RECENT AMERICAN DECISIONS.

In the Supreme Court of Massachusetts—January Term, 1862—*at Boston.*

AMBROSE MERRILL *vs.* BOYLSTON FIRE AND MARINE INSURANCE CO.

1. An abandonment of the voyage insured and substitution of a new voyage defeats the policy of insurance from the time of such abandonment, although when the loss occurs, the vessel is sailing in a track or course of the voyage common both to the voyage described in the policy, and in the substituted voyage.
2. Such abandonment may occur after the vessel has commenced her specified voyage.
3. The facts in the present case present a case of abandonment, and not one of an intention to deviate, and the policy was therefore at once defeated when the master of the ship abandoned the termini of the voyage described in the policy, and sailed from Falmouth, bound to Antwerp, as her port of discharge.

This was an action by the assured upon a policy of insurance in the following form,—" six thousand dollars, viz: two thousand on freight of ship Abby Langdon, at and from Newport to Point de Galle, and thence to Akyab. Also, four thousand dollars on freight of said ship, at and from Akyab to port of discharge in the kingdom of Great Britain, at and after the rate of four and one-half per cent. from Newport to Point de Galle and Akyab, and three per cent. from Akyab to Great Britain."

The ship performed her voyage to Akyab, and while there the master entered into a contract to take on board a cargo of rice, and to proceed to Falmouth for orders to discharge at a port in the United Kingdom or on the Continent, between Havre and Hamburgh inclusive. The ship safely arrived at Falmouth, and the master there received orders to go to Antwerp to discharge his cargo, and in pursuance of those orders and the previous contract made by the master, the ship sailed from Falmouth, bound for Antwerp, as her port of discharge. While the ship was pursuing the voyage to Antwerp by the usual track for such a voyage, on the south side of the Isle of Wight, she was totally lost by the perils of the sea. If the master had received orders at Falmouth to go to any port on the east coast of Great Britain, north of the Isle of Wight, the

ship might, without deviation, have pursued the same course which was followed down to the time of the loss.

It was held by the court that these facts presented a case of abandonment of the voyage insured, and that the ship in sailing from Falmouth, bound for Antwerp, as her port of discharge, had entered upon a new and substituted voyage, and the policy was thereby defeated.

The case was argued by *H. W. Paine* for the plaintiff, and *B. R. Curtis* for the defendants.

The opinion of the court was delivered by

DEWEY, J.—The question is, whether this loss happened in the course of the voyage insured, and while the same was covered by the policy. Certain general principles will be found to have been settled in the adjudicated cases, which will reduce the question now before us to a narrow compass. A well-settled distinction exists between the cases of a purposed deviation, and an abandonment of the voyage. As respects an intention to deviate, if the loss occurs before an actual deviation, the underwriter is not discharged. An abandonment of the voyage and substitution of another and different voyage at once defeats the policy. The point of doubt, and in reference to which there will be found a conflict of authorities to some extent, is as to the facts necessary to constitute an abandonment; or, in another form of stating the point, what class of cases range under the head of an intention to deviate merely, and thus retain the benefit of the policy, if the loss occurs before the departure from the route common to both the port described in the policy, and the port intended to be reached by a deviation.

In this latter class all agree that the more simple and ordinary cases of proposed deviation, occurring under some new motive or purpose arising after the vessel has sailed on her prescribed course, and when the deviation was to be a temporary deviation only, and not to defeat her voyage to the port named in the policy, would furnish a case where the mere intent to deviate would not affect the policy. The weight of authority seems also very clearly

to show that a purpose existing at the commencement of the voyage to put into an intermediate port out of the course of the voyage described in the policy, the original *termini* of the voyage being still preserved, is not the substitution of a different voyage, but only an intention to deviate: *Foster* vs. *Wilmer*, 2 Strange, 1248; *Marine Insurance Co.* vs. *Tucker*, 3 Cranch, 357; *Hobart* vs. *Norton*, 8 Pickering, 160; *Hare* vs. *Travis*, 7 Barn. & Cresswell, 15; Parsons on Maritime Law, 2 vol. 306.

It will be observed that the cases held as mere intention to deviate, embraced in the last proposition, are cases where there was, at no period, any intention to change the termini of the voyage, and the proposed departure from the direct course of the voyage was only to be temporary, and the vessel to resume and perfect the voyage to the port named in the policy.

As to the abandonment of the voyage described in the policy, and substitution of a new one, all agree that when an actual abandonment of the voyage, and substitution of a distinct voyage, has occurred before the commencement of the voyage, the policy does not attach or cover any loss in whatever part of the voyage it has occurred. But as to what facts will constitute an abandonment of the voyage, and at what period of time, in reference to the voyage, it must be determined and acted upon, has been the subject of much discussion and conflict of opinion.

On the one hand, it is insisted that there can be no application of the principles applicable to abandonment, if the alteration of the voyage and substitution of a new one occurs, at any point subsequent to the commencement of the voyage, and that all changes of purpose as to the course of the voyage are to be treated as deviations, or intended deviations, and therefore, if the vessel is lost before the actual deviation, such purpose, however fully settled, does not defeat the policy.

On the other hand, it is alleged, if the ship either originally sail on a different voyage from that described in the policy; or if, after commencing her voyage, she entirely abandoned all intention of prosecuting it, this is a change and abandonment of the voyage, which

avoids the policy from the moment the intention of so abandoning is definitely formed.

To sustain the present defence, it is not necessary to adopt the latter position in the broad terms above stated; but it is necessary to hold that such purpose to abandon may be formed and settled after the commencement of the voyage, and after the vessel has arrived at a port of destination for a part of her entire voyage, and before taking her departure from a port where she lawfully was.

This question was very much considered in the case of *Lawrence* vs. *Ocean Insurance Co.*, reported in the 11 John. 241, and again in *Lawrence* vs. *Firemen's Insurance Co.*, 14 John. 46. The first case arose upon a policy of insurance "from New York to Gottenburgh, and at and from thence to one port in the Baltic or Black Sea, not south of the river Eyder." The vessel sailed from New York, and arrived at Gottenburgh; there the port selected for the voyage was Petersburgh, and she sailed for Petersburgh, and while on her voyage was detained by various causes at Chalchan, and while there changed her purpose and sailed for Stockholm. While pursuing, however, the direct route to St. Petersburgh, and before she came to the point of departure for Stockholm, she sustained a loss by capture by the French.

It was held by a majority of the Supreme Court, and confirmed by a majority of the Court of Errors, that it was the case of an intended deviation only, and the vessel having been lost before she had arrived at the dividing point, the insurers were liable.

The conflicting opinions held by the eminent jurists who heard that case, leave it, as respects other tribunals, valuable for its fullness of examination and elucidation, rather than as an authority to guide us. Thompson, C. J., in giving his reason for thus holding, says: "No case can be found where a change of voyage, after the commencement of the one described in the policy has attached, has been held the substitution of a new voyage."

All the judges treat the case as a policy for a voyage to Petersburgh, that port being fixed by the selection made by the assured, and taking her departure from Gottenburgh with that purpose.

Mr. Justice Thompson did not deem it material whether the voyage was to be considered as one entire voyage, commencing at New York, or as a voyage commencing at Gottenburgh, his position being, that if commenced at either place it was a commencement of the voyage insured, and with the effect that such after proposed and settled purpose to change the port of destination would, until an actual deviation had occurred, be treated as a mere intention to deviate, and would not discharge the policy.

Mr. Justice Van Ness, while he fully concedes, that where the termini of the voyage are preserved, an unexecuted intention to deviate does not affect the policy, affirms that when the termini are abandoned, and a new and indefinite voyage is determined upon and commenced, the policy ceases to have any effect. Here the *termini* were not preserved, and it must, in his opinion, be treated as an abandonment of the old voyage. He further adds: "in every case where such change of purpose has not been held to vitiate the policy, it will be found the *terminus ad quem* mentioned in the policy was not abandoned, but the vessel intended ultimately to proceed to it;" and he held that it was not material as to an abandonment, whether such change in the voyage was decided and acted upon before or after the voyage commenced.

Chancellor Kent, sitting in the Court of Errors, upon the hearing of the case of *Lawrence* vs. *Firemen's Insurance Company*, *supra*, held similar views. He held that if the original plan of destination be abandoned in order to go to another port of discharge, the voyage itself becomes changed, because the termini of the original voyage is changed. The identity of the voyage is gone —if the intention to abandon be once clearly and certainly established, it then becomes perfectly immaterial whether the vessel was lost before or after she came to the dividing point, because, in either case, she was lost not on the voyage insured, but a different voyage. He also repudiates the distinction set up between the case of a change of voyage, determined upon before or after the commencement of the voyage.

The case of *Marine Insurance Company* vs. *Tucker*, 3 Cranch, 357, will be found, upon examination, not to meet the present case,

or to sanction the position taken on the part of the plaintiff. It was a policy at and from "Kingston, in Jamaica, to Alexandria, in Virginia." The ship originally took a cargo to deliver at Alexandria, but subsequently took freight for Baltimore, with intention to go to Baltimore, and from thence to Alexandria; and while prosecuting her voyage with that intent, and while on the direct course both to Baltimore and Alexandria, and before she had arrived at the dividing point between them, was captured, and the court held it was only a case of intended deviation, and that the insurers were liable.

It will be seen that in this, as well as many other cases, when the rule of an intended deviation has been applied, that the court place great stress upon the fact that the *termini* of the voyage was not proposed to be changed.

In this case, Washington, J., says, "the rule which we consider firmly established by a long and uniform course of decisions, is that if the ship sail from the port mentioned in the policy, with the intention to go to the port also described therein, a determination to call at an intermediate port to land a cargo, is not such a change of the voyage as to prevent the policy from attaching, but is merely a case of deviation."

In the same case, Patterson, J., says, "from a review of the cases, the principle is established that when the termini of the voyage are the same, an intention to touch at an intermediate port, though out of the direct course, does not constitute a different voyage. In the present case the termini are the same."

The case of *Kenly* vs. *Ryan*, 2 H. Blackstone, 343, often relied upon as an authority to sustain the application of the principle of intended deviation, in distinction from abandonment, will be found to rest upon the same ground. It was an insurance from Granada to Liverpool.

She sailed with a settled purpose to touch at Cork. Having been lost before she arrived at the point of deviation, it was only an intent to deviate.

The Court say, "where the *termini* of the intended voyage was really the same as those described in the policy, it was to be con-

sidered the same voyage, and a design to deviate, not effected, would not vitiate."

The case of *Stacker* vs. *Harris*, 3 Mass., seems to be a case having a direct bearing upon the question. We are considering, and particularly upon the point whether this doctrine of abandonment of a voyage can be applied to a case arising upon a purpose thus formed wholly after the commencement of the voyage insured, and upon a general policy authorizing sailing to and from various ports. The insurance was from Boston to the Canaries, and at and from thence to any ports in Spanish America, and at and from thence to her port of discharge in the United States. The voyage is duly commenced, the ship goes to the Canaries and from thence to Vera Cruz. During this period the policy was in full force, but at Vera Cruz she takes a cargo for the Havana, and on her passage to the Havana, but while on the track, common to her proper voyage to her port of discharge in the United States, and before any actual departure from that common track, she was captured and lost. This Court held that the original voyage had been abandoned, and the voyage from Vera Cruz was a distinct voyage, and the insurers not liable for the loss, although the same happened before the vessel came to the dividing point.

The case just cited would seem decisive of the case now before us. The rule on this subject, as stated in Arnould on Insurance, 1 Arn. 344 (350,) is that a change of voyage takes place when either before, or after sailing, the assured abandons the thought of proceeding to the port of destination originally prescribed by the policy, and seeks for another. "The effect of such a change of voyage is to discharge the underwriter from all liability in the policy from the moment the purpose of changing the voyage is distinctly formed."

"Hence if the purpose of changing the law be fixed before the commencement of the risk, the policy is void *ab initio*—if it be not formed until after the ship has sailed, the underwriter is discharged from all liability for losses which may occur subsequently to its having been formed, although such loss may take place while the ship is still on the track common both to the voyage insured and that which is substituted for it.

It is not necessary in sustaining the defence to the present action to sanction the broad doctrine thus stated by Arnould, and apparently sanctioned by Chancellor Kent and Justice Van Ness, that a change of purpose as to the port of destination, formed while actually on a voyage from the port described in the policy to the port described in the policy is, from the moment it is decided upon, to be dealt with as an abandonment of the voyage insured. This policy of insurance contemplated, in the first instance, a voyage to Akyab, for which a stipulated rate of premium was to be paid, and a further voyage from Akyab to the port of discharge in the kingdom of Great Britain, at another and different rate of premium—the first of these voyages was made under the terms of the policy. The second commenced at Akyab. Before leaving Akyab, or commencing the voyage, the master entered into a contract, the performance of which required him, as the events proved, to change his port of discharge to one out of the kingdom of Great Britain. It is true that when the ship sailed from Akyab, it was left uncertain where the port of discharge would be, but no right of choice on the part of the ship, but at the orders of the shipper, to be received at Falmouth. The stoppage was at Falmouth for such orders, and at Falmouth the shipper, as he was authorized by the contract at Akyab, selected Antwerp as the port of discharge for the cargo, and it is distinctly admitted "that in pursuance of those orders and the contract of affreightment, the ship sailed from Falmouth bound for Antwerp as her port of discharge. The ship pursued the voyage to Antwerp by the usual track for such a voyage, and while thus pursuing it, she accidently went ashore in a fog, on the south side of the Isle of Wight, and was totally lost by the perils of the sea. The track of the voyage from Akyab to the time of the loss of ship, was one that might have been pursued without liability for deviation, had the master received orders at Falmouth to go to any port on the east coast of Great Britain, north of the Isle of Wight.

It would seem to present a decided case of substitution of a new voyage, and abandonment of that described in the policy. The purpose so to do was fully formed, and obligations assumed in reference to it, before commencing the voyage from Akyab, at the

election of the shipper. What was uncertain or fluctuating during the voyage to Falmouth was at that place made certain, and every other purpose was abandoned, and a voyage commenced from Falmouth to Antwerp, which was only defeated by the loss of the ship by the perils of the sea—that the loss occurred on a track of a voyage common to a port on the east coast of Great Britain, as well as Antwerp, does none the less make this a case of substitution of a new voyage. The termini were no longer the same. The voyage had lost its identity, and could in no sense be called a voyage to a port of discharge in the kingdom of Great Britain.

Upon the facts stated in this case, submitted to us, the Court are of opinion that the original voyage was abandoned at Falmouth, and that when the ship sailed from Falmouth bound to Antwerp as her port of discharge, she had commenced a new voyage, and not one covered by this policy.

Judgment for the Defendant.

The decision in the foregoing case, so far as it proceeds on the ground that the change of the *terminus* of a voyage, during its progress, is *ipso facto* an avoidance of the insurance, is in accordance with what is stated by Mr. Arnould, 1 Arn. on Ins. 343, &c., 2d ed., and no doubt correctly, to be the result of the latest English authorities, and has also in its favor in this country the great weight of Chancellor Kent's name, 14 Johns. 57. Yet it has against it the decision of the majority both of the Supreme Court and the Court of Appeals of New York, in Lawrence *vs.* Ocean Ins. Co., 11 Johns. 241; 14 Johns. 46; of the dicta at least of Judge Johnson in Marine Ins. Co., of Alexandria *vs.* Tucker, 3 Cranch, 357; and of the dicta if not the decision in Winter *vs.* Delaware Mutual Safety Ins. Co., 30 Penn. St. 339. Mr. Phillips' opinion is also opposed to the English view, 1 Phill. on Ins. § 992. There being this conflict of authority on the narrow but rather important question which is discussed in the text with so much acuteness and ability, it is perhaps just and proper to re-state briefly the arguments which have been supposed to justify the opposite conclusion.

The ordinary marine policy is an undertaking to indemnify the insured against certain kinds of losses which may happen to a ship or its cargo or freight, during the course of a particular voyage. This voyage is usually but not necessarily ascertained by reference to some designated *termini*. It may be, for instance, "from Boston to Liverpool," but it may be just as well "from the United States to Europe and a market." See Gardner *vs.* Col. Ins. Co., 2 Cranch, 473; Leathby *vs.* Hunter, 7 Bing. 517; Robertson *vs.* Money, 1 Ry. & M. 75. It is all, so far, a mere matter of agreement between the parties. But a voyage, in contemplation of law, does not consist simply of a point of departure and a point of destination. If

it did, a vessel might carry its insurance round the globe, provided only the insured intended at some time or other to bring her into the designated port. It further includes and requires the strict pursuance of the usual course of navigation between the points specified in the policy, for a vessel of the kind. It would not be of much importance to an insurer, whether a ship from Boston went to Liverpool or to Southampton; but it would be whether she went to either, in winter time, by way of Greenland, instead of by the customary route. It is therefore settled, that if a vessel, without reason, departs or deviates from this usual course of navigation, it is as much a forfeiture of her insurance as if she changed her destination altogether. See 1 Phillips on Ins. § 989; 1 Arnould, 341. Why? Not indeed because the risk is increased, which perhaps could never be absolutely ascertained, but because the vessel is no longer on the *voyage* insured: 1 Phillips, § 983; 1 Arn. 342.

So far it seems impossible to distinguish between a change in the *terminus* of a voyage, and a change in the course of its navigation. According to circumstances, the one or the other would be most injurious. In either case it is an effectual change in the *voyage* itself, within the expressed or implied understanding of the parties, and the insurer is entitled to say, *non in hæc fœdera veni.* Now, suppose during the voyage the insured entertains, and declares in the most emphatic and decisive way, a determination to deviate from the proper route at a particular point, say, to go to a port several hundred miles out of the usual course; but *before* that determination has been carried into effect, and the point of departure reached, a loss takes place. In such case, it is agreed on all hands, that the insurer is not discharged. Foster *vs.* Wilmer, 2 Strange, 1249; Carter *vs.* Royal Exch. Co., cited Ibid.; Thellusson *vs.* Ferguson, 1 Douglas, 361; Hare *vs.* Travis, 7 B. & Cr. 15; Marine Ins. Co. *vs.* Tucker, 3 Cranch, 357; Hobart *vs.* Norton, 8 Pick. 159; Winter *vs.* Delaware Mut. Safety Ins. Co., 30 Penn. St. 339; 1 Phillips, § 1001; 1 Arn. 345. A mere intention to do wrong, to violate the terms of a contract, is nothing. Before the wrongful act is committed, the man may change his mind; and he is not estopped from repentance by his declarations alone. Just so long as the vessel is kept on the proper track, it matters nothing to the insurer, what the secret or avowed designs of the insured may be.

Now, suppose in the case put, instead of its being a change of the *course* of a voyage, it is a change of its *terminus* which is resolved upon; what reason can be assigned for any difference in the result? To the insurer there can be practically none, for until the point of divergence is reached, there is no increase of risk; and after it is passed he gains equally in either case, for in both his liability is thereby cut short, and the premium prematurely earned. Nor, as we have suggested, is the change of the *terminus* of a voyage always or necessarily a more important thing than a change of route. The owner of a vessel insured from Liverpool to Albany may, for some reason, determine, in the course of the voyage, to make New York the port of discharge. Here the course of the voyage, so long as it lasts, is entirely unaffected, and though there is a change of the *terminus ad quem*, it is one which enures to the advantage of the insurer, by shortening the duration of the risk. Can it be that this would cause an absolute forfeiture of the insurance, while if the insured, instead of shortening his voyage, had lengthened it, by inserting

a parenthetical trip to Baltimore, he would be safe until he got off the Banks of Newfoundland? The answer to this is succinctly given by Chief Justice Lowrie, in Winter *vs.* Ins. Co., 30 Penn. St. 339: "It is not essential to perform the whole voyage; the less of it the better for the insurer."

These considerations show that the distinction between a change of the terminus of a voyage and a change of its course, at least as respects this particular point, is entirely artificial, and founded in no obvious reason. And even if it could be sustained, it would be productive of more practical inconvenience than benefit. It would require in every case an investigation into the intentions and motives of the insured or his shipmaster, during the voyage, which would be difficult and often fruitless, for it would go hard, if he who must be best aware of those intentions and motives, could not discover, when the pinch came, that it was always his design to wind up the deviation, by however circuitous a course, at the original port of destination. On the other hand, that by which alone the insurer can be really affected, an actual deviation from the proper course of the vessel, is a physical fact which can be ascertained with ease, and readily proved.

For reasons such as these, it is urged by Mr. Phillips and others, that the doctrine of Lawrence *vs.* Ins. Co., above cited, from its greater simplicity, convenience, and good sense, is to be preferred to that of the English Courts on the subject. The arguments and authorities by which the latter is supported, are fully and carefully stated in the foregoing opinion of Mr. Justice Dewey, and we shall not attempt to weaken them by repetition. We may observe, in conclusion, that the actual decision in the case proceeds on a distinction which may be considered to reconcile the authorities to some degree, and which, at any rate, is ingenious, and forcibly sustained.

H. W.

In the Supreme Court of Errors of Connecticut—Sept. Term, 1860.

BOWMAN *vs.* FOOT.

Our statutes with regard to the recovery of leased premises, except in the specific remedy which they provide and the notice to quit prescribed, do not dispense with the requirements of the common law on the subject.

A lease for a term of years, under which the rent was payable quarterly on certain days named, contained the following condition:—"Provided however, that if the lessee shall neglect to pay the rent as aforesaid, then this lease shall thereupon, by virtue of this express stipulation, expire and terminate; and the lessor may, at any time thereafter, re-enter said premises, and the same possess as of his former estate." Held,

1. That the terms *expire and terminate* were merely equivalent to the more common expression, *shall become void.*

2. That the lease, by the non-payment of rent, did not become void, but only voidable at the option of the lessor.

3. That to take advantage of his right to avoid the lease, it was necessary for the lessor—1st. To make demand of the rent on the day it fell due, on the premises, and at a convenient hour before sunset. 2d. Upon neglect to pay the rent, to make a re-entry on the premises, or in some other positive manner assert the forfeiture of the lease. [Per STORRS, C. J., and HINMAN, J.; ELLSWORTH and SANFORD, Js., dissenting.]

Whether, after an entry for non-payment of rent, the acceptance of the rent is a waiver of the forfeiture: *Quere.* The current of authorities is against such a doctrine.

Writ of error from the judgment of a justice of the peace, upon a summary process brought by the present defendant for the recovery of certain premises leased to the present plaintiff. The writ of error was brought to the Superior Court, and by that Court reserved for the advice of this Court. By the bill of exceptions allowed by the justice, and upon which the only questions in the case arose, the following facts appeared.

The lease under which the defendant in the original suit held the premises, was (so far as important to the case) as follows:

"This indenture, made by and between Enos Foot of the first part, and William F. Bowman of the second part, witnesseth, that the said party of the first part has leased and does hereby lease to the said party of the second part, the house and premises known as the Assembly House, in the city of New Haven, on the corner of Court and Orange streets, for the term of three years from the first day of April, 1858, for the annual rent of five hundred and fifty dollars, payable in quarter-yearly payments of one hundred and thirty-seven $\frac{50}{100}$ dollars each, to wit: on the first days of July, October, January and April, in each year.

"And the said party of the first part covenants with said party of the second part, that he has good right to lease said premises in manner aforesaid, and that he will suffer and permit said party of the second part, (he keeping all the covenants on his part, as hereinafter contained,) to occupy, possess, and enjoy said premises during the term aforesaid, without hindrance or molestation from him or any person claiming by, from, or under him.

"And the said party of the second part covenants with the said party of the first part to hire said premises, and to pay the rent therefor, as aforesaid. * * * * *

"*Provided however*, and it is further agreed, that if said party of the second part shall neglect to pay the rent as aforesaid. * * * then this lease shall thereupon, by virtue of this express stipulation therein, expire and terminate, and the party of the first part may, at any time thereafter, re-enter said premises, and the same have and possess as of his former estate.

"And it is further agreed between the parties hereto, that whenever this lease shall terminate, either by lapse of time or by virtue of any of the express stipulations therein, that said lessee hereby waives all right to any notice to quit possession, as prescribed by the statute relating to summary process. * * *

"And this agreement in writing is, at all times during the period the lessee shall occupy said premises, to be referred to as evidence of the conditions, stipulations, and agreements under which he occupies the same."

It was found by the court that there was due to the plaintiff from the defendant, as rent under the lease, on the first day of April, 1859, the sum of $137.50, and that the defendant did not, in fact, pay this sum on that day. On this point the court found more particularly, that, on the first day of April the plaintiff had an interview with the defendant, in which the parties conversed about the rent and about the payment of a certain note for $400, then due from the defendant to the plaintiff, and that the plaintiff did not then, in fact, waive the payment of the rent at that time, or excuse the defendant from the immediate payment thereof, but that the defendant understood the plaintiff in that conversation expressly to excuse him from such immediate payment, and to consent that he might pay the rent at a subsequent day; and the Court found that, in consequence of such understanding, the defendant omitted to pay the rent on that day. The Court further found that, on the 4th day of April, 1859, and before suit was brought, the defendant tendered to the plaintiff, as rent, the sum of $150, and that the plaintiff accepted it as rent to April first, and gave a receipt therefor

on account, but that the plaintiff, in accepting it, did not expressly waive any right which he then had (if he then had any) to prosecute and maintain his suit, but, on the contrary, then expressly declared that he did not waive any such right.

The plaintiff claimed, upon the facts so found by the court, that the law was so that the defendant had, within the legal intent and meaning of the lease, "neglected" to pay the rent on the first day of April, and that, consequently, the lease did on the same day expire and terminate; but the defendant contended that upon the facts the law was so, that he did not, within such legal intent and meaning, "neglect" to pay the rent. Upon this question of law the court sustained the claim of the plaintiff, and held that, upon the facts so found, the defendant had "neglected" to pay the rent, and that consequently the lease did, on the 1st day of April, 1859, expire and terminate.

The plaintiff in error assigned as errors—1st. That the justice held that the right to insist on the forfeiture for non-payment of the rent due on the 1st of April, 1859, had not been waived by the subsequent acceptance of the rent on the 4th of April, 1859; and 2d. That the justice held that the lease was determined on the 1st of April, 1859, by the non-payment of the rent due on that day, when no demand had been made for the rent.

Doolittle and *Bronson*, for the plaintiff in error.

C. R. Ingersoll, for defendant.

The opinion of the Court was delivered by

STORRS, C. J.—We do not find it necessary to decide whether, by the acceptance of rent which fell due before the alleged determination of the lease, the lessor waived his right to repossess himself of his estate. The current of authority is against such a doctrine, although the opposite view of the law is not wholly unsupported. *Coon* vs. *Brickett*, 2 N. Hamp. 163. It is generally maintained that an entry for condition broken ought not at all to affect the right to receive payment of a pre-existing debt, or the acceptance of payment of such a debt to affect the right of entry.

Nor do we determine whether the effect of such an acceptance can be qualified by a landlord's declaration, at the time of the acceptance, that he does not thereby mean to waive any right. High authority sanctions the idea that the acceptance of rent accruing after condition broken, is in law a waiver of the forfeiture, and not evidence of such waiver merely. It has also been said by judges of great eminence, that the right of the party who pays money to control its application, constrains the lessor who receives rent, tendered as such, to waive his claim of forfeiture.

The only point which we propose to settle as the law of the present case, is that upon the facts stated there was no legal determination of the lessee's estate.

Our statute of summary process recognises no other termination of leases than such as is effected by force of the contract itself. It supersedes none of the common law remedies of the landlord, except in respect of the notice to quit and the form of procedure by action. It follows, that the question whether the tenant's rights have ceased must be settled according to a common law interpretation of the instrument of demise. In some States, precise legal consequences are annexed by statute to the non-payment of rent, and the lessee is arbitrarily divested of his estate. Our statutes contain no such provision.

The lease in evidence was for three years, ending on the first day of April, 1861. It contained a covenant of quiet enjoyment for the full term, with a qualification thus expressed:—"he [the lessee] keeping all the covenants on his part." One of these covenants was for the payment of a quarterly rent upon certain quarter days named. In a subsequent part of the instrument is a proviso of the following tenor: "Provided, however, that if the lessee neglects to pay the rent, &c., then this lease shall thereupon, by virtue of this express stipulation therein, expire and terminate, and the party of the first part may, at any time thereafter, re-enter said premises, and the same have and possess as of his former estate." Again, the parties agree that so long as the lessee's occupation continues, (referring to a holding over by consent,) the written agreement shall be evidence "of the *conditions*, stipulations and agreements under

which he occupies." It will be observed that the draughtsman of the contract designs to make use of technical language; and we have, in the first place, the clearest expression of a *condition* annexed to the covenant for the tenant's peaceable enjoyment of estate. Next, we have the correct commencement of a condition —"provided however"—in the very stipulation which is said to terminate the lease, and we have, at the close of the stipulation, a re-entry clause—the apt formula to indicate how a forfeiture is to be enforced: Best, C. J., in *Willson* vs. *Phillips*, 2 Bing. 13. Last of all, we have an explicit reference to the "conditions" of the instrument by that very name. It was the clear intent of the parties, whatever they may have supposed to be the legal consequences in detail of such a stipulation, to attach to the demise a condition for the lessor's benefit, upon the breach of which he was authorized to compel the tenant to submit to a forfeiture of his tenancy.

The legal interpretation of the instrument agrees with this manifest intent. There is no peculiar significance to the words "shall expire and terminate." They mean just as much, and just as little, as would the more common phrase, "shall become void," if inserted at the same place. Indeed, it appears that both terms were employed together in a lease, the construction of which was the subject of determination in the case of *Jackson* vs. *Harrison*, 17 Johns. 66. It was there provided, that in case the rent should not be paid "it should be lawful for the lessor to re-enter," &c., and that "the lease and estate thereby granted should cease, determine, and become utterly void, if the lessor should elect so to consider it." It is well understood, that such expressions as these in leases for years do not designate the non-payment of rent as an event, like a death or a marriage, at the date of which an estate shall cease at all events. If so, it would be in the power of the tenant, whenever his leasehold property became unprofitable or onerous, to relieve himself at any pay-day of his duty to retain it, by simply violating his own covenants. Such a construction would be a plain perversion of the intent of the parties. Accordingly, such stipulations are now universally taken to be for the advantage of the landlord.

"Void" means "voidable at his election:" *Jones* vs. *Carter*, 15 Mees. & Wels. 718. "Expire and terminate" is also an elliptical phrase, meaning "expire and terminate at the lessor's option." This principle of construction leaves us nothing to do with a distinction, which is said to prevail between freehold interests and leases for years, requiring in one case, and not requiring in the other, an entry or claim to divest an estate wholly void by the breach of a condition. In cases like the present, the estate is not wholly void by reason of a breach. Its avoidance is contingent upon the acts of the reversioner. Compare Shep. Touch., pages 139 and 184; see, also, *Doe* vs. *Bancks*, 4 B. & Ald. 401. To ascertain the law of the case in hand we must fill up the ellipsis. The lease is to expire and terminate after non-payment, at the option of the lessor, who may then re-enter and annul the tenancy.

This rendering of the contract makes the duration of the lease contingent on the exercise by the lessor of his right to terminate it. To denote how this is to be done, the instrument, fairly read, implies that a re-entry shall take place; the usual technical mode prescribed in such contracts, indicating, in the case of estates less than freehold, not necessarily a literal entry, but some proceeding that should in a significant and decisive manner declare the forfeiture of the lease and assert the landlord's rights.

If a tenant's right is thus voidable only, the option to avoid must be exercised under the contract and according to legal usage. The re-entry clause, at all events, creates a necessity for some positive act of the landlord, to determine his tenant's estate. In construing a lease which authorized the lessor, upon the lessee's neglect to perform his covenants, to enter without further demand and notice, and to dispossess the latter, the Supreme Court of Massachusetts held that, inasmuch as a condition and not a limitation was created by the words employed, the estate of the tenant was not avoided by the neglect, and could only be terminated by re-entry: *Fifty Associates* vs. *Howland*, 11 Met. 99. Since the present case was decided, we have learned that this doctrine was involved in a decision of the Queen's Bench, *Bishop* vs. *Trustees of Bedford Charity*, 28 L. Jour. 215, which was afterwards reviewed in the Exchequer

Chamber. The doctrine itself does not appear to have been disputed. The defendants, owners of certain premises, were charged with being also in possession of them, and therefore liable for an injury suffered through their negligent condition. They had been leased for thirty years, subject to a right of re-entry for the non-payment of rent. The lessee failed to pay, went into bankruptcy, and left the occupancy of the premises to his weekly lodgers, who, as such, had of course no estate in them. From these persons the defendants, before the accident, had collected rent, and after it, by a decree of the Court of Insolvency, obtained a surrender of the lease itself. To establish possession in the defendants, the judges of the Exchequer Chamber held that it must appear that they had by re-entry avoided their tenant's lease; that the receipt of rent from the weekly lodgers was no proof of re-entry, as it was consistent with the continued existence of the lessee's tenancy; and that, as no demand was proved, the defendants had not asserted in fact their rights under the re-entry clause, and therefore could not be said to be in possession of their property at the time of the injury.

Where a lease is thus voidable, the landlord's option to avoid it should be exercised at the proper point of time, and in the proper place; and, above all, should be brought home to the tenant's knowledge through some unequivocal act, in order to certify to him that he is absolved from the further performance of a lessee's duties. "Where," to quote Baron Parke, "the terms of a lease provide that it shall be avoided by re-entry, either in the case of a freehold lease or a *chattel interest*, an entry, or what is tantamount thereto, is indispensable."

Assuming, then, that it devolves on the lessor to take active measures to enforce his right of avoidance, we cannot doubt that no such forfeiture should be suffered, as for a breach of duty, unless the performance of the duty is first demanded or requested. This principle is illustrated in a striking manner by the case of *Merrifield* vs. *Cobleigh*, 4 Cush. 182, where the controversy related to a freehold estate. "Whenever," so ran the covenant, "the grantee shall neglect or refuse to support" a certain fence, "this

deed shall be void." The court held that, until there was a demand upon the grantee to repair the decayed fence, there was no breach of the condition. Yet literally, at the point of time when the grantee passively neglected that duty, his title failed. In the case before us no demand was made for the rent. The conversation of April 1st, 1859, however it was or ought to have been understood, is not claimed to have amounted, even by implication, to such a demand.

To prevent future litigation, and to enable parties to make contracts adapted to the view which we take of the law, we go a step beyond the requirements of the case to speak of the formalities necessary to terminate a lease voidable on the non-payment of rent. We confess that we know of no new rules with which to instruct our judgment in this matter, and naturally adhere to the settled doctrines of the common law.

The case of *Jackson* vs. *Harrison* was decided by a learned court, and has not been overruled by any of the higher tribunals of the State of New York. The lease in question was for seven years, and provided, as has been stated, for an avoidance and re-entry upon non-payment of rent. The court held that an entry was essential to the forfeiture claimed, and that none could be made without showing a demand of the rent due, upon the last day of payment, on the premises, and at a convenient hour before sunset. "The plaintiff," says Van Ness, J., "equally fails in showing a right of entry, by reason that the defendant did not pay the United States tax, because the indispensably necessary step of making a demand of the defendant within the period required by law in order to create a forfeiture, was not taken." This decision seems to be a true exposition of the common law.

A late New Hampshire case, *McQuesten* vs. *Morgan*, 34 N. Hamp. 400, in its result, accords with our present conclusion, and involves facts of the same general character.

There is error in the proceedings of the magistrate, and we advise that his judgment be reversed.

In this opinion HINMAN, J., concurred.

ELLSWORTH and SANFORD, Js., were of opinion that our statutes respecting leases had done away with the technical rules of the common law as to getting possession of leased premises, and dissented from the opinion of the Chief Justice.

Judgment reversed.

(1) It has been in general held that the receipt of rent accruing after a breach of covenant by a tenant, which by the provisions of his lease creates a forfeiture of the term, is a waiver by the landlord of his right of re-entry, if he was at the time aware of the forfeiture, but otherwise not, because the act is an affirmance of the existence of the tenancy, and an election by the landlord to treat the lease as still subsisting. Jackson *vs.* Brownson, 7 Johnson, 227; Camp *vs.* Pulver, 5 Barbour, 91; Clarke *vs.* Cummings, Id. 339; Koeler *vs.* Davis, 5 Duer, 507: Jackson *vs.* Sheldon, 5 Cowen, 448; McKeldore *vs.* Darracott, 13 Gratt. 278; Dendy *vs.* Nicholl, 4 C. B., N. S. 376; Price *vs.* Werwood, 4 Hurls. & Norm. 511. In Croft *vs.* Lumley, 5 Ell. & Bl. 648; 6 H. Lds. Cases, 672; Ell., Bl. & Ell. 1069, Am. ed., the question was much discussed. There a lessee tendered rent which had accrued subsequently to breaches of covenant, as rent, but the lessor took it as compensation for occupation, expressly reserving the right of re-entry; it was held by the Queen's Bench to be nevertheless a waiver of the forfeiture. The judgment was affirmed in the Exchequer Chamber, and in the House of Lords on another ground. But in the latter tribunal it was held by a majority of the Judges consulted, Crompton, J., dissenting, that by force of the maxim *solutio accipitur in modum solventis*, the receipt of the rent operated as a waiver of the forfeiture in respect to such breaches as were known at the time. Erle, J., went farther, and held it to be a waiver also as respects even unknown breaches, which did not differ in circumstances from those which were known; and Watson, B., held it to be a waiver of all previous breaches. On the other hand, it was the opinion of Crompton, J., that the receipt of the rent was not necessarily a waiver, but that the question was, whether it was in fact received with the intention to waive the forfeiture, and in this Lord Wensleydale appeared to agree.

For the converse reason, the mere receipt of rent due *before* the forfeiture, will not be a waiver. Jackson *vs.* Allen, 3 Cow. 220; Hunter *vs.* Ousterhouldt, 11 Barbour, 33; Stuyvesant *vs.* Davis, 9 Paige, 427; Bleeker *vs.* Smith, 13 Wend. 533; though the opposite was held in Coon *vs.* Bricket, 2 New Hamp. 163. Nor even if after a forfeiture will it operate to relieve from the consequences of subsequent continuance of the original forfeiture. Jackson *vs.* Allen, 3 Cowen, 220; Bleecker *vs.* Smith, 13 Wend. 533. But where the landlord *distrains* for rent due *before* the forfeiture, with the knowledge of it, it will be a waiver; because that is an act which could only be lawfully done during the continuance of the tenancy. Jackson *vs.* Sheldon, 5 Bowen, 448; Stuyvesant *vs.* Davis, 9 Paige, 427; but see McKeldore *vs.* Darracott, 13 Grattan, 278. On the other hand, after the landlord has taken steps by ejectment to enforce his right of entry, he cannot obtain any relief in equity or at law, which would assume the existence of the tenancy, as by an injunction to prevent the collection of rent by the tenant from sub-tenants; Stuyvesant *vs.* Davis, 9

Paige, 427; or an action to compel the payment of subsequent rent or the performance of the covenants of the lease. Jones *vs.* Carter, 15 M. & W. 718.

(2) There is no doubt, as is stated in the foregoing opinion, that weight of authority is that, under the usual clause of forfeiture, the breach of a condition in a lease does not make it absolutely void, but only voidable at the election of the landlord; and that re-entry, or what is equivalent thereto, must be resorted to by him, to enforce the election. In addition to the cases cited in the foregoing opinion, Doe *vs.* Banks, 4 B. & A. 401; Rede *vs.* Farr, 6 M. & S. 121; Doe *vs.* Meux, 4 B. & C. 606; Doe *vs.* Birch, 1 M. & W. 406; Doe *vs.* Lewis, 5 A. & E. 277; Clarke *vs.* Jones, 1 Denio, 577; Phillips *vs.* Chesson, 12 Ired. 194. But in Pennsylvania, this appears not to be the law; and the breach of condition is held to avoid the lease absolutely: Kenrick *vs.* Smith, 7 Watts & Serg. 47; Shaeffer *vs.* Shaeffer, 1 Wright, 527; Davis *vs.* Moss, 2 Id. 346. But it deserves notice, that the question did not distinctly arise in either of these cases. The first was substantially that of a vendee under articles, so that the landlord had still the legal title. In the second he had present possession for a limited estate; and the third was that of a mining lease, in which the landlord had a general possession of the land, subject to the mining right.

(3) The established rule at common law has always been, that where a right of re-entry is claimed on the ground of a forfeiture for non-payment of rent, there must be proof of a demand of the precise sum due, on the most notorious part of the demised premises, at a convenient time before sunset on the day when the rent is due. Co. Litt. 202 a; 1 Williams & Saunders, 287; Clun's Case, 10 Rep. 129 a; Cropp *vs.* Hambleton, Co., Eliz. 48; Wood & Chevor's Case, 4 Leonard, 180; Tinkler *vs.* Prentice, 4 Taunt. 549; Acocks *vs.* Phillips, 5 Hurlst. & Norm. 183; and this has been generally followed in the United States. Conner *vs.* Bradley, 1 How. U. S. 217; 17 Pet. 267; Jackson *vs.* Harrison, 17 Johns. 70; Remsen *vs.* Concklin, 18 Id. 450; Jackson *vs.* Kepp, 3 Wend. 230; Van Rensselaer *vs.* Jewell, 2 Comst. 147; McCormick *vs.* Connell, 6 Serg. & R. 153; Stover *vs.* Whitman, 6 Binn. 419; Gage *vs.* Smith, 14 Maine, 466; James *vs.* Reed, 15 New Hamp. 68; Jewett *vs.* Berry, 20 Id. 46; McQuester *vs.* Mergher, 34 Id. 400; Chapman *vs.* Wright, 20 Illinois, 120; Eichart *vs.* Bargus, 12 B. Monroe, 464; Mackuben *vs.* Whitecraft, 4 Harr. & John. 135; Yale *vs.* Crewson, 6 Ind. 65; Phillips *vs.* Doe, 3 Ind. 132; Gaskill *vs.* Tramer, 3 Calif. 334.

H. W.

In the New York Court of Appeals.

CHESTER M. FOSTER ET AL. *vs.* DENIS JULIEN, APPELLANT.[1]

1. A. made his promissory note in the city of New York, payable generally. He resided at the time in New York, as well as the endorser. Before the note fell due, he removed to New Jersey, where he resided at its maturity. *Held*, that it was not necessary for the holder, in order to charge the endorser, to present the note for payment at the maker's former place of residence in New York.

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[1] We are indebted to the courtesy of Judge Davies for the following opinion, for which he will accept our thanks.—EDS. A. L. REG.

2. The cases of Anderson *vs.* Drake, 14 Johnson, 114, and Taylor *vs.* Snyder, 3 Denio, 145, commented upon, and the case of Wheeler *vs.* Field, 6 Metcalf, 290, overruled.

The opinion of the Court was delivered by

DAVIES, J.—This is an action upon a promissory note, made by one George Varden, payable to the order of the defendant, and by him indorsed. The note was dated at New York, where the maker resided at the time, and the indorser resided in the same city. The note was dated May 3d, 1855, and had three months to run. About the middle of June following, the maker removed to the State of New Jersey, and continued to reside there until Sept. 24, 1855. The note fell due August 6th, and was protested, and notice of protest duly given to the defendant. From the facts found, it appears that the notary, on the day the note fell due, made inquiries for the maker at the Post Office in the City of New York, and, to ascertain his residence, examined the City Directory, but the maker's residence, on such inquiry, could not be found. The Judge, upon those facts, found, as a question of law, that the removal of the maker from the State of New York into the State of New Jersey, and his continued residence there up to the maturity of the note, dispensed with the necessity of the demand upon him. The judgment was affirmed at the General Term, and the defendant appeals to this Court.

The only question presented for consideration is, whether the change of residence of the maker, from the State of New York to the State of New Jersey, intermediate the date of the note and its maturity, dispensed with the necessity of presenting the note at the last place of residence of the maker in this State, and demanding payment thereof there. It is not contended that the holder was bound to seek out the maker or his place of residence in the State to which he had removed, for the purpose of presenting the note and demanding payment. But it is urged that the holder should have sought the last place of residence of the maker in this State, and made the presentation and demand there. The Supreme Court of this State in *Anderson* vs. *Drake*, 14 Johns. 114, say they had then (in 1817,) in a late case not reported, decided, when the

drawer of a note had removed to Canada, the note being dated and drawn in Albany, though not made payable at any particular place in that city, that a demand in Albany was sufficient to charge the indorser. It is not stated where the demand in that case was made in Albany, and it is not seen, upon the facts stated, how it could have been made, nor is any reason given for making it. It was decided in *Anderson* vs. *Drake*, *supra*, that when a note is not made payable at any particular place, and the maker has a known and permanent residence *within the State*, the holder is bound to make a demand at such residence in order to charge the indorser. The general rule is, that the holder of a note who seeks to charge the indorser, must demand payment of the note, at its maturity, of the maker, at his place of business or residence. If the note is payable at a particular place, the demand must be made at the appointed place. The holder must use all reasonable and proper diligence to find the maker, when no particular place of payment is appointed in the note. And the case of *Anderson* vs. *Drake*, *supra*, established the rule, that when a change of residence of the maker took place between the making of the note and its maturity, and no place was appointed in the note for its payment, the demand of payment must be made of the maker at his place of residence at the maturity of the note, provided such residence was within this State. *Taylor* vs. *Snyder*, 3 Denio, 145, was an action upon a note dated at Troy, in this State, the maker residing in Florida at the time of making the note, and at its maturity. No intermediate change of residence took place. The payment of the note was demanded of the defendant, the indorser thereon, at Troy, and on refusal, was protested, and notice given. Beardsley, J., reviews, ably and elaborately, all the cases where the presentment of the note for payment has been excused, and classifies the exceptions to the general rule, requiring presentment and demand to charge the indorser, and shows they all rest on peculiar reasons. He says: "In one, the maker has absconded; in another, he is temporarily absent, and has no domicil or place of business within the State; in a third, his residence, if any, cannot be ascertained; while in the fourth, he has removed out of the State, and taken up his residence in another

country. In each of these instances, let it be observed, the fact constituting the excuse occurs subsequently to the making and indorsement of the note, and it is this new and changed condition of the maker, and that only, by which the indorser stands committed without a regular demand."

In *McGurdee* vs. *Bank of Washington*, 9 Wheaton, 598, the Supreme Court of the United States say, in reference to change of residence to a foreign country, or to another State, "that reason and convenience are in favor of sustaining the doctrine that such a removal is an excuse from actual demand. Precision and certainty are often of more importance to the rules of law than their abstract justice; on this point there is no other rule that can be laid down which will not have too much latitude as to place and distance. Besides which, it is consistent with analogy to other cases, that the indorser should stand committed in this respect by the conduct of the maker. For his absconding, or removal out of the kingdom, the indorser is held, in England, to stand committed."

It is thus seen that the controlling element, which is introduced to establish the indorser's liability, is the change of condition after the making of the note. It is this change which commits the indorser, and excuses the presentment and demand of the note; and in this State the rule has been regarded as well settled, since the decision of the case of *Anderson* vs. *Drake*, that a removal of the maker after the making of the note and before its maturity, out of the State, excuses the holder from presentment and demand. It is true that the court say that in the case of the removal of the maker of the note to Canada, intermediate its making and maturity, where the note was dated at Albany, a demand in Albany was held sufficient to charge the indorser, yet it is not stated where the demand in Albany in that case was made, or if the court deemed the fact of a demand essential. The principle of the cases was, that the removal of the maker excused presentment and demand, and the Canada case was decided in harmony with that principle, and it was not necessary to the case, or to render the decision in conformity with the previous cases, to advert to the fact that a demand of payment of the note (if any was made) was made in Albany. It

was not relied on, or adverted to, that such demand was made at any particular place, and no reason is suggested why it should have been made at all, or that its being made was regarded as a material circumstance. The Canada case is certainly no authority for the position of the defendant, that the demand should have been made at the last place of business or residence of the maker in this State. Beardsley, J., in *Taylor* vs. *Snyder*, *supra*, says, "that there is a further exception to the rule requiring a demand to be made of the maker, or at his domicil, or his place of business, for where a note is made by a resident of the State, who, before it is payable, removes from the State and takes up a permanent residence elsewhere, the holder need not follow him to make demand, *but it is sufficient to present the note for payment at the former place of residence of the maker.*"

I have looked at all the authorities referred to in support of this position, and they fail entirely to sustain the point in terms stated, and furnish no authority for the qualification that it is sufficient to present the note for payment at the former place of business of the maker. The learned judge was misled by the head-note to the case in 9th Wheaton, *supra*, which is in these words: "When the maker of the note has removed into another State or another jurisdiction, subsequent to the making of the note, a personal demand on him is not necessary to charge the indorser; *but it is sufficient to present the note at the former place of residence of the maker.*"

There is nothing in the case to warrant the qualifications or suggestions in the head-note relative to presenting the note at the former place of residence of the maker. It has long been well settled that a personal presentment of the note to the maker is not necessary to charge the indorser, neither will the presentment alone of the note suffice to charge the indorser; there must be a demand of payment, and refusal; but no case which I have met with requires that the presentment and demand should be personal to and of the maker. A demand of payment at the place of business, or residence of the maker, was sufficient, and a refusal by any one there was all that was required. In *Cromwell* vs. *Hynson*, 2 Esp. 511, it was held that the presentation of a bill to the wife, at the party's

house, he being a master of a ship, and absent from England, was a sufficient demand. (See, also, 2 Taunton, 206.) The facts as admitted in *M'Gruder* vs. *Bank of Washington, supra,* were that at the maturity of the note neither the holder or the notary knew of the removal, from the District of Columbia, of the maker who resided there at the date of the note; that ten days before its maturity he removed out of the District to the State of Maryland, nine miles distance from his previous residence. At its maturity the note was delivered to a notary, who went with it to the house of the maker, where he had resided, and from which he had removed, in order there to present the note and demand payment; and not finding him there, and being ignorant of his place of residence, returned the said note under protest. Now, it is not alleged that the notary presented the note at the last place of residence of the maker, in the District, or that he demanded payment of it from any body, and the court, in its opinion, does not advert to the fact that the notary went with the note to the maker's last place of residence, or intimate that he should have done so, and there presented it and demanded payment; but the court distinctly places its decision upon the fact that the removal of the maker, after the date of the note, and before its maturity, out of the District into one of the States, being in another jurisdiction, absolved the holder from the necessity of presentation and demand of payment, and held the indorser duly charged, though neither was done. The court gave no intimation that the note had been presented at the maker's last place of residence, or that that fact was regarded as at all material.

The next case referred to by Justice Beardsley is that of *Anderson* vs. *Drake, supra,* in which no such point arose or is referred to. The only allusion to it is the remark made relative to the Canada case, where it was said it was held that a demand in Albany was sufficient to charge the indorser. *Dennie* vs. *Walker*, N. Hamp. 199, did not present the point; but so far as it bears on the present case, is an authority to sustain the judgment in this case. There the maker of a note resided in Portsmouth, at the date of the note, but at its maturity was at sea, his family still residing there, and there had been no change of his residence. The court held that

his absence did not excuse presentment and demand at his residence to charge the indorser. Upham, J., says: "A removal without the bounds of the government, after the making of a note and before it becomes due, and where no place of payment of the note is specified, render a demand upon the maker unnecessary; but this is an exception to the general rule, and must be construed strictly. Anything less than an actual change of residence by removal without the State, would leave the rule too uncertain."

The next case is that of *Gillespie* vs. *Hannahan*, 4 M'Cord, Rep. 503. Here the notary made inquiry for the maker of the note in Charleston, where it was dated, and where the maker resided at the time it was made, but who had no residence at its maturity in Charleston, having in the meanwhile removed to Philadelphia. The notary protested the note, and gave notice to the indorser without having made any presentment or demand. In an action against the indorser, the court held that when the maker has removed to another State, and resided there at the maturity of the note, demand of payment was not necessary. The court says: "For all legal purposes a neighboring State is regarded as a foreign country. Bills drawn on a sister State are regarded as foreign bills, and the terms 'beyond the seas,' used in the statute of limitations, have, in construction, been applied to a neighboring State, and I come to the conclusion that, for the purposes of a demand on the maker of a promissory note, it must be so regarded, and that his absence from the State in which the note was made, and where it was understood it was to be paid, will excuse the holder from making a personal demand, in order to charge the indorser."

Reid vs. *Morrison*, 2 Watts & Sergt. 401, I regard as an authority in point. There the court held, that if the drawer of a bill or maker of a note has absconded, that circumstance will dispense with the necessity of making any further inquiry after him, citing Chitty on Bills, 261; Bayley on Bills, 95. In *Duncan* vs. *M'Cullough*, 4 Sergt. & Rawle, 480, the court say, "the same rule which exists in the case of absconding applies to that of the removal of the maker or drawer into another jurisdiction after the execution of the instrument." *Gist* vs. *Lybrand*, 3 Ohio, 307,

is also a case in point. It was urged there that no inquiry was made at the last place of residence of the maker for payment, he having intermediate the date of the note and its maturity, removed from the State. The court say, "we all concur in opinion with the Supreme Court of the United States upon the first point in this case. In the case of *McGruder* vs. *Bank of Washington*, cited by the plaintiff's counsel, they have settled that the removal of a maker of a note, after it was made and before its maturity, into a different State from where he resided when the note was made, excuses the holder from making actual demand of payment from the maker. Whether the demand should be made at any other place is not made a point or adjudicated upon in that case. But it seems to us a clear consequence of the decision that such demand was unnecessary. The fact of removal commits the indorser and dispenses with the demand, unless a particular place be appointed for the payment of the note in the note itself."

I entirely concur in the views thus clearly expressed by the Supreme Court of Ohio. I think they correctly apprehended the exact force and extent of the decision of the Supreme Court of the United States, and that case should be followed as an authority. There would have been no misapprehension in reference to that case, if the head-note of the reporter had not interpolated a qualification to the rule enunciated, not contained in the case or in the opinion of the court. This misapprehension undoubtedly led Mr. Justice Beardsley into the qualification of the rule otherwise correctly enunciated by him, and which rule was fully sustained by the authorities cited; but they do not sustain the qualification of the rule, it being only found in this head-note. The case in 9th Wheaton was decided in 1824, and I think the rule then laid down was in harmony with previous adjudications in England and in this country, and, as it establishes a uniform and reasonable and certain rule of commercial law by the highest tribunal in the country, and one not in conflict with our own decisions, I think we ought to recognise and adhere to it. This rule is approved by one of our most learned and able writers on this subject. See Edwards on Bills, pp. 485, 486.

I have been able to find but one case where a different rule has

been announced. It is that of *Wheeler* vs. *Field*, 6 Met. 290. There the court held, to charge an indorser upon a note dated in New York, where the maker had removed out of the State where it was made and dated before its maturity, that a demand should have been made at the maker's last place of residence in New York, when he had removed to the State of Illinois. No authorities are cited for the opinion expressed, and no reasons are given why it should be recognised. It is certainly in direct conflict with those which have been already referred to, and is not in harmony with the principles settled in numerous cases. We think it better to adhere to the long-settled rule as laid down in the case in 9th Wheaton, even although cases might be supposed in which its application might, by possibility, work some wrong. It is of the highest importance in a commercial community, that the rules relating to the presentment, demand, and protest of bills and notes, should be certain, and when once enunciated should be adhered to; and no reasons are suggested which we think should influence us to depart from or modify the rule as laid down by the United States Supreme Court in the case in 9th Wheaton. We think it a reasonable, just, and proper rule, and one which should have universal application.

The judgment appealed from should be affirmed, with costs.

It is much to be regretted that the rule applicable to an important point of mercantile law should be different in two States of such commercial importance as New York and Massachusetts. The opinion in the principal case shows that the weight of authority is in favor of the New York rule. The question may also be examined from another point of view.

A test by which the liability of an indorser may be ascertained, is the application of legal principles belonging to conditional contracts. Certain acts in the nature of conditions precedent, must be performed by the holder before the indorser can be regarded as liable. These conditions may be either express or implied. The general principles are in both cases the same.

I. Express conditions. The most common express condition arises when the note is made payable at a particular place. In England, it is the rule that such a condition forms part of the contract both with the maker and indorser, and no action can be brought against either, unless the condition is performed or dispensed with. In this country generally, the engagement of the maker under such circumstances is not conditional but absolute, and the failure of the holder to make the presentment can only be urged as matter of defence. The indorser may however insist that the clause forms an essential part of his contract, and that a demand should be made at the place named, in order that he may be charged. It is evident that the material point in this condition is *locality*

It is unimportant where the maker may reside. The parties have chosen by an explicit statement to contract, that though the maker may remove from the country or may abscond, the demand must be made at the place specified. It was upon this ground that Sands *vs.* Clark, 8 C. B. 751, was decided. An action was brought against the maker of a note payable at a particular place. No presentment had been made, and the excuse was offered that the maker had absconded. But as *locality* was the substance of the condition, the court held that it had not been performed, and the maker was not liable. The case was argued both by counsel and the court upon the law of conditions, and upon commercial decisions. Maine's case, 5 Coke R. 25 a, among others was cited. It was evidently the opinion of the court that the condition precedent in the case of negotiable paper would be dispensed with under the same circumstances as in other branches of the law. What would constitute a dispensation as to the maker would also as to the indorser. This was suggested by counsel, and denied by no one. It is evident, under the English law, the condition so far as it is expressed is the same in both cases.

II. It is true that there is a difference in one respect between express and implied conditions. The latter cannot affect the contract of the maker, but only of the endorser. In the absence of an express condition, the engagement of the maker is absolute. There is an entire accord between the commercial law of England and of this country in this respect. Implied conditions must, however, when they exist, be observed with the same accuracy as express conditions, and parol evidence can no more vary the one than the other. Suse *vs.* Pompe, 8 C. B. N. S. 537, (1860), Byles, J., delivering the opinion of the court.

What then are the circumstances under which the condition in question in the law of negotiable paper is waived? The indorser stipulates that certain acts in reference to the maker shall be done by the holder before he is liable, but he engages on his part that the maker shall remain in a condition to have those acts done. If the entire contract were written, it would be somewhat as follows: "it is understood that if the holder of the note shall, upon the day on which by the rules of commercial law it falls due, present it at the place of business or of the residence of the maker for payment, and if this is refused, shall give timely notice to the endorser, he will be liable. The endorser on his part agrees that the *maker shall do no act to prevent* the demand from being made in the manner agreed upon." This is the fair and reasonable construction of the contract. It is manifestly the engagement by the English law when the maker *expressly* stipulates for demand at a particular place, and no suggestion has ever been made in the English courts that the indorser's contract is in that case different from the maker's upon the subject of demand. There is, of course, no legal rule which would prevent the indorser from entering into an undertaking as to the conduct of the maker.

The circumstances dispensing with the performance of a condition precedent are thus stated by Addison. "Whenever a party by doing a previous act would acquire a right to any debt or duty, and the other prevents him from doing it, he acquires the right as completely as if it had been actually done," p. 889, and cases cited. The only inquiry then is, has the maker prevented the holder from performing the condition precedent? This is, for the purpose of charging the indorser that the note shall be demanded of the maker at his place