ages, it would seem that the charge complained of, which gives the rule of damages on account of plaintiff's being put off at Kildare, is not open to the charge of being hypothetical or conjectural. If the court was right in the proposition of law declared as to the liability of the defendant, and as to the right of the plaintiff to recover damages for being put off at Kildare, then it seems clear that the rule of damages given by the court was favorable to the defendant, as authorizing a lessening of the actual damages suffered by the plaintiff in being put off at Kildare, and gives plaintiff in error no ground for complaint in this court. On the record, as brought to this court, we see no other course than to affirm the judgment, and it is so ordered.

BANK OF EDGEFIELD *v.* FARMERS' CO-OPERATIVE MANUF'G CO.

(*Circuit Court of Appeals, Fifth Circuit.* June 13, 1892.)

No. 27.

1. PLEADINGS—AMENDMENT—VERIFICATION.
In a suit in a federal court on certain notes, pleas filed alleging want of consideration, which are verified by an officer authorized under Code Ga. § 3450, to administer oaths, to wit, a justice of the peace, and afterwards sworn to at the trial before the clerk of the court and by the direction of the court, are sufficiently verified to make an issuable defense; and such verification before a clerk at the trial is allowable under Code Ga. § 3479 *et seq.*, as well as by Rev. St. U. S. § 954, providing that the court "may at any time permit either party to amend any defect in process or pleading" on certain conditions.

2. NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDERS—NOTICE OF EQUITIES.
Where a bank takes three negotiable notes before maturity as collateral for money loaned, together with three other past-due protested notes by the same makers and indorsers, there being nothing on the face of the notes to indicate that they were given for the same consideration or formed part of one transaction, mere knowledge of the dishonor of the past-due notes will not operate as notice to the bank that the three notes not yet due were tainted by defective consideration, or of any equities existing between the original parties thereto, and the bank is entitled to recover the whole of the indebtedness of the borrower to it in a suit on such notes.

3. SAME—COMMERCIAL LAW—STATE DECISIONS.
When a bank advances money on certain negotiable notes, some of which are past due, the question of notice of any equities existing between the original parties, arising from knowledge on part of the bank of such overdue notes, is not a question of the construction of a contract, which is usually determined by the *locus contractus*, but is governed by the rule of commercial law which affects subsequent holders in the matter of notice of prior equities, and not by the statutes, rules, or decisions of the particular state where such notes were executed.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

Action by the Bank of Edgefield against the Farmers' Co-operative Manufacturing Company on three promissory notes held as collateral security for a loan of $1,239.77. Verdict and judgment for $475.65 for plaintiff, who brings error. Reversed.

Statement by PARDEE, Circuit Judge:

The plaintiff in error filed a suit on the common-law side of the circuit court of the United States for the northern district of Georgia against the defendant in error, being an action upon three promissory notes, ag-

gregating $5,270. Each of said notes was made at Griffin, Ga., on the 28th September, 1889, by the defendant in error, payable to the order of Smith & Vaile Company, a corporation organized under the laws, and being a citizen, of the state of Ohio. These three notes were afterwards, and before due, indorsed by Smith & Vaile Company to D. A. Tompkins, a citizen of, and residing in, the state of North Carolina, who then, before the notes became due, indorsed them for value to the plaintiff in error, a citizen of, and residing in, the state of South Carolina. The defendant in error filed certain pleas setting up the failure of consideration, which said pleas were sworn to by W. P. Walker, president of the defendant company, before a justice of the peace for Spalding county, in the state of Georgia.

When the case was called for trial in the court below, plaintiff in error moved for judgment, because there was no issuable defense filed under oath, as provided by the statutes of the state of Georgia and rules of court, plaintiff contending that the affidavit to the plea, made before a justice of the peace, constituted no sworn defense in the circuit court of the United States. The court ruled (*a*) that the affidavit was sufficient; and (*b*) that if it was not sufficient the plea could be sworn to then in open court; and the plea was thereupon sworn to by W. E. H. Searcy, president of the defendant company, before W. C. Carter, deputy clerk of the circuit court of the United States for the northern district of Georgia. Plaintiff then renewed the motion for judgment, because there could be no affidavit to a plea after the first term of the court. The court overruled this motion, and declined to permit the plaintiff to take judgment without a jury. The defendant then filed an additional plea, which was also sworn to before the deputy clerk, setting forth that, when the loan was made by the Bank of Edgefield to D. A. Tompkins, upon the three notes as collateral, certain of the notes which had been given by defendant to Smith & Vaile Company, and which were among those deposited as collateral security by Tompkins, were then due and unpaid; and that this was notice to the Bank of Edgefield; and that, if anything was due to plaintiff, it was only the amount first loaned to Tompkins, being $500.

The other facts in the case sufficiently appear from the assignments of error, as follows:

"(1) That the court erred in not granting a judgment for plaintiff, as requested by its attorneys, upon the ground that there was no issuable defense filed under oath by defendant.

"(2) Because the court erred in not granting judgment for plaintiff, as requested by its attorneys, after defendant had been allowed to swear to its pleas in open court at the time of the trial.

"(3) Because the court erred in permitting the introduction of the depositions of M. H. Mims, cashier of plaintiff, which were offered by defendant at the trial, and objected to by plaintiff in open court and in presence of the jury.

"(4) Because the court erred in permitting W. E. H. Searcy, president of the defendant company, to testify in the cause over the objection of the plaintiff, made in open court in presence of the jury.

"(5) Because the court erred in not ruling out and excluding from the jury the depositions of said M. H. Mims and the testimony of W. E. H. Searcy, when the same was requested by attorney for plaintiff in open court and in presence of the jury.

"(6) Because the court erred in charging the jury as set forth in the transcript of the record.

"(7) Because the court erred in charging the jury as follows: 'Now, these notes are held by the Bank of Edgefield, and the proofs show exactly what that transaction was. We have the evidence of the cashier of the bank that these six notes—the three notes sued on, and the three notes for $500 each, which were the first three to mature—were placed in August, 1890, in the Bank of Edgefield, and that some notes were given by Mr. Tompkins after that, the first of which were given on the 18th October. The three notes, however, were due at the time these notes were placed in the bank. In the opinion of the court, the dishonoring of the three notes, as it is called in law, —the failure to pay them when they were due,—was notice to the bank of all the equities existing between the machinery company, Smith & Vaile Company, and the defendant corporation.'

"(8) Because the court erred in charging the jury as follows: 'So that being the case, in the opinion of the court, the bank would only be entitled to recover on these notes, under the evidence and the pleadings, the amount due by the defendant to Smith & Vaile Company, which would be the amount as stated to you a while ago, the difference in the freight, and the interest which Mr. Searcy says was on the entire transaction up to the time they made the arrangement, at or about the time of the date of the letter.'

"(9) Because the court erred in charging the jury as follows: 'About the date of that letter which you have in evidence, 28th February, 1890, I believe, there was an adjustment of this matter between Tompkins, agent or representative of the establishment that sold the machinery, and the president of the defendant corporation;' there having been no evidence adduced at the trial to authorize or justify such charge.

"(10) Because the court erred in charging the jury as follows: 'The proof shows that these notes were given for the purchase of certain machinery, and that that machinery was not delivered; that it was not to be delivered, however, until the three five hundred dollar notes were paid, and that these notes were not paid. The evidence is somewhat indefinite about that;' it appearing from the evidence that W. E. H. Searcy, a witness for defendant, positively and without dispute, that neither of the said three five hundred dollar notes were paid, the evidence not having in any wise been indefinite upon this point.

"(11) Because the court erred in charging the jury as follows: 'But Mr. Searcy stated they agreed he was to pay the interest on the entire transaction and the difference in freight. I do not believe that the bank is entitled to recover any more than that. I think, however, they are entitled to recover that;' there having no evidence to warrant such a charge, and the same being illegal and misleading.

"(12) Because the court erred in refusing to charge the jury, when so requested by counsel for plaintiff, as follows: 'If you find, as is admitted by the plaintiff, that the three notes for $500 each were past due when they were transferred by Tompkins to the plaintiff bank, along with the three notes sued on, then this is not notice to the bank of all the equities existing between the defendant company and Smith & Vaile Company; nor was it evidence of a want or failure of consideration of the three notes not then due, and now sued upon. But you may consider the fact of the three $500.00 notes being past due when the six notes were transferred to the plaintiff bank in determining from the evidence if that fact showed bad faith in the bank in

taking the notes not due, and, if it did, then the plaintiff cannot recover anything. But if you find from the evidence that, when the bank took the six notes, it took the three notes sued on before due, in good faith and for a valuable consideration, to wit, as collateral security for debt of D. A. Tompkins, then the plaintiff is entitled to recover the full amount called for by the three notes sued on.'

"(13) Because the court erred in taking a wholly erroneous view of the real issues and merits of the cause, and in permitting the defendant to introduce evidence of the equities existing between the defendant and Smith & Vaile Company, to whom the notes sued on were given, without there being any pleadings to justify the introduction of such evidence, and without there being any legal right on the part of the defendant to introduce testimony as to such equities; it not having been shown that the plaintiff took the three notes sued on without any knowledge of any failure of consideration or infirmity in the said notes, nor that plaintiff took said notes in bad faith."

Henry B. Tompkins, for plaintiff in error.

Hall & Hammond and *Dismukes & Mills*, (*John I. Hall* and *F. D. Dismukes*, of counsel,) for defendant in error.

Before PARDEE and MCCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. The first and second assignments of error are not well taken. The plea in this case was sworn to originally before one of the officers mentioned in section 3450 of the Georgia Code, and in accordance with the Georgia practice, which we are inclined to think was sufficient verification to the plea filed in the circuit court; but, whether this be so or not, when the plea was afterwards sworn to in open court at the time of the trial, by the direction of the court, we have no doubt the plea was sufficiently verified. Code Ga. § 3479 *et seq.*, is very liberal with regard to the allowance of the amendments, and sufficiently broad, in our opinion, to cover this case. And section 954 of the Revised Statutes of the United States provides that the court "may, at any time, permit either of the parties to amend any defect in process or pleadings, and upon such conditions as it shall in its discretion and by its rules prescribe."

The seventh assignment of error seems to be well taken. It is as follows:

"(7) Because the court erred in charging the jury as follows: 'Now, these notes are held by the Bank of Edgefield, and the proofs show exactly what that transaction was: We have the evidence of the cashier of the bank that these six notes—the three notes sued on, and the three notes for $500 each, which were the first three to mature—were placed in August, 1890, in the Bank of Edgefield, and that some notes were given by Mr. Tompkins after that, the first of which were given on the 18th of October. The three notes, however, were due at the time these notes were placed in the bank. In the opinion of the court, the dishonoring of the three notes—as it is called in law, the failure to pay them when they were due—was notice to the bank of all the equities existing between the machinery company, Smith & Vaile Company, and the defendant corporation.' "

There was nothing on the face of the notes to indicate that the three notes for $500 each, which were past due when they, with the three

notes sued on, were deposited as collateral security with the plaintiff, were for the same consideration, or referred in any way to the same transaction, upon which the three notes sued upon were any of them issued. There is no proof in the case tending to show that the plaintiff had any knowledge whatever of the transaction or contract between the defendant and Smith & Vaile Company, or that the six notes constituted or formed part of one transaction. "Where more than one note is executed upon the same consideration, they are not all to be regarded as dishonored when one is overdue and unpaid." Daniel, Neg. Inst. § 787.

The precise question was before the supreme court of the state of Wisconsin in the case of *Boss* v. *Hewitt*, 15 Wis. 260. In that case the court said:

"Upon the question whether the purchaser should be chargeable with notice of any defects in the consideration of the notes subsequently to become due by reason of the first being overdue at the time, no authority was cited by either counsel, and we have found none. The notes were all secured by one mortgage, and, if it had appeared on the face of the papers that they were all given for one consideration, upon one transaction, it might be urged, with considerable force, that, as the law charged the purchaser with notice of any defect in the consideration of the first note, it must also charge him with like notice that all were given for one consideration. But how that question should be decided, if it ever arises, can be then determined. But there was nothing on the face of the papers to show that the notes were all given for one consideration. It is true they bore the same date, and were secured by one mortgage. But it is frequently the case that parties, in giving securities, include debts arising out of many different transactions, as to some of which there might have been defenses not affecting the others; and we do not think that a purchaser of negotiable notes before maturity can be held chargeable with notice of any defect in their consideration from the mere fact that another note, secured by the same mortgage, was overdue, and had not been paid."

Boss v. *Hewitt* was affirmed in the supreme court of Wisconsin, 45 Wis. 110, citing *Bank* v. *Kirby*, 108 Mass. 497, and *Cromwell* v. *County of Sac*, 96 U. S. 51. In *Cromwell* v. *County of Sac*, affirmed in *Railway Co.* v. *Sprague*, 103 U. S. 756–762, and also in case of *Morgan* v. *U. S.*, 113 U. S. 476–502, 5 Sup. Ct. Rep. 588, it is held that the fact that installments of interest are overdue and unpaid is not sufficient to affect the position of one taking bonds and subsequent coupons before maturity for value, as a *bona fide* holder.

The defendant in error contends that the rule given in the judge's charge was correct, because section 2786 of the Code of Georgia provides as follows:

"If the holder receives it after it is due, its nonpayment at maturity is notice to him of dishonor, and he takes it subject to all the equities existing between the original parties thereto; and if there be several notes constituting one transaction, but due at different times, the fact that the one is overdue and unpaid shall be notice to the purchaser of all, and put him on his guard."

And he cites the case of *Harrell* v. *Broxton*, 78 Ga. 129, 3 S. E. Rep. 5, to the same purport.

The plaintiff in error contends that the question of notice of equities existing between original parties in the case of commercial paper is regulated and determined by the commercial law, and not by the rule or decisions in any particular state; relying upon *Swift* v. *Tyson*, 16 Pet. 1; *Oates* v. *Bank*, 100 U. S. 239; *Railroad Co.* v. *National Bank*, 102 U. S. 14; *Pana* v. *Bowler*, 107 U. S. 529–541, 2 Sup. Ct. Rep. 704; *Burgess* v. *Seligman*, 107 U. S. 33, 2 Sup. Ct. Rep. 10; *King* v. *Doane*, 139 U. S. 173, 11 Sup. Ct. Rep. 465.

There is no doubt that the law of the place where the contract was made usually governs in the construction and enforcement thereof, and that the validity and effect of all writings or contracts are determined by the laws of the place where executed. The question presented here, however, is not with regard to the construction of the contract or its validity, but, rather, with regard to the rule of commercial law which affects subsequent holders in the matter of notice of prior equities. We are of the opinion that the general commercial law prevails, and not any particular rule or decision established in the state of Georgia either by the decisions of the supreme court of that state or by statute announcing a rule.

It has been settled in the courts of the United States since the leading case of *Goodman* v. *Simonds*, 20 How. 343, that one who acquires mercantile paper before maturity from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that would cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts. *Swift* v. *Smith*, 102 U. S. 442; *King* v. *Doane*, 139 U. S. 166, 11 Sup. Ct. Rep. 465. It follows that, although the three notes of the same date as those acquired by the plaintiff were past due, and that the plaintiff was informed of that fact, still that would not be notice that the three notes not yet due were in any wise tainted by defective consideration, or for any other cause.

The eighth assignment of error seems also to be well taken. It is as follows:

"(8) Because the court erred in charging the jury as follows: 'So that being the case, in the opinion of the court, the bank would only be entitled to recover on these notes, under the evidence and the pleadings, the amount due by the defendant to Smith & Vaile Company, which would be the amount as stated to you a while ago, the difference in the freight, and the interest which Mr. Searcy says was on the entire transaction up to the time they made the arrangement, at or about the time of the date of the letter.' "

The proof in the case shows without dispute that the three promissory notes sued upon by plaintiff were held by it as collateral security to secure loans and discounts from time to time thereafter to D. A. Tompkins, whose total indebtedness to the plaintiff at the time suit was brought amounted to $1,239.77. This evidence was produced by the defendant, and, as there is no evidence to the contrary, it is certainly

binding upon the defendant. "When it appears that the bill or note was acquired by the holder as collateral security for a debt, and he is deemed entitled to recover upon it, he is still limited to the amount of the debt which it secures if there be a valid defense against his transferrer, being regarded as, at all events, a *bona fide* holder, and entitled to stand upon a better footing only *pro tanto*. Thus the holder could recover against an accommodation party no more than the consideration actually advanced; but, in the absence of proof, he will be deemed to have advanced the full amount of the paper." Daniel, Neg. Inst. § 832. To the same effect see *Stoddard* v. *Kimball*, 6 Cush. 469; *President, etc.*, v. *Chapin*, 8 Metc. (Mass.) 40; *Fisher* v. *Fisher*, 98 Mass. 303; *Bank* v. *Roberts*, 45 Wis. 373; *Bank* v. *Werst*, 52 Iowa, 684, 3 N. W. Rep. 711; *Hatcher* v. *Bank*, 79 Ga. 547, 5 S. E. Rep. 111, and cases there cited.

The charge of the court, based on the theory that the plaintiff was not a *bona fide* holder, limiting plaintiff's right to recover to the amounts due by the defendant to Smith & Vaile Company, was probably correct, if the theory upon which it was based had been the correct theory of the case; but, as we have shown in considering the seventh assignment of error, that theory was wrong, and it follows that the charge of the court limiting the plaintiff's right to recover an amount less than the indebtedness of Tompkins to plaintiff was erroneous. A consideration of the other assignments of error is unnecessary. The judgment of the circuit court is reversed, with costs, and the cause is remanded, with instructions to order a new trial.

In re GREENE.

(*Circuit Court, S. D. Ohio, W. D.* August 4, 1892.)

1. HABEAS CORPUS—PRISONER HELD FOR REMOVAL TO ANOTHER DISTRICT—INDICTMENT.
   On habeas corpus to release a person held under a warrant of a United States commissioner to await an order of the district judge for his removal to another district to answer an indictment, it is the right and duty of the circuit court to examine the indictment to ascertain whether it charges any offense against the United States, or whether the offense comes within the jurisdiction of the court in which the indictment is pending.
2. CRIMINAL LAW—OFFENSES AGAINST UNITED STATES—COMMON-LAW DEFINITIONS.
   There are no common-law offenses against the United States, and the offenses cognizable in the federal courts are only such as the federal statutes define, provide a punishment for, and confer jurisdiction to try; but when congress adopts or creates a common-law offense the courts may properly look to the common law for the true meaning and definition thereof, in the absence of a clear definition in the act creating it.
3. SAME—MONOPOLIES—INDICTMENT.
   Under the act of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," an indictment simply following the language of the statute would be wholly insufficient, for the words of the act do not themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense; and the indictment must, therefore, be tested by the specific facts alleged to have been done or committed.
4. CONSTITUTIONAL LAW—INTERSTATE COMMERCE—MONOPOLIES.
   Congress has no authority, under the commerce clause or any other provision of the constitution, to limit the right of a corporation created by a state in the acqui-