Case No. 16,724.

UNITED STATES v. WILLIAMS ET AL.

{1 Ware, (175) 173.}[1]

District Court, D. Maine. Feb. Term, 1830.

DEMURRER TO EVIDENCE—PAYMENT OF DUTY BONDS—BANK CHECKS—COLLECTOR'S RECEIPT—ESTOPPEL—CANCELLATION OF BOND.

1. In a demurrer to evidence, the party who demurs is held to admit every fact which a jury, in the exercise of a fair and reasonable discretion, could infer from the evidence, but he is not bound to admit forced and violent inferences.
2. A collector of the customs is not authorized to receive any thing in payment of a duty bond, but the lawful money of the United States, or foreign gold or silver coins, made current by law. If he receives a check upon a bank, this is not payment of the bond until the check is paid.
3. When a general agent is acting under special instructions, which are known to the person with whom he is dealing, he cannot bind his principal by any act which violates his instructions. In such a case there is no difference between the authority of a general and special agent to bind his principal.
4. A receipt of a collector upon a duty bond, acknowledging payment and satisfaction of the bond, does not operate as an estoppel. It is open to explanation, and is no bar to a suit on the bond if it be not paid.
5. The cancellation of a bond does not, per se, destroy it when it is cancelled through fraud or evident mistake, but it may be declared upon as a good and subsisting obligation.

This was a case of demurrer to evidence.

Mr. Shepley, U. S. Dist Atty.

Mitchell & Randall, for defendants.

WARE, District Judge. The declaration in this case is on a bond alleged to be lost, which is in the penal sum of $10,000. The defendants have pleaded the general issue, non est factum, and also a special plea of payment, and in this plea have set forth the bond with the condition, which is to secure the payment of $739.56, being the amount of duties on certain merchandise imported into the port of Bath, in the brig Elizabeth. The case comes before me on a demurrer to the evidence by the plaintiffs. The effect of a demurrer to evidence is to take the case from the jury, and substitute the court in their place, not only to decide the law, but to determine the facts. This is a course of proceeding to which a party has a right to resort, but it is unusual, and not favored by the courts, because it withdraws the consideration of the evidence from the appropriate tribunal for the decision of all matters of fact. In proceedings at common law the jury are the legal and proper judges of weight of evidence, of the credit of witnesses, and of the force of circumstantial and presumptive proofs, where the effect of presumptions is not settled by the rules of law. When they have ascertained and settled the facts in controversy, it is the office of the court to decide the law. By this proceeding, the jury in the particular case are superseded in their regular and appropriate office, and the whole duty of settling both the

law and facts, is referred to the court. If a party chooses to adopt this mode of proceeding, the court will, in a proper case, admit him to his demurrer, but will exact of him, as a condition, a distinct admission, on the record, of every fact which the evidence proves. If the evidence is loose and indeterminate,

and such as may be pressed with more or less effect upon a jury—or if it consists of circumstances which lead to the belief of other facts beyond those which are directly in proof, the court will require him to admit the truth of the facts which stand on this doubtful or uncertain proof, and the existence of those ulterior facts which the presumptive and circumstantial evidence renders only probable, and which a jury, in the exercise of a reasonable discretion, might either admit or reject. These principles were settled in the case of Gibson v. Hunter, 2 H. Bl. 187—211, the leading case on this subject, and have never since been considered as open to controversy. In the most correct practice, the facts are settled and entered on the record under the immediate direction of the court, and this will usually be required, when insisted on by the adverse party, before the court will require him to join in the demurrer. 2 H. Bl. 187; 2 Tidd, Prac. 794. The facts will then appear stated as in a special verdict, and the court will apply the law to the facts in the same manner in the one case as in the other. If, however, the adverse party joins the demurrer without insisting on the facts being thus previously ascertained and stated, but will refer the whole evidence, in the form in which it is offered in court, to its decision, the court will proceed, in adjudicating upon the case, on the same principles in judging of the evidence as it would in making up the statement of facts before the joinder of the demurrer. It will not go to work critically to ascertain on which side lies the balance of conflicting testimony, nor scrutinize with severity and strictness the credit of witnesses, but will generally take the facts sworn to, as true, so far at least as they make in favor of the party joining the demurrer. It will infer from loose and circumstantial testimony all the facts that could be found by a jury in the exercise of a reasonable and fair discretion. It was argued by the counsel for the defendant that the court is bound to admit every fact which can possibly be inferred by a jury. But this is stating the principle too strongly. The court will not draw such inferences from the evidence as are manifestly unreasonable and capricious. The true rule is stated by Chief Justice Marshall. Pawling v. U. S., 4 Cranch [8 U. S.] 221. "The party demurring admits the truth of the testimony to which he demurs, and all the conclusions of fact which a jury may fairly draw from that testimony, but forced and violent inferences he does not admit."

The facts in this case are not numerous, and few of them are controverted. The defendants, on the 12th of May, were indebted to the United States on the duty bond which is the subject of this action, payable "on or before the 8th of June" to the collector of the port of Bath for the time being. In the month of April, Mr. Swanton, the collector, was removed from office, and Mr. King appointed in his place. Mr. Swanton was notified of his removal, by a letter from the comptroller of the treasury, dated April 26, and ordered to deliver all the public property in his hands to his successor, on his application. Mr. King did not apply for it until the 15th of May, and Swanton continued to act as collector till the close of that day. On the 12th of May the defendant called for his bond, due the

8th of June. It was cancelled by J. B. Swanton, Jr., the deputy collector, and delivered to him, and the deputy received a check on the Lincoln Bank in payment, and gave him a receipt in full for the bond. There is no certain proof whether this check was in the common form, or was a memorandum check. Swanton says he preferred memorandum checks, because the bank would pay them only to the payee named in the cheek, and would not pay to the bearer. But in the absence of positive proof, as the court is bound to make every reasonable inference from the evidence in favor of the defendants, this may be presumed to be a check in the ordinary form, payable, on demand at the bank, to the bearer. It must also be presumed that it was received by the deputy collector as payment and satisfaction of the bond. It was never presented at the bank, but the collector having kept it in his possession for several weeks, it was returned to the drawer, who gave him, in exchange, his promissory note payable to the collector. Swanton says he thinks this note was payable to his order, but is not certain; but according to another witness, Williams, the maker, declared it was not payable to order. This note Swanton assigned to Biggs, one of the sureties, as an indemnity for his liability on his bond, some time in the latter part of June, or the beginning of July, and of course after the duty bond became payable. It was also proved that duty bonds in that office were usually paid by cheeks on the bank.

Such are the material facts in the case. The question whether Swanton, after he was notified of his removal, and of the appointment of his successor, could legally act as collector until, his successor was qualified and took possession of the office, and whether his acts within that period were binding on the United States, was waived at the argument, and it was assumed on the one side, and not contested on the other, that Swanton was, during this time, collector de jure as well as de facto. The question which has been elaborately and learnedly argued at the bar is, admitting Swanton to have had the authority to act as collector until his successor took possession of the office, whether the facts in proof amount to a payment of the bond, or otherwise present a legal bar to the right of the United States to recover on the instrument. It is expressly provided by statute that duties shall be payable only in the money

of the United States, that is, in the gold and silver coins of the United States, or in such foreign coins as are made current by law and are a legal tender in the payment of other debts (Laws U. S., Act March 2, 1799, c. 128, § 74 [1 Story's Laws, 635; 1 Stat. 680, c. 22]), or in the bills of the Bank of the United States (Act April, 1816). It is not pretended that a check drawn by a private merchant, on a banking corporation, comes within the words of the statute. Had it been presented for payment, and actually paid, this would without doubt have been payment of the bond; or if it had been carried to the credit of the collector, the bank being solvent, I do not think it could well be maintained that it was not payment of the bond. But this check was never presented for payment at the bank, nor payment of it demanded. But it is argued that a check, being a negotiable security, is held by the local law of the state to be a constructive payment. The principles of the local law that a negotiable security, given in consideration of a pre-existing debt, is presumed to be an extinguishment of that debt, is, as I understand it, confined to debts due on simple contract. Maneely v. McGee, 6 Mass. 143; Thacher v. Dinsmore, 5 Mass. 299. It does not apply to a debt secured by an instrument of a higher nature, as by bond. But I am not prepared to say that this rule of the local law, being a departure from the principles of the general law merchant of the country, would be applicable to a debt due to the United States, upon a contract made by their debtor directly with them, and that more especially when the positive injunctions of the statute just referred to are considered. But there is no doubt that a negotiable security is payment, when the creditor receives it as such (Sheely v. Mandeville, 6 Cranch [10 U. S.] 264), and the evidence in the ease is such that a jury might easily infer that his cheek was taken in payment of the bond. That the deputy considered the bond as paid, is evident from his cancelling it. And the intention of the collector to extinguish the rights of the United States, under the bond, appears to be clearly indicated by his subsequent conduct. His keeping the check for so long a time without presenting it for payment, his afterwards exchanging it for a new security, and finally transferring this new security in pledge to a third person, a month or six weeks after the bond became due, all show that he considered the paper which he had taken as a satisfaction of the bond. If Mr. Swanton were himself the creditor, and had been acting for himself, it would be very difficult, on this demurrer, to render judgment in his favor. Swanton, however, was not acting for himself. He was merely an agent, acting in this business at least under a limited authority, and express and positive instructions. He had no authority to compromise or compound the debts of the United States, or exchange their securities. He was merely authorized to receive payment, and that in a way particularly pointed out, and his instructions must be presumed to be known to the defendants, as they were written in the public laws of the country. Admitting, then, that he would himself have been bound if it had been his own private debt, it by no means follows that he has bound his principal. When a man contracts with another, acting as the agent

of some third person, he knows that he cannot bind his principal beyond the authority under which he acts. A prudent man will therefore ascertain the extent of his authority before he enters into the contract. The very fact that the person is acting under a derived authority, is a warning to him to inquire into its extent and limitation, and if he contracts without first ascertaining them, he does it at his own peril, for the principal may disavow the acts of his agent if they transcend his authority.

If the agent is intrusted to transact all the business of the principal, or all his business of a particular kind, or at a particular place, he is called a general agent, and in order to execute his agency he must necessarily be intrusted with a general authority to transact the business in the ordinary and authorized mode, and to bind his principal in all cases in which it is necessary to carry his agency into effect. Paley, Prin. & Ag. 162, 163. Whether a man, in any particular case has been constituted a general agent, is a question of fact, which may be established by direct proof, or inferred from circumstances. The fact being established, the presumption of law is that he has the authority to transact the business of his principal in the usual and customary mode in which such business is ordinarily transacted. It is on this presumption that the public trusts him, and his acts will bind his principal while he confines himself within the general scope of his agency, and they are free from fraud or collusion, although he may have acted in violation of his private instructions. 2 Kent, Comm. p. 484; Whitehead v. Tuckett, 15 East, 400. This presumption stands on plain and obvious reasons of public policy; it is a necessary principle to prevent fraud and encourage confidence in trade. Those who deal with such an agent, do it in reliance on his general authority, and they cannot be presumed to be acquainted with any private restrictions on this general authority. But if the knowledge of any such particular instructions is brought home to any individual who deals with him, the principal will not be bound unless the act of the agent is strictly within his authority. The force of the legal presumption yields to proof of the contrary. A special agent is one intrusted to do a particular act, or certain specified acts, and binds his employer only when he strictly pursues his power. It is the business of the party who deals with him to ascertain the extent of his authority, otherwise he trusts him at his own peril. 2 Kent, Comm. 484; Paley, Prin. &

Ag. 164. When a general agent acts under specific instructions, and these are brought home to the knowledge of the person who deals with him, then upon plain principles there can be no difference between his authority to bind his principal, and that of a special agent. And when these instructions are found in the general and public laws of the country, every person is presumed to be acquainted with them, and all the presumptions of law in favor of a general power are removed.

In the present case, therefore, the question which was discussed at the bar, whether a collector of the customs is to be considered a general or special agent of the United States, is wholly immaterial. In either case he was bound by his instructions, and these being as well known to the defendants as to himself, he cannot upon well-established principles, bind the United States beyond the precise limits of his power. These were, to receive in payment of the bond only such money as was a legal tender in payment of debts, or bills of the Bank of the United States. If, therefore, it was the intention of the parties that this check should be received as payment of the bond, it was an illegal intention, and not binding on the United States. It was in direct violation of a public law, which must be presumed to be known to both parties.

In the next place, it is said the deputy collector's receipt, acknowledging satisfaction of the debt, is a bar to any suit on the bond. A receipt does not operate as an estoppel to bar a right, without a satisfaction. It is merely evidence of payment, not conclusive, but always open to explanation or contradiction. Harden v. Gordon [Case No. 6,047]; Stackpole v. Arnold, 11 Mass. 32; Wilkinson v. Scott, 17 Mass. 257; Ensign v. Webster, 1 Johns. Cas. 145; Tobey v. Barber, 5 Johns. 68. A party denying its validity may always inquire into the consideration, and show what it in fact was, and impeach it on the ground of fraud, mistake, accident, or surprise. If the view which has been taken of the case is correct, the receipt can be no bar to this action. The consideration of the receipt was the check, and admitting that the collector received this as payment, as this was unauthorized and contrary to law, it is not binding on the United States. Whether the objection taken to it be fraud or mistake on the part of the collector or of his deputy, it is equally fatal. But it is said that the act of cancelling, by its own intrinsic virtue, annihilated the bond as a legal instrument, even if it was not paid, so that no action can be maintained upon it. The ancient doctrine certainly looks that way. The forms pf pleading formerly rendered it necessary to make a profert of the deed, and without such profert the declaration was incurably defective. East India Co. v. Boddam, 9 Ves. 466. For so tenacious were the courts in former times of mere artificial and technical rules, which are professedly devised as subsidiary to justice, by promoting its regular and orderly administration, that the plainest claims of right were sacrificed rather than deviate from the forms of proceedings which had been sanctioned by long usage. If a bond was lost by time or accident, the obligee had no remedy at law, simply because no profert could be made of it; and if it were cancelled

by fraud or mistake, it would seem also necessarily to follow, from this rule of pleading, that the remedy upon it would be gone, because, when produced, it would not support the declaration. The good sense of modern times has overcome this difficulty, and the obligee of a bond which has been accidentally lost or destroyed, can now recover upon it at law, as a good and subsisting obligation, without a profert. If the entire destruction of a bond does not present any insuperable obstacle to a recovery upon it, it will be difficult to show, by any rational and sensible distinction, why an action may not be maintained on a bond that has been cancelled, or from which the seal has been torn off, if it be shown that it was cancelled by fraud or mistake, without its having been paid or satisfied. The cancellation is certainly nothing more than the total destruction of the bond. If the collector, instead of cancelling this bond, had thrown it into the fire there would be no difficulty, on proof of the facts, in maintaining this action, as upon a lost bond; and why the remedy should be taken away, when instead of burning up the paper, he has, under the same state of facts, cancelled it by marks made with a pen, is more than I can reconcile with any principles of justice or common sense. In my opinion, no such absurdity can be imputed to the law. The cases of Cutts v. U. S. {Case No. 3,522}, and U. S. v. Spalding {Id. 16,365}, are conclusive to the point that the mere cancellation of the bond, if done animo cancellandi, will not destroy its validity. Neither of these cases were precisely like the case at bar. In the first, it was decided that a deed was not avoided by the seal being torn off by the obligor, whether he did it fraudulently or innocently; and in the latter, that if the obligee is induced to tear off the seal, or annul the bond, by the fraud or imposition of the obligor, the bond may still be declared on as a subsisting obligation. The mere fact of cancellation itself does not, therefore, annul the obligation of the bond. The circumstances under which it was cancelled may be inquired into, and these cases appear to me, in their spirit, to lead to the conclusion that a deed which has been cancelled by mistake or fraud, without being paid or otherwise satisfied, will support an action under the same circumstances as those upon which a recovery can be had on a bond lost or destroyed. My opinion on the whole case is, that judgment must be rendered for the plaintiffs.

[1] {Reported by Hon. Ashur Ware, District Judge.}