JOHNSON ET AL. V. UNITED STATES.

Case No. 7,419.
{5 Mason, 425.}[1]

Circuit Court, D. Maine. May Term, 1830.

CUSTOMS DUTIES—BOND FOR PAYMENT OF—UNLAWFUL CANCELLATION BY COLLECTOR—WHAT IS A VALID PAYMENT—AUTHORITY TO BIND GOVERNMENT—WHETHER GOVERNMENT BOUND BY AN ESTOPPEL—APPOINTMENT OF SUCCESSOR—EFFECT—DEMURRER TO EVIDENCE.

1. If a collector of the customs cancels a bond for duties, without receiving payment of the amount of duties, in connivance with the debtor, the cancellation is void, and the bond may still be declared upon as a subsisting deed; for the cancellation is, in such a case, a flagrant violation of duty.

{Cited in Bottomley v. U. S., Case No. 1,688.}

2. A collector of the customs is not at liberty to receive any thing but money of the United States, or foreign gold or silver coin made current, in payment of duties.—If he receives a check on a bank in payment, it is at his own peril, and if the check is not paid, the bond is not discharged; a fortiori, it is not discharged by the receipt of a memorandum check.

3. A collector, like other public officers, cannot bind the United States by any acts beyond, or contrary to, the authority given him by the laws.

{Cited in U. S. v. Bradbury, Case No. 14,635: U. S. v. Buchanan, 8 How. (49 U. S.) 106.}

{Cited in Indiana Cent. Canal Co. v. State, 53 Ind. 593.}

4. The receipt of a collector acknowledging payment is prima facie evidence, but not conclusive, of the fact of payment.

5. Upon a demurrer to evidence, the party demurring is bound to admit all the facts, which the evidence on the other side conduces to prove; and the court on such a demurrer will infer them in his favour.

6. Quaere, whether a collector is not to all intents functus officio, as soon as a removal takes place by the appointment of another person in his stead?

7. The government is not ordinarily bound by an estoppel.

{Cited in John Shillito Co. v. McClung, 2 C. C. A. 526, 51 Fed. 875; Lake Superior

Ship Canal, Railway & Iron Co. v. Cunningham, 44 Fed. 833.]

{Error to the district court of the United States for the district of Maine.}

The original action was debt, brought by the United States upon a bond given for the payment of duties in the usual form. The declaration alleged, that the defendants, on the 8th of September, 1828, by their writing obligatory of that date, sealed with their seals, which having been lost and destroyed cannot be produced here in court, bound themselves unto the United States, in the sum of ten thousand dollars, to be paid by the defendants on demand; yet, &c. The defendants pleaded, 1. Non est factum; 2. That they bring into court here the said supposed writing obligatory, mentioned in the plaintiffs' declaration, and pray that the same may be read and enrolled here in court; and the said supposed writing obligatory, and the condition thereof, are read and enrolled here in court in these words, viz. (setting forth the bond and condition verbatim, the bond having still on its face the seals of the parties, but with a cancellation or cross over the names as follows, X); which being read and heard, they plead actio non, &c, averring a payment of the amount of the duties on the 12th of May, 1829, (the condition of the bond being for payment of the duties on or before the 8th day of June, 1829,) to the collector of the customs for the district of Bath, for the time being, and that the sum so paid "was then and there accepted by the said collector, as full and complete performance of said condition; and said collector delivered up said writing obligatory, to said defendants, cancelled and receipted according to the condition of the aforesaid writing obligatory; and this they are ready to verify; wherefore, &c." The United States replied, that the defendants did not pay said sum to the collector of the customs for the district of Bath, in manner and form, &c, offering an issue to the contrary, which was joined by the defendants. At the trial of these issues, there was a demurrer to evidence on behalf of the United States, and a joinder in demurrer by the defendants, upon which the district judge gave a judgment in favour of the United States; and the present writ of error was brought to that judgment.

The evidence, as stated in the demurrer to evidence, was as follows:

"The plaintiffs sue the defendants in a plea of debt, and declare on a bond, dated September the eighth, in the year of our Lord one thousand eight hundred and twenty eight, for ten thousand dollars, as lost and destroyed, as will be made to appear by reference thereto. And the defendants appear by their attorneys, and plead, first, non est factum and issue is joined thereon; and secondly, payment of the amount due on said bond, and the plaintiffs reply to said second plea, denying the payment, and issue is thereon joined; all which pleadings are at large to be considered as herein set forth; and thereupon a jury is duly empanelled to try the said issues, and the cause is opened to the court and jury by reading the pleadings; and the plaintiffs to maintain the issues on their part, called upon John B. Swanton, who being duly sworn, testified as follows:

"'I, John B. Swanton, on oath declare and say, that I do not recollect of delivering a bond dated September 8, 1828, payable June 8, 1829, signed by Johnson Williams and others, to William King, the present collector at Bath; if not delivered to him, it was delivered to Mr. Williams, who paid it to me or my son; but my impression is, that the bond he paid me fell due in July. It was either handed to Mr. King or Mr. Williams. There has been some difference in the communications between the comptroller, Mr. King, and myself, in regard to bonds, and I cannot decide from the inspection of the authenticated paper exhibited to me, whether the bond inquired for is contained in the original account or not. I delivered a duty bond or bonds to the defendants, the last day of payment of which had not arrived, on the fifteenth day of May last. I think there was one or two. I took a check or checks on the Lincoln Bank in payment of the same. I cannot be positive whether I was in the office that day when the checks were given, or whether my son received them; nor whether they were signed by J. Williams, or J. Williams & Co.; whether they were memorandum checks or not, I cannot say. I considered memorandum checks best, as the cashier would not be likely to pay them to a third person; I considered those checks perfectly good. My bondsmen to the United States became alarmed, and one of them called on me and I offered to give him security, either in money or notes. The checks taken in this case were sent to Mr. Williams, who sent me the notes of J. Williams & Co. for the amount of the checks, which I delivered to Mr. Riggs, the bondsman, as security. I should think the notes were delivered Riggs the last of June or first of July. The checks were either in my hands, or in my son's, while I was absent from Bath. The note or notes taken, I cannot say whether made payable to me or to me and my order: I think it was payable to me or order, but am not certain. I think my son took the note or notes from Mr. Williams in my absence, in obedience to my directions. The note or notes were delivered Mr. Benjamin Riggs, but whether I endorsed it or them or not, cannot say. He has it or them now in his possession, and it was, I think, given to him by my son. The amount I believe, of my official bond, is ten thousand dollars. My last quarterly account was made up including the fifteenth day of May last I cannot say when it was forwarded, but think it was a month or two after that day. My

accounts are usually made up in the course of ten or twenty days after the quarter; that ending the thirty-first of March last, was rendered in April, and I have the comptroller's receipt of the same. The accounts rendered up to the thirty-first of March have been rendered both to the register and to the comptroller; the account since that period has not been rendered to the comptroller; but the one to the register has been. Owing to the difficulties about these bonds, the account has not been made up for the comptroller. I cannot give the balance on outstanding bonds on the thirty-first of March, but should think it exceeded fifty thousand dollars; the balance of my cash account at that time was between three and four thousand dollars; not far from four thousand dollars. I do not render a monthly account of bonds taken. I would not say that there was a bond of Williams's dated September eighth, eighteen hundred and twenty-eight. All bonds of these defendants, which were not handed over to Mr. King, were settled for by these defendants with me or my son. The bonds, settled with these defendants, were either discharged by myself, as collector of the port of Bath, or by my son as deputy-collector; and presume they were given up to them thus discharged and cancelled. I think the bonds were executed by Johnson Williams & Co., and J. Williams, attorney to Simeon Mathews; that the bonds of these defendants were usually executed in this manner, I had a power of attorney in the office authorizing Mr. Williams to sign for Mr. Mathews. I do not know that Mathews is a partner in the house of Johnson Williams & Co. It has been my uniform practice while collector, to receive checks in payment of bonds; and to discharge and cancel bonds upon the receipt of cheeks. Not more than five hundred dollars, I should think, was paid in specie while I was collector. Some gentlemen have frequently paid their bonds before they became due. I think the form of the bond used in that office is payable "on or before" a certain day. I should think that I had been near thirty years in the employment of the custom-house at Bath. This has been the uniform mode of payment at the office since the bank has been established—before that time drafts were taken. I have been deputy-collector from eighteen hundred and four or five, and until I was appointed collector. I have been called as a witness by the district attorney, in behalf of the United States, in their suit against Johnson Williams and others, pending in the district court of the United States, September term, eighteen hundred and twenty-nine. I delivered up the office to Mr. King after office hours, on the fifteenth day of May last; from that period he has assumed the duties of the office. The bond now exhibited to me of date September 8, 1828, and payable June 8, 1829, is one of the bonds which I referred to as being settled by me or my son, and was discharged, as appears on the back, on the 12th day of May last by my son.'"

The plaintiffs next called Denny McCobb, who being duly sworn, testified as follows:

"Johnson Williams told me that he had received the bond of Mr. Swanton, upon giving his check for the amount I understood him to refer to the bond in suit. That after-

wards, Mr. Swanton or Mr. Swanton's son, brought him the check and took his note for the amount, payable to Mr. Swanton, and not to his order. This was stated last evening at the public house in this town. Mr. King was present Mr. Williams said that Mr. Swanton would say the same. Mr. King requested Mr. Williams to state to me the circumstances, as he, Williams, was going away. Mr. Williams did not state whether the check was a memorandum check or not."

And thereupon the defendants being called upon by the district attorney to produce the bond declared upon in the writ, did produce the same, with the endorsement or obliteration thereon, as the same is now, and which is set forth in evidence, as follows:

"Manifest, No. 50.

"Good for $739 56.

"Know all men by these presents, that we, Johnson Williams & Co. of Bath, Simeon Mathews of Waterville, state of Maine, are held, and firmly bound unto the United States of America, in the sum of ten thousand dollars, to be paid to the said United States; for the payment whereof we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents; sealed with our seals. Dated this eighth day of September, in the fifty-third year of the independence of the said United States, and in the year of our Lord one thousand eight hundred and twenty-eight. The condition of this obligation is such, that if the above bounden Johnson Williams & Co. and Simeon Mathews, or either of them, or either of their heirs, executors, or administrators, shall do, on or before the eighth day of June next, well and truly pay, or cause to be paid, unto the collector of the customs for the district of Bath, Maine, for the time being, the sum of twenty hundred dollars, or the amount of duties to be ascertained as due and arising on certain goods, wares, and merchandise, entered by the above bounden Johnson Williams & Co., imported in the brig Elizabeth, P. Higgins, master, from St. Eustatia, as per entry, dated this date, then the above obligation to be void, otherwise to remain in full force and virtue.

"Signed, sealed, and delivered in presence of J. B. Swanton."

"Collector's Office, Bath, Maine, May 12, 1829. Received of Johnson Williams & Co. the sum of seven hundred thirty-nine dollars and 56/100 in full of the within bond. J. B. Swanton, Jr., Dep. Collector."

And thereupon the defendants called Parker McCobb, who being duly sworn, testified as follows:

"I have been concerned in navigation for the last twenty years, and have been interested in bonds given to the custom-houses in Bath, Boston, and New York. All the bonds that I have taken up at Bath, have been paid at the custom-house, and by checks in all instances, that I recollect. Bonds at Boston and New York were paid at the branch of the United States Bank, by checks or by bills; either checks on the branch, or some other bank in the city. When I have given my check, I have taken my bond."

The defendants' counsel then read the following letter from the comptroller of the treasury, to John B. Swanton, to wit:

"Treasury Department, Comptroller's Office, July 10, 1829. Sir—Having been informed by the collector at Bath, that you had not yet delivered over to him the duty bonds remaining unpaid on the 15th May, 1829, the date of his oath of office it will become my indispensable, although unpleasant duty, if the transfer alluded to be further delayed, to report your case for suit. I have also to request that you will lose no time in depositing in the Branch Bank of the United States at Portland, to the credit of the treasurer of the United States, the cash remaining in your hands, and forward the cashier's receipt therefor. Respectfully, Joseph Anderson, Comptroller.

"John B. Swanton, Esq."

The plaintiffs, by the district attorney, then read the authenticated copy of the following letter, from the same to the same, to wit:

"Treasury Department, Comptroller's Office, April 21, 1829. Sir—William King, Esq. having been appointed collector of the customs, and inspector of the revenue, for the port of Bath, Maine, you will deliver to him, on application, all the public property (cash excepted) in your possession, together with the books of entry, forms and instructions, with which you have been furnished by this department, for all which you will take duplicate receipts, (specifying every article,) and forward one of them to this office. Any public moneys you may have in your hands, you will deposit in bank, to the credit of the treasurer of the United States, and forward the cashier's receipt for the same. Respectfully [Signed] Joseph Anderson, Comptroller.

"John B. Swanton, Esq."

"Treasury Department, Register's Office, Sept. 3, 1829. Pursuant to an act entitled "An act to provide more effectually for the settlement of accounts between the United States and receiver of public money,' I, Thomas L. Smith, register of the treasury, do hereby certify that the within is a true copy of a letter from Joseph Anderson, comptroller of the treasury, to John B. Swanton, late collector of the customs for the district of Bath, in the state of Maine, dated the 21st of April, 1829, on record in this department. T. L. Smith, Register."

"Be it remembered, that Thomas L. Smith, Esq., who has signed the within certificate, is now, and was at the time of doing so, register of the treasury of the United States, and

that to all such his official attestations, due faith and credit is, and ought to be given. In testimony whereof, I, Samuel D. Ingham, secretary of the treasury, have hereunto set my hand and caused to be affixed the seal of this department, at Washington, this third day of September, in the year one thousand eight hundred and twenty nine. S. D. Ingham, Secretary of the Treasury."

And also the following letter from the same, to William King, dated May twenty-eighth, eighteen hundred and twenty-nine, to wit:

"Treasury Department, Comptroller's Office, 28th May, 1829. Sir—I have received your letter of the 16th inst enclosing your official bond and oaths of office, together with copies of two lists of bonds transferred to you by your predecessor in office. The bonds specified in these lists amount to $29,310 04/100; but having, in consequence of your suggestion that he had withheld some bonds from you, had reference to his last returns, it appears that his balance in bonds amounted to $19,350 02/100. It is evident therefore, that he has still in his possession bonds to a large amount, which ought to be delivered to you. If his object in retaining them be to collect the money, the course is irregular and improper; such having been decided by the supreme court in the case of Sthreshley v. U. S., 4 Cranch {8 U. S.} 169. You will therefore again apply to him to deliver over to you the bonds still retained by him, instructions to which effect will be given to him by this department. Should he decline doing so, you will be pleased to inform this department thereof without delay, and notify the obligors that any payment made to him will not be valid in law. In examining the official bond executed by you, I discover that the clerk erroneously styled you 'collector of the customs and inspector of the revenue for the port of Bath;' whereas it should have been 'collector of the customs for the district, and inspector of the revenue for the port of Bath.' I have therefore to request you to execute another bond, for which purpose the enclosed blank is transmitted to you. Should the same sureties who signed your former bond join you in this, it will be unnecessary to procure another certificate touching their sufficiency. Respectfully, Joseph Andrews, Comptroller.

"William King, Esq., Collector, Bath, Maine."

And also the following letter from the same to the same, dated July the tenth, eighteen hundred and twenty one, to wit:

"Treasury Department, Comptroller's Office, July 10, 1829. Sir—In consequence of the representation in your letter of the 29th ultimo, the following lists have been obtained from the auditor's office, and are forwarded for your information, viz.: 1. List of bonds in suit 2. Ditto, ditto, due on or before

the fifteenth day of May, 1829, (the date of your oath of office,) and remaining unpaid on that day. 3. Ditto, taken before, but which did not become due until after the fifteenth of May, 1829. Mr. Swanton's returns end with the 31st December, 1828, and the above mentioned list having been prepared from the records of those returns, the treasury has no knowledge of what bonds due be fore the 15th May last may have been paid to him either before or after that day. There can be no doubt, however, that any payments made to him subsequently to that day, will not exonerate the parties from their responsibility to the United States, for the duties for which such bonds were given. Mr. Swanton will again be directed to place in your hands the bonds remaining unpaid on the day mentioned, and if he delays a compliance, his case will immediately be reported for suit. Respectfully, Joseph Anderson, Comptroller.

"William King, Esq."

And also a letter from John B. Swanton to William King, dated May the fourth, one thousand eight hundred and twenty-nine, as follows:

"William King, Esq.—Sir: I will be in readiness to give you an abstract of bonds payable, and those in suit, together with the public property in my hands, by the fifteenth instant. Your obedient servant, J. B. Swanton.

"Bath, 4th May, 1829."

And also the commission of William King, duly signed, and under the seal of said states, dated April twenty-first, one thousand eight hundred and twenty-nine. And the qualification of said King endorsed on the back thereof, dated the fifteenth day of May, in the year of our Lord one thousand eight hundred and twenty-nine, appointing said King collector of the customs for the district, and inspector of the revenue for the port of Bath, in said district

To this evidence there was a demurrer on the part of the United States, and a joinder in demurrer.

Mitchell & Longfellow, for plaintiffs in error.

Mr. Shepley, Dist. Arty., for the United States.

On the plea of non est factum, Mitchell & Longfellow cited Cutts v. U. S. [Case No. 3,522.] On the plea of payment, they cited [Sheehy v. Mandeville] 6 Cranch [10 U. S.] 264; [Buddicum v. Kirk] 3 Cranch [7 U. S.] 293; Phil. Ev. 161; Wallace v. Agry [Case No. 17,096]; 10 Mass. 155.

The district attorney also cited on the plea of payment: Act 1799, c. 128, § 74; [1 Story's Laws, 635; 1 Stat. 680, c. 22]; 2 Pick. 204; Van Reimsdyk v. Kane [Case No. 16,871]; 5 Mass. 299; 6 Mass. 143, 358; 11 Mass. 359. As to a receipt being a discharge without payment, he cited 5 East, 230; 11 Mass. 263; U. S. v. Scalding [Case No. 16,365; Riggs v. Tayloe] 9 Wheat. [22 U. S.] 483; [Renner v. Bank of Columbia] Id. 581. As to act of agent binding principal, and how far, he cited [Hodgson v. Dexter] 1 Cranch [5 U. S.]

345; {Penhallow v. Doane} 3 Dall. {3 U. S.} 57; {Mechanics' Bank of Alexandria v. Bank of Columbia} 5 Wheat. {18 U. S.} 337; 11 Madd. 72, 88; 2 Ld. Raym. 930, 2 Salk. 442; 5 Mass. 37. As to acts of public officers, how far binding, he cited 7 Mass. 460; 8 Mass. 84; U. S. v. Hayward {Case No. 15,336}; The Francis {Id. 5,036}; The Margaretta {Id. 9,072}; U. S. v. Lyman {Id. 15,647; Lee v. Munroe} 7 Cranch {11 U. S.} 369.

STORY, Circuit Justice. This case comes before the court upon a writ of error, founded on a judgment in favour of the United States, upon a demurrer to evidence, preferred in behalf of the United States, and joined in by the other party. The general nature and operation of such a demurrer has been expounded with great force and correctness in the opinion delivered by Lord Chief Justice Eyre, in the case of Gibson v. Hunter, 2 H. Bl. 187. The supreme court of the United States has also, on various occasions, been called upon to discuss the nature and effect of the proceeding. But I shall do no more at present, than to refer to some of the leading cases, not meaning to comment on them. Young v. Black, 7 Cranch {11 U. S.} 505; Fowle v. Common Council of Alexandria, 11 Wheat. {24 U. S.} 320; United States Bank v. Smith, Id. 171. The result of the whole is, that the party demurring is bound to admit not merely all the facts which the evidence directly establishes, but all which it conduces to prove. The demurrer should state the facts, and not merely the evidence of facts; and it is utterly inadmissible to demur to the evidence, when there is contradictory testimony to the same points, or presumptions leading to opposite conclusions, so that what the facts are remains uncertain, and may be urged with more or less effect to a jury. The court, however, will, in favour of the party, against whom the demurrer is sought, as it withdraws from the jury the proper consideration of his case, make every inference for him, which the facts in proof would warrant a jury to draw. But if the facts are so imperfectly and loosely stated, that the court cannot arrive at a satisfactory conclusion, that the judgment can be maintained upon the actual presentation of the evidence of these facts, then the course is to reverse the judgment, and to award a venire facias de novo. 2 H. Bl. 187, 209; {Fowle v. Common Council of Alexandria} 11 Wheat. {24 U. S.} 320.

In considering the evidence in the present case, I have felt very great difficulties in satisfying my own mind, that the facts are so stated, that the court can found any just conclusion as to the law applicable to the case. Under such circumstances, the proper

course would be to award a venire facias de novo; in order to bring the facts more perfectly before the court. But as no exception was taken by either side at the argument, and there was an implied waiver of any such exception; and as I am given to understand, that there are several cases depending upon the general questions discussed at the bar, I shall proceed at once to deliver my opinion upon them, passing by any farther consideration of the manner, in which they are presented on the record. It may be taken as a fact, though it is no where directly averred, that Swanton, the witness, was the collector of the customs for the district, at the time when the bond in controversy was given, and that he acted as collector de facto at the time of the supposed payment of the duties, and that the receipt was signed by his deputy de facto in the office. The bond, according to the condition, was payable on or before the 8th day of June, 1829; and the payment is supposed to have been actually made on the 12th of May, almost a month before the duties could have been demanded. It may be taken also as conceded by the parties, that William King was appointed collector, and duly approved by the senate on the 21st of April, 1829, upon the removal of Swanton from the office by the president; that Swanton had due notice of his removal, and of King's appointment, at least as early as the 4th of May; and that arrangements were made between them for the surrender of the papers and public property belonging to the office to King, as early as the 15th day of the same month; and of course, that the transaction, which gave origin to the present suit, took place in the intermediate period between the notice and the actual induction of King into office, which may be presumed to have been on the latter day.

A question very fairly open upon the record (which has, however, been expressly waived by the parties at the argument) is, whether by the appointment of King to the office, and due notice thereof to Swanton, the latter was not virtually removed from office, so as to cease, at least from that notice, to be collector de jure; and if so, whether all his acts as such, if not absolutely void, were not voidable by the government. That is a question of very grave importance, with which I should not choose to meddle unnecessarily. The collection act of 1799, c. 128, §§ 1, 21, 22 [1 Story's Laws, 573; 1 Stat. 627, c. 22], while it provides for the appointment of collectors, and for the manner of executing the duties of their office in cases of their death, and disability, and absence, (section 22), has left the case of a removal from office wholly unprovided for. And the act of 1820, c. 102 [3 Stat. 582], limiting the term of office of certain officers, and, among others, of collectors, has also left the case of a vacancy in office, produced by the expiration of such term, in the same posture. The great case of Marbury v. Madison, 1 Cranch [5 U. S.] 137, great, not only from the authority which pronounced it, but also from the importance of the topics which it discussed, contains much reasoning, which might aid us in such an inquiry. It is there, among other things, said, "that when a person appointed to any office refuses to accept that office, the successor is nominated in the place of the person

who has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy." From this remark it might perhaps be thought, that the removal of the actual incumbent from office was complete by the new appointment, independent of any acceptance by the new appointee.

But waiving all consideration of this question, let us see what are the grounds, upon which the case was rested at the argument. And first, as to the plea of non est factum, it is admitted, that the bond was originally executed by the defendants, and was sufficiently binding in its legal operation. But the argument of the defendants is, that it is no longer a subsisting obligation; it is no longer their deed, having been cancelled, and being produced by them in that state, in court, the issue ought to be found in their favour. When a deed is once legally cancelled, it is doubtless functus officio, and cannot again be set up as a subsisting deed. And doubtless the production of it in a cancelled state, is prima facie evidence to support the plea of non est factum. But every cancellation does not, per se, operate a destruction of the legal validity of a deed. If the cancellation be by mistake, or accident, or fraud, against the intention, or without the co-operation of the obligee, I have no doubt, that it may still be declared on as a subsisting deed by the obligee. In the case of Cutts v. U. S. {Case No. 3,522}, which has been cited at the bar, I had occasion to examine the doctrine inculcated by the old authorities upon this subject. It does not appear to me, that there is any sufficient authority, upon which to found a different doctrine from that which I now express. If there are dicta, or even cases, looking somewhat at variance with it, they do not, in my humble judgment, entitle themselves to any serious regard, when compared with others, which contain more rational principles, consistent at once with common sense, and the just analogies of the common law.[2] If by mistake of the parties one bond is cancelled, instead of another; if by accident a seal is torn off or destroyed; if by fraud a name is erased, or any obligatory clause obliterated, it seems difficult to imagine, that, in any rational system of jurisprudence, such circumstances should be held to discharge the

obligation. But at all events there can be no doubt, that where a cancellation or destruction of the deed has taken place by the mistake or connivance or fraud of the obligor himself, without any assent of the obligee, the instrument itself may still be declared on as a subsisting deed. The authorities referred to in Cutts v. U. S. [supra], fully support this position.

In the present case no doubt exists, that the cancellation was made with the entire privity and consent of the obligors. If it has been wrongfully made, they cannot avail themselves of the fact to escape from their original personal responsibility. And the question, therefore, really resolves itself into the point, whether there has been a cancellation under circumstances, to which the law attaches validity. It is admitted, that the receipt of the deputy-collector de facto is genuine, and if payment was in fact made of that bond, as it purports to be in that receipt, the bond was legally extinguished, and the cancellation justifiable. There is no pretence to say, that the bond has been extinguished in any other manner; and we need not meddle with any other foreign considerations. If no payment has been in fact made, is the cancellation nevertheless to be deemed valid? In the first place, it is to be considered, that this is not an act done by the obligee in the bond with the privity of the obligors, but by an agent of the obligee; and that agent not a private agent, but one whose duties and powers are defined and limited by law. The obligors cannot plead ignorance of the limitations of such duties and powers prescribed by law; but they are bound, as all citizens are, to take notice of them. If a private agent were, by connivance with the obligors, to cancel an obligation contrary to the known instructions of the obligee, such an act would not bind the latter. Such an act, call it by however gentle a name we may, would be, in contemplation of law, a fraud upon the obligee. A fortiori, the act of a public officer in violation of the duties of his office, which duties constitute a part of the vital arrangements of the government, cannot be permitted to have any legal effect by way of defence to those who have participated in the violation, and encouraged and aided it. I hold it most clear, that the acts of a public officer beyond the scope of his powers, and in violation of his public duties are, in such cases at least, utterly void. A different doctrine would lead to the most alarming and mischievous consequences, and unsettle some of the best established principles of the law of agency. I, for one, do not incline to retract a syllable which was uttered on this subject in the case of U. S. v. Lyman [Case No. 15,647], and the case of The Margaretta [Id. 9,072]. Then, could the collector or his deputy lawfully cancel the present bond without an actual payment of the money due for the duties? Clearly not, unless we are at liberty to disregard the whole objects as well as the express words of the act of 1799, c. 128 [1 Story's Laws, 573; 1 Stat. 627, c. 22], for the collection of duties. I meddle not with cases of discharges from debts by other officers, as by sheriffs upon executions, without payment, which may, for aught I know, be open to the government of other principles. Sheriffs are officers of the law, and

not mere agents of private persons, or of the government; and how far their acts would be upheld in plain violation of their duty, and in fraud of the law, it is not now necessary to consider. In the ease of collectors, there is an express provision of law to which this court must listen; and it would be monstrous to say, that the whole duties accruing to the government from importers, might be evaded by connivance with him in fraud of the law.

Then, it is said, that here the court cannot go into the consideration of the fact of payment, because the receipt of a public officer is an estoppel to the government to deny the payment. That proposition is liable to many objections. In the first place, the general principle in relation to governments is, that they are not bound by estoppels, under instruments created by themselves, although they may be where the estoppel is derivative from another under whom they claim a title. See Carver v. Jackson, 4 Pet. [29 U. S.] 1. In the next place, the act of an agent never can bind his principal by way of estoppel, unless it is within the scope of his agency. And in the next place, receipts, not under seal, do not belong to that class of instruments which are affected by the doctrine of estoppels. They have been solemnly adjudged to be open to contradiction and denial. See Harden v. Gordon [Case No. 6,047]; 1 Johns. Dig. Ev. 11, § 150; Veale v. Warner, 1 Saund. 325, and note; 11 Mass. 27, 143, 359; 17 Mass. 249; 3 Starkie, Ev. pt. 4, p. 1271. The receipt is, indeed, prima facie evidence of payment; but it is no more. If it has been signed by mistake or by fraud, or by other improper contrivances, without actual payment, it is not conclusive upon the government. Then, has there been any actual effective payment which can give support to the cancellation on the first issue, or establish the material allegations of the second issue? The admitted facts are, that there was no actual payment made in money; that the cancellation was made upon a check, being given by Williams & Co., or on their behalf, on the Lincoln Bank; that the check was never presented for payment at the bank, but a few days afterwards the cheek was given up to Williams, who gave in lieu thereof, the notes of Williams & Co. for the amount of the check, payable to the collector, or to him or his order; and by the collector put into the hands of one of his sureties, on his official bond to the government, by way of indemnity. Neither the check nor any equivalent fund ever came

into the hands of the new collector. Whether the check so received was a memorandum check (that is, a check given as a mere memorandum of the amount of a debt, and not a business check to be presented immediately at the bank for payment) or not, does not appear from the evidence. The collector states in his testimony, that he cannot say, whether it was or was not, though he considered memorandum checks as best, because the cashier would not be likely to pay them to a third person. That a jury would infer from these circumstances that it was a memorandum check, can admit of very little doubt; that a court upon this proceeding ought to infer it, is a matter of more question and difficulty. Upon the plea of payment, the onus probandi is upon the defendants; and therefore, if the evidence left the matter in doubt, that would be decisive against them upon that issue. To say the least, the prima facie evidence of payment, stated in the receipt, would be brought into most serious doubt by such a posture of the accompanying facts.

But it is said, that payment by a check is a good payment; that this is the doctrine of the local law; and it is supported by the general custom of merchants in the payment of duty bonds. And it is farther contended, that the local law, and the custom, are equally obligatory upon the United States. I am not prepared to admit either position. It is not competent for the state legislation to regulate the rights of the United States, in respect to payments by their debtors. The general government has a right to prescribe its own rules on this subject. And as to the custom of merchants it can clearly have no operation to make law, much less to supersede the actual provisions of the law, in respect to the sovereign rights of the government Without doubt, a common practice exists, founded upon the mutual convenience of the collector and the debtors at the custom-house, to receive the checks of the latter in payment of duty bonds. This, however, is a mere affair of private confidence; but if the check is not paid at the bank, it does not amount to a payment of the duty bond, or compromit the rights of the government, for the plain reason that the laws nowhere recognise any such right in the collector, to receive such checks in payment Both he and the debtor, act, in such cases, at their own peril; the former in delivering up the bond, the latter in receiving it without actual payment. This is true in respect to checks received ordinarily in the course of business by the collector, where an immediate demand and payment thereof is intended and expected by the parties. But suppose the collector should keep the check until the bank had failed, or the party should afterwards, by other checks, withdraw his funds from the bank, so that when presented, payment should be refused, would it be contended that the government were bound, or had made the check its own, by the improper act of its officer? I hold, clearly not. The seventy-fourth section of the collection act of 1799, c. 128 [chapter 22], declares, that all duties to be collected shall be payable in money of the United States, or in foreign gold or silver coins, at certain rates stated in the section; and even foreign coins are not receivable, which are not by law a tender, unless by a special proclamation of (the president of the United States.

This is a plain provision, which admits of no controversy. How can any collector, by any arrangement, not to say by any connivance with a public debtor, supersede it? If such debtor do concert an evasion of it with the collector, is it not a fraud upon the law? If so, a fortiori, a memorandum check would be no payment Would there be any pretence to say that the collector had a right to receive any goods, or lands, or collateral securities in payment? Where are we to stop, if we do not stop at the plain terms of the act? But it is by no means clear, even by the local law, that taking a check in payment of an antecedent debt, is to be deemed a payment of the debt, unless it has been presented for payment and paid, or the creditor has made it his own by his conduct. The case of Dennie v. Hart, 2 Pick. 204, looks strongly the other way. And it is manifest that in our local law, varying in this respect from the general commercial law, a negotiable check or note is not deemed absolute payment; but it is open to be rebutted by any circumstances which establish that the parties did not so intend it. In the case now before us, it does not even appear that the debtors had any funds in the Lincoln Bank; the check was never presented or paid, and the drawers afterwards received it back without any payment Under such circumstances, it would be difficult to maintain, before a jury, that the parties ever originally intended that it should be deemed an absolute payment, even if the case could be brought (as I think it cannot) within the reach of the local law. Upon the whole, looking at this case with reference to the points made, and so elaborately discussed at the argument, and at those only, I am of opinion that the judgment upon the demurrer ought to be, as it was in the court below, in favour of the United States; and the judgment ought to be affirmed accordingly.

[1] {Reported by William P. Mason, Esq.}

[2] See Shep. Touch, c. 4, p. 66, § 6. Com. Dig. "Fait," 1, 2; Vin. Abr. "Faits," X, 1,2, as to the general doctrines on this subject in the old cases.