

small consequence to the plaintiff to secure the employment which in this written agreement the defendant expressed itself willing to continue. The proof shows that the service the plaintiff could render, and was rendering, and had been rendering for two years after his wounds had healed, was reasonably worth about the wages and the allowances which the defendant consented to give. It shows also that he was not quite as efficient as a man with two good hands and two sound legs would have been with like skill and experience, but, to our minds, there is nothing on the face of this paper that indicates that the defendant, for a disputed claim that was thrice barred, was willing to give, or was giving, a binding contract to pay an annuity to a man 55 years old at the rate of \$840 a year as long as he should live. His disability was fixed more than two years before the date of this writing. Exactly how much he was disabled was known, not only to him, but to the defendant. It is easier to say what the contract does not mean than to declare authoritatively and clearly what is the proper construction of the contract. The defendant contends that it is an employment by the month, and, like every other such employment, subject to be discontinued, at the will of either, at the expiration of any month, or at any time, for adequate cause. This construction comports more with the terms of the writing itself, and we conclude it is the only intelligible construction to be put upon the writing.

It appears to us that the plaintiff has been led into this contract, and into the loss of valuable employment, by his own misconstruction of the contract. His own testimony on the trial of this case showed clearly that in his dealings with the agent of the defendant he relied upon the unfounded belief that he had the defendant bound to pay him an annuity of \$70 a month for the rest of his life, and that he could work or not, as he pleased,—a kind of servant that would not be very valuable to any employer. We conclude that the demurrer to the declaration should have been sustained, and for the error of the court in overruling the demurrer—without further comment on other errors indicated—the judgment of the circuit court is reversed, and the cause is remanded to be proceeded with in that court in accordance with the views we have expressed.

PARDEE, Circuit Judge, dissents.

NORTON et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. June 7, 1897.)

No. 564.

SUIT ON POSTMASTER'S BOND—EVIDENCE.

Rev. St. § 952, providing that "no claim for a credit shall be allowed upon the trial of any suit for delinquency against a postmaster * * * unless the same has been presented to the sixth auditor, and by him disallowed," etc., does not affect the admissibility of evidence offered to show that the defendant never received the amounts with which he is charged.

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

George Clark and D. C. Bolinger, for plaintiffs in error.
J. Ward Gurley, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. The record presents the following case for determination: Suit was brought in 1895 against Charles M. Norton and his sureties on his three official bonds as postmaster at Calvert, Tex. The suit came on for trial at the November term, 1896. Exceptions were reserved, and error is alleged as to the rulings of the court in rejecting certain pieces of evidence offered. A general view of the case, which we have, will dispose of it without going into detail as to all the evidence offered and rejected. The suit, as it finally went to trial, although not so originally, was for certain balances claimed to be due by Norton, as postmaster, in connection with the money-order business of the post office at Calvert. The United States introduced in evidence the three bonds sued on, executed by the defendant and his sureties; three certified transcripts from the auditor of the treasury for the post-office department, showing balance due by Norton as postmaster at Calvert for the period covered by the three bonds, respectively, of \$33.10, \$1,108.50, and \$1,454.98; also evidence of demand for the said several sums of Norton and his sureties. The government having closed, the defendant offered, among other things, to show that the several balances claimed to be due by him as postmaster on the money-order business of the Calvert office had never come into his hands; that he had never received any of the money with which he was charged by the post-office department, and which was embraced in the transcript offered in evidence for the government. This evidence was objected to by the United States attorney, and rejected by the court, on the ground that it was not admissible under section 952 of the Revised Statutes. The court, having rejected defendant's evidence, directed a verdict in favor of the government for the amount sued for. The section (952) of the Revised Statutes referred to reads as follows:

"No claim for a credit shall be allowed upon the trial of any suit for delinquency against a postmaster, contractor, or other officer, agent or employé of the postoffice department, unless the same has been presented to the sixth auditor and by him disallowed, in whole or in part, or unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting to the said auditor a claim for such a credit by some unavoidable accident."

Was this section applicable to the testimony offered in the district court? That is the question for determination here. It will be seen that the language of this statute is that "no claim for a credit shall be allowed upon the trial of any suit against a postmaster * * * unless the same has been presented to the sixth auditor, and by him disallowed, in whole or in part." When there is a claim by the postmaster that money charged against him did not actually

come into his hands at all, is that a claim "for a credit"? A claim for a credit, in the ordinary sense in which that expression is used, is against an opposing debit. Where one is charged with certain funds as having come into his hands, and he denies that he ever received such funds, that is not a claim for a credit in any reasonable or just sense. Where funds have come into the hands of a person by reason of some fiduciary relation, and he claims to have paid the same over either to the owner, or to some third person by his direction or authority, that is a claim for a credit. Assuming, therefore, that the language used in this statute was used in its ordinary and usual sense, it does not embrace or apply to the case of a claim that funds with which a postmaster is charged never came into his hands at all. The use of the term "vouchers" in a subsequent part of this section emphasizes the fact that its meaning is that above indicated. The defendant is allowed to introduce vouchers "not before in his power to procure, and that he was prevented from exhibiting to said auditor a claim for such credit by some unavoidable accident." The "claim of credit," therefore, is to be evidenced by "vouchers." We think this is clear, construing the meaning of the first expression in the section cited above, in connection with the language of the latter part of the section just referred to. The claim of credit to be made is to be evidenced by "vouchers," and certainly no voucher could be presented by a postmaster for the disbursement of that which never came into his hands. So we have no difficulty in holding that a postmaster, against whom suit is brought for default on his official bond, may defend by showing that the money, or a part thereof, as claimed by the government, never actually came into his hands, without presenting the same to the auditor for the post-office department, and having the same by him disallowed. Any other conclusion would not only do violence to the language of the statute referred to, but do manifest injustice and wrong to defendant against whom such suit is brought. Cited for the defendant on this question: *Myer's v. U. S.*, 1 McLean, 493, Fed. Cas. No. 9,996; *U. S. v. Hutcheson*, 39 Fed. 540; *Ware v. U. S.*, 4 Wall. 629; *U. S. v. Dumas*, 149 U. S. 286, 13 Sup. Ct. 872. For the reasons given, we think the verdict directed in favor of the government was wrong; therefore the judgment of the court below is reversed, with directions to award a new trial.

MERCHANTS' & PLANTERS' OIL CO. v. KENTUCKY REFINING CO.

(Circuit Court of Appeals, Fifth Circuit. May 11, 1897.)

No. 515.

PLEADING AND PROOF—VARIANCE—DECEIT—BREACH OF CONTRACT.

Plaintiff brought an action according to the Texas practice to recover possession of certain oil cars, with actual and exemplary damages for the wrongful detention thereof, alleging that defendant obtained possession of the cars by fraudulently pretending to have for sale, and to sell to plaintiff, cotton-seed oil of a certain grade, to be transported in said cars, but that in fact it had no oil of that grade. Judgment for possession and for the rental value of the cars having been rendered for plaintiff, *held*, that