given a very broad definition."
The court went on, nevertheless, to find specific language in the defini-
tion to support its conclusion that the bills of exchange were "se-
curities." It wrote: "A bill of exchange, of course, is merely a form
of note. Upon acceptance it is a promise to pay to the order of a
certain person and it is negotiable." This characterization seems less than obvious in light of the
Uniform Commercial Code's sharp distinction between notes and bills
of exchange, although it is true that acceptance, under the Code,
substantially eliminates the differences in legal effect. The Uniform
Negotiable Instruments Act, a predecessor of the Code, drew a simi-
lar distinction and was in effect in every American jurisdiction when
the federal securities laws were enacted. And, finally, Congress'
definition of a security, in juxtaposing the words, itself reflects an
appreciation of the bills-notes distinction. It would seem most rea-

negative implications—abounds in the area of exemptions from the 1933 Act (and it is,
of course, on such an exemption that the 1934 Act's exclusory clause was based). See 1
L. Loss, supra note 9, at 496-97, 570-72, 584-85 (1962).
31 Id.
32 Compare UCC § 3-104(2)(a) ("order" instruments) (bills or drafts) with id.
§ 3-104(2)(d) ("promise" instruments) (notes).
33 Cf. note 16 supra & accompanying text. The contract of the acceptor of a bill
is the same as that of the maker of a note, see UCC § 3-413(1), and the secondary
liability of a bill's drawer is very nearly similar to that of an indorser of any negotiable
instrument, compare id. § 3-415(2) with id. § 3-414(1). The instrument, once accepted,
see id. §§ 3-410(1), must almost certainly be considered an "evidence of indebtedness," cf.
ote 15 supra, but that does not make it a "note." It is worth recalling that notes, un-
like bills of exchange, are frequently employed as a means of raising funds in the com-
mercial-paper market or of creating significant debt (or, at times, disguised equity, cf.
INT. REV. CODE OF 1954, § 385) interests in corporations; Congress' exemption of the
former notes, see note 27 supra, serves only to emphasize that its regulatory attention was
focused on the latter—investment—notes, cf. note 42 infra. The fact that a bill of ex-
change, once accepted, may resemble a note in the legal relationships it entails does not mean
that it resembles a note also in those functional characteristics that justify regula-
tion under the federal securities acts.
34 See UNIFORM NEGOTIABLE INSTRUMENTS ACT § 191 (act withdrawn 1951, as super-
ceded by the UCC) ("Bill" means bill of exchange, and 'note' means negotiable promis-
sory note."); see also id. §§ 126, 184.
35 See NATIONAL CONF. OF COMM'RS ON UNIFORM STATE LAWS, HANDBOOK 590 (1932).
sonable, then, to hold on the basis of a careful reading of the statutory definition that bills of exchange are not embraced by the 1934 Act, unless the “economic reality” in which such bills figured might lead one to conclude otherwise in a particular case.

The MacAndrews court failed entirely to consider the commercial context in which the alleged securities figured. The applicability of each of the 1934 Act’s definitions is limited by an introductory phrase, as follows: “When used in this chapter, unless the context otherwise requires—[the term X means Y, etc.]”38 Although authority for resort to such clauses is relatively slim,37 it appears clear that “context” invites reference not only to the textual environment of words in a statute,38 but also to the real-world factual situation within which the definitional question arises.39 It having been conceded that the securities acts’ definitions should be liberally construed, even the most latitudinarian interpreter must be prepared to stop short of absurdity.40 More concretely put, even though one might conceive of circumstances in which bills of exchange were the subject matter of investment transactions and could fairly be considered securities by the law as well as by the parties,41 at the same time one is hard

[It] does not follow that Congress meant to cover such a transaction, not even though the facts answer the dictionary definitions of each term used in the statutory definition. It is quite true, as the Board has very well said, that as the articulation of a statute increases, the room for interpretation must contract; but the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create. Such an approach is in order with respect to the definition of a “security” under consideration, which appears, on the whole, intended to embrace investment media of all forms. Cf. notes 27, 33 supra.
39 See, e.g., Movielab, Inc. v. Berkey Photo, Inc., 321 F. Supp. 806 (S.D.N.Y. 1970), aff’d per curiam, 452 F.2d 662 (2d Cir. 1971). Long-term notes had been taken in exchange for corporate assets, and Judge Mansfield (still sitting as a district judge) felt thoroughly constrained by the language of the definition to hold that “securities” were involved. 321 F. Supp. at 809. He did go on to observe, however, with apparent satisfaction, that notes of the type concerned “are frequently discounted, purchased for investment, hypothecated, or otherwise made the subject of dealings in the market place.” Id. Cf. K. Llewellyn, supra note 13, at 60 et passim (calling on judges to decide cases in the light of “situation-sense”). See also the authorities cited note 37 supra.
40 One might expect that point to be the more nearly approached, the further the situation departs from the securities-market context identified as having necessitated passage of the 1934 Act; see 1934 Act § 2, 15 U.S.C. § 78b (1970).
41 Cf. Sanders v. John Nuveen & Co., 463 F.2d 1075 (7th Cir.), cert. denied, 409 U.S. 1009 (1972) (1934 Act’s commercial-paper exclusion held inapplicable to notes offered to the public as investment media). See also Comment, supra note 27.
pressed to suppose bills employed commercially as payment media are considered securities by any party to the transaction.  

Attention to context further implies attention to consequences. Where bills of exchange are traded as securities, application of the securities laws may be beneficial, if not in fact necessary, in order to prevent fraudulent dealing. But where, as in _MacAndrews_, bills of exchange function as substitutes for cash, application of the securities laws hardly appears necessary, and in fact would very likely be disruptive of the commercial environment. On the further ground that interpretation must appreciate context, then, _MacAndrews_ appears wrongly decided.

In summary, _MacAndrews_ can teach a great deal to judges and lawyers generally. Its lesson, in essence, is that careful analysis is not rendered superfluous by policies of broad application of remedial legislation, and, further, that analysis is surer when illuminated by context. Finally, it should be plain how dangerous it is to suppose the securities laws to be either ubiquitous or all-embracing. Congress, in its concern for the investor, appears to have neither contemplated nor desired a fundamental alteration in the fabric of commercial law; courts and litigators, in consequence, would do well carefully to take the full measure of their actions.

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42 Cf. 1 L. Loss, _supra_ note 9, at 546 (arguing, on the basis of the "context" clause, that long-term promissory notes given to obtain personal loans ought not be considered subject to antifraud liabilities under the securities acts).


44 See notes 5-6 _supra_ & accompanying text.

45 See note 9 _supra_ & accompanying text. One is reminded of Lord Denman's observation: "[T]he mere statement and restatement of a doctrine,—the mere repetition of the cantilena of lawyers, cannot make it law, unless it can be traced to some competent authority, . . . if it be irreconcilable to some clear legal principle." O'Connell v. The Queen, 8 Eng. Rep. 1061, 1143 (H.L. 1844).