not much above what he gave; that Robert Alexander, although rich in other property, made no effort to relieve this, are facts which render the real value, at the time of sale, too doubtful, to make the inadequacy of price a circumstance of sufficient weight to convert this deed into a mortgage.

It is, therefore, the opinion of the court, that the decree of the circuit court is erroneous, and ought to be reversed, and that the cause be remanded to that court, with directions to dismiss the bill.

Decree reversed.

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*DUNLOP *v.* MUNROE. (*a*) [*242

Negligence of postmaster.

Where issue is taken upon the neglect of a postmaster himself, it is not competent to give in evidence, the neglect of his assistant.

Where it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case; and his liability then will only result from his own neglect, in not properly superintending the discharge of their duties in his office.

In order to make a postmaster liable for negligence, it must appear, that the loss or injury sustained by the plaintiff was the consequence of the negligence.

Parol evidence cannot be given, that one set of written instructions from the postmaster-general, susperseded another set of written instructions.

Dunlop *v.* Munroe, 1 Cr. C. C. 536, affirmed.

ERROR to the Circuit Court for the district of Columbia, sitting at Washington, in an action wherein James and John Dunlop were plaintiffs, and Thomas Munroe, the deputy postmaster at Washington, was defendant. The declaration, after having been several times amended, contained nine counts.

1. The first count was as follows: Thomas Munroe, late of Washington county, gentleman, was attached to answer unto James Dunlop and John Dunlop, in a plea of trespass on the case, &c., whereupon, the said James and John, by Francis S. Key, their attorney, complain, that whereas, by the laws of the United States of America, relative to the post-office establishment of the United States, and of the post-roads within the United States, it was enacted, that there should be established, at the seat of the government of the United States, a general post-office, under the direction of a postmaster-general, and that post-offices should be established, and that postmasters should be appointed, by the said postmaster-general, at all such places as should appear to him expedient, on the post-roads which then were, or might thereafter be established, and the carriage of the mail on all such post-roads provided for; and that every postmaster, so appointed by the said postmaster-general, should keep an office, in which one or more persons should attend for the purpose of performing the duties thereof; and a post-road was directed to be established from Passamaquoddy, in the district of Maine, to St. Mary's, in Georgia, within the said United States; and the city of Philadelphia, in the state of Pennsylvania, and the city of Washington, in the district of Columbia, and the town of Petersburg, in the state of Virginia, were places through which the said post-road was directed by law to pass. And whereas, in pursuance of the said laws, a general post-office was

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(*a*) March 9th, 1812. Present, all the judges.

established at the seat of government of the United States, under the *direction of a postmaster-general, duly appointed and qualified, and a post-road established within the United States from Passamaquoddy, in the district of Maine aforesaid, to St. Mary's, in Georgia aforesaid ; and the said city of Philadelphia, and the said city of Washington, and the said town of Petersburgh, were places through which the said road did pass, and post-offices were duly established at the said places, so as aforesaid, on the said post-road, by the said postmaster-general ; and postmasters by him duly appointed and qualified to attend to the duties of the said post-offices, and the carriage of the mail of the United States on the said post-road provided for by the said postmaster-general, agreeable to law : and the said Thomas Munroe was, by the said postmaster-general, duly appointed and qualified the postmaster at the said office, so as aforesaid established at the said city of Washington, on the said post-road, and between the city of Philadelphia and the town of Petersburgh aforesaid, also on the said post-road, and as such was bound to attend to and perform all the duties thereof, and to receive, make up, and distribute and forward the mails of the said United States, and all the letters and packets contained therein, which should arrive or come to his said post-office so by him kept as aforesaid, at the said city of Washington, to all such places on the said post-road to which the same were directed and addressed ; and the said Thomas, so being, as aforesaid, postmaster at the said post-office, so as aforesaid lawfully established at the said city of Washington, on the post-road so as aforesaid, also lawfully established, and post-offices being also, in like manner, lawfully established at the said city of Philadelphia, and the said town of Petersburg, on the said post-road, and postmasters duly appointed and qualified, and attending to the duties of the said post-offices, on the 30th day of July, in the year 1806, the said James and John being possessed of a large sum of money, to wit, the sum of $2000 current money of the United States, of their own proper money, and being so possessed thereof, on the same day and year, did inclose the same, in bank notes, by means of their agents in that particular (a certain Walker & Kennedy) in a letter sealed and directed to the said James and John, at Petersburg, in Virginia aforesaid, on the post-road aforesaid, and the said sum of money, so sealed and inclosed *in said letter, so directed, did place in the post-office in the said city of Philadelphia, so as aforesaid established on the said post-road, to be forwarded on the said post-road, in the mail of the United States, to the said town of Petersburg, on the post-road aforesaid, and the said letter, directed as aforesaid, and the money in bank notes as aforesaid, to the said amount, inclosed in the same, were, accordingly, by the said postmaster at Philadelphia, and from the office there established as aforesaid, on the said post-road, sent on and forwarded in the mail of the United States, on the day and year aforesaid ; and did afterwards, to wit, on the first day of August, in the year aforesaid, arrive at the post-office of the said Thomas, postmaster as aforesaid, in the said city of Washington, on the said post-road, in the mail of the United States, on the route to the post-office at Petersburg aforesaid, on the post-road aforesaid, and was, on the day and year last mentioned, at the county of Washington aforesaid, received by the said Thomas, to be by him sent on and forwarded in the mail of the United States, on the said post-road, to the said James and Jonn, at Petersburg, to whom the same was directed and addressed :

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Yet the said Thomas, regardless of his said duty as postmaster, and wholly neglecting the same, did not send on the said letter, and the sum of money contained and inclosed in the same, to the said town of Petersburg, on the said post-road, in the mail of the United States, to the said James and John, to whom the same was directed, as it was his duty to do ; but the same letter, and the said sum of money therein contained as aforesaid, were fraudulently and improperly secreted, withheld and taken, in the said post-office at the city of Washington aforesaid, by the said Thomas, or some other person employed by him in his said office, so that the said James and John were prevented from receiving the same, and the same letter, and sum of money, have been wholly lost to the said plaintiffs.

2. The second count was like the first, in every particular, except that it stated that the plaintiffs placed the letter, inclosing the money, in the post-office at Philadelphia, to be forwarded "without delaying the same a single post," and that it was received by the defendant, at his office in Washington, on the 1st of August 1806, to be by him sent on and forwarded, without delaying the same a single *post, in the mail of the United States, [*245 &c.; "yet the said Thomas, regardless of his said duty as postmaster, and wholly neglecting the same, did not, on the first day of August, in the year aforesaid, send on the said letter, and the sum of money contained and inclosed in the same, to the town of Petersburg, on the said post-road, in the mail of the United States, which left the city of Washington on the said first day of August, in the year aforesaid, for Petersburg aforesaid, as it was his duty and in his power to have done ; but the same letter, and the said sum of money therein contained as aforesaid, were, by the negligence, carelessness and misconduct of the said Thomas, in his said office aforesaid, utterly, afterwards, to them, the said James and John, lost ; by reason whereof, the said James and John, the sum of money so as aforesaid contained and inclosed in the said letter, directed and addressed as aforesaid, and the use and possession of the same, have entirely lost ; to the great damage," &c.

3. The third count was like the first, in every respect, except that instead of averring that the plaintiffs were possessed of a large sum of money, it averred, that they were possessed of "certain property of great value, to wit, "of certain bank-notes for the payment of money, to the amount of the value of $2000, current money of the United States, as their own property, and inclosed the same bank notes," &c., using the words "bank-notes," in lieu of the words "sum of money," in the residue of the count. It contained also an averment of a demand and refusal of the defendant to deliver the letter and bank-notes, whereby the same had been totally lost to the plaintiffs, whereof the defendant had notice.

4. The fourth count was like the first, except that it used the terms "bank-notes," instead of "sum of money in bank-notes ;" and instead of averring, that the letter and sum of money were "fraudulently and improperly secreted, withheld and taken, in the said post-office," it averred, that "the same letter and bank-notes were, by the negligence, carelessness and misconduct of the said Thomas, in his said office, lost," &c.; and averred a demand and refusal to deliver them, whereby they had been totally lost to the plaintiffs, whereof the defendant had notice, &c.

*5. The fifth point varied from the others considerably in the recital [*246 respecting the establishment of post-roads and post-offices ; but the

principal difference consisted in an averment, that the postmasters, appointed by the postmaster-general, were to perform their duties according to law, "and to the instructions of the postmaster-general relative to their duty." That the post-office at Washington was a distributing office, and that it was the duty of the defendant, according to the instructions of the postmaster-general, then in force, to open the mail addressed "Southern," and to distribute and remail the letters and packets into proper mails, before the departure of the mail ; and on no account to delay them a single post, by which it was in his power to send them in the regular course of the mail. It then averred, that the letter and bank-notes were put into the post-office at Philadelphia, on the 30th of July, and were from thence forwarded in the mail on the 31st, and arrived at Washington on the 1st of August, and were, in the usual manner, delivered and placed in the post-office at Washington, kept by the defendant, to be, by him, remailed, and sent on and forwarded in the mail of the United States to Petersburg, to the plaintiffs ; and were delivered and placed in the usual and regular course of the mail, at and in the post-office at Washington aforesaid, "in time to be remailed and sent on, according to the instruction and direction aforesaid of the postmaster-general aforesaid, in the same day of the arrival aforesaid, and by the same mail which, thereafter, and on the same day, departed from the post-office aforesaid, in the city of Washington aforesaid, with letters for the town of Petersburg aforesaid ; by virtue of which premises, it was the duty of the defendant, on the said 1st day of August, in the year 1806, at," &c., "to have distributed, remailed, and sent on, or caused to have been distributed," &c., "the said letter, containing the said bank-notes, to the town of Petersburg aforesaid, in the mail of the United States aforesaid, on the same 1st day of August, in the year aforesaid, which it was in the power of the defendant to have done, in the usual and regular course of the business of his said office : Nevertheless, the said defendant, on the first day of August, in the year aforesaid, at the county aforesaid, regardless of his duty as postmaster as aforesaid, did not send on or forward, or cause to be sent on or forwarded, *on the said first day of August, in the year aforesaid, the said letter containing the bank-notes aforesaid, to the town of Petersburg as aforesaid, in the mail of the United States aforesaid, which left the said city of Washington, on the said 1st day of August, and which ought to have received and carried the said letter, and bank-notes inclosed therein, to the post-office in the said town of Petersburgh, but by reason of his negligence and misconduct aforesaid, in his said office, on the said first day of August, the said letter, and the said bank-notes inclosed therein as aforesaid, have been, afterwards, utterly, and ever since, lost to the plaintiffs."

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6. The sixth count was like the fifth, except that it averred that the letter, with the bank-notes inclosed, was received at the post-office in Washington, on the 1st of August, "by Henry Whetcroft, then and there agent and clerk of the defendant, duly authorized to perform the duties of the said office for the defendant, to be remailed and sent on," &c. "By virtue of which premises, it was the duty of the said defendant, postmaster as aforesaid, by himself, his said agent, or some other person, on the 1st day of August aforesaid, to have distributed, remailed and sent on the said letter," &c., "in the mail of the United States, on the same 1st day of August,

which it was in the power of the defendant, by himself or his said agent and clerk, to have done," &c.: "Nevertheless, the said defendant, on the said 1st day of August," "regardless of his said duty as postmaster as aforesaid, did not, by himself, or his said servant and clerk, or any other person, send on and forward, on the said 1st day of August, the said letter," &c. "But by reason of the negligence and misconduct aforesaid, in transacting the business of the said office on the said 1st day of August," &c., "the said letter," &c., have been, afterwards, utterly and ever since, lost to them, the said plaintiffs," &c.

7. The seventh count was like the sixth, except that it averred, that the letter, &c., were received at the post-office in Washington, by William Hewitt, another agent, servant or clerk of the defendant.

8. The eighth count charged, that the letter, &c., was *duly, by the carrier of the mail, placed in the office of the defendant, at Washington, on the 1st of August 1806, in time to be remailed and sent on by the mail of the same day, and that it was his duty, by himself or by his agents, or some of them, to have remailed and sent it on, accordingly, by that mail, which he did not do, or cause to be done; but by reason of the negligence and misconduct aforesaid, in his said office, on the said first day of August, the letter, &c., have been afterwards utterly and ever since lost to the plaintiff. [*248

9. The ninth count was like the eighth, except that it averred, that the mail which left Washington for Petersburg, on the 1st of August (and which ought to have carried the plaintiff's letter), arrived safely at Petersburg, with all its letters, &c.; "but the said defendant did unduly, improperly and negligently delay, detain, and keep the letter aforesaid, containing," &c., "in his said post-office, until and after the departure of the mail aforesaid, which ought, as aforesaid, by the laws and postmaster-general's instructions aforesaid, to have carried and contained the same, on the said first day of August; and the letter and bank-notes aforesaid, so as aforesaid unduly detained, the said defendant did delay, and keep in his said office, for a long space of time, to wit, until the departure of the mail, which thereafter, to wit, on the 3d day of August next following, left his said office for the town of Petersburg aforesaid, but which never did arrive at the post-office in the said town of Petersburg, but was, together with the letters and packages contained therein, and with the letter and bank-notes aforesaid of the said plaintiffs, thus improperly delayed and unduly forwarded, wholly and entirely lost on its said route to the town of Petersburg aforesaid, and before its arrival at the said post-office in the said town of Petersburg; by reason of which said undue, improper and unlawful delay and detention, negligence and misconduct of the said Thomas Munroe, in his said post-office, the letter, and bank-notes contained therein as aforesaid, have been then, and ever since, utterly lost to the plaintiffs."

To these nine counts, there were eighteen pleas in bar: *1. The first plea was the general issue of not guilty, pleaded to all the counts. [*249

2. The second plea was also pleaded to all the counts, and was, "that the said letter containing," &c., "was not brought to and delivered, nor in any manner given in charge at the said post-office at Washington, in the mail of the United States, which, on the 31st of July 1806, left the post-office at Philadelphia, and which, on the 1st of August next ensuing, arrived at

the post-office in Washington, in manner and form," &c.; and of this he puts himself on the country, and the plaintiffs likewise.

3. The third plea was to the 1st, 2d, 3d and 4th counts, and denied that the letter, &c., was received by the defendant, in manner and form, &c. Upon this plea, issue was joined.

4. The fourth plea was to the 1st and 3d counts, and denied that the letter, &c., was fraudulently secreted, withheld and taken, by the defendant, in manner and form, &c. Upon this plea, also, the plaintiffs joined issue.

5. The fifth plea was also to the 1st and 3d counts, and averred, that as to the defendants having personally received the said letter, &c., and as to his having fraudulently secreted, withheld and taken the same, &c., he was not guilty, and of this he put himself upon the country; and the plaintiffs likewise. And as to the residue of the allegations, charges and complaints of fraud and misconduct, in the two last-mentioned counts of the said declaration above supposed to have been committed in the said post-office at Washington, by some other person employed by the defendant in the said office, he says, that the plaintiffs, their action aforesaid, to have, &c., ought not, because he says, that at the time when, &c., and always before and ever since, the defendant, in pursuance of regulations and instructions duly made and issued by the postmaster-general, took due precaution and exercised all reasonable care, diligence and circumspection, to cause all mails, letters and packets brought to the said office, to be duly sent on and forwarded, according to the destination of the same, and to prevent all frauds and embezzlements in the said *office, by selecting, appointing and employing as clerks and assistants in the said office, and to attend in the said office at the regular hours directed by the postmaster-general, for the purpose of performing the duties of the same, none but persons of competent skill and knowledge, of fair character, of known good-repute for fidelity and honesty, and who, upon being so appointed and employed; and previous to entering upon the duties assigned them as aforesaid, or the execution of their trusts aforesaid, had, in pursuance of the act of congress in such case made and provided, and in obedience to the express instructions of the postmaster-general, respectively taken and subscribed, before a magistrate, in due manner and form, the oath prescribed by the said act of congress, and also the oath, in due manner and form, as directed by the postmaster-general aforesaid; that is to say, an oath to support the constitution of the United States, and had respectively transmitted to, and caused to be duly filed in the general post-office, certificates, in due form, of the said oaths so taken and subscribed as aforesaid. And the said defendant in fact says, that at the time when, &c., and for a long time before and after, he had, with due precaution and circumspection, and with all reasonable care and diligence, and in pursuance of regulations and instructions duly made and issued by the postmaster-general of the United States, selected and duly appointed and employed, two persons of competent skill and knowledge, of fair character and of known good-repute for fidelity and honesty; that is to say, one Henry Whetcroft and one William Hewitt, as clerks and assistants in the said post-office, and to attend regularly, &c., for the purpose of performing the duties of the said office, and to whom, and to no other person or persons, were, then and there entrusted, by the said defendant, the duties of receiving and opening the mails brought to the said office for distribution or delivery, and of receiving,

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distributing, remailing and sending on, according to the proper destination of the same, all mails, letters, &c., there being, then and there, no other person or persons employed in the said office, to whom the defendant had entrusted any agency in the duties of the said office, or who were suffered by the defendant to inspect or handle any letters, newspapers or other articles constituting a part of any mail brought, &c., they, the said Henry Whetcroft and William Hewitt, upon being appointed and * employed [*251 as aforesaid, and previous to entering upon the duties, &c., having, in pursuance of the said act of congress, and in obedience to the instructions and directions of the postmaster-general aforesaid, respectively, and duly, taken and subscribed the oaths aforesaid, and duly transmitted to and caused to be filed in the general post-office, certificates, in due form, of the said oaths, respectively, so taken and subscribed as aforesaid; and the said defendant says, that if the said letter, &c., was in fact delivered and received, or in any manner given in charge at the said post-office, or was, in fact, fraudulently secreted, withheld and taken by any person employed and entrusted by the defendant to attend in the said office, for the purpose of performing the duties of the same, then such fraudulent embezzlement was without any participation or connivance whatsoever of the defendant, and without any fraud, collusion or other misdemeanor in office whatsoever, on the part of the defendant, or by him done or permitted, but altogether without his consent or knowledge, and against his will; and this he is ready to verify, &c.

To the latter part of this plea, there was a special demurrer and joinder, because: 1. The plea is argumentative in this, that it states that the defendant has appointed competent and honest men to do the duties of the said office, and therefore infers, that he himself is not liable for their negligence; and further, in this, that he states what acts he did in relation to his office, and reasons from them in his exculpation. 2. Because the plea does not confess and avoid, nor deny the allegations of the said counts, or of any of them. 3. Because it does not state the nature and circumstances of error or mistake supposed to be made by his said clerks and assistants, so as to show that it did not proceed from a want of reasonable care and diligence. 4. Because the plea amounts to the general issue. 5. Because it does not set forth any matter of law, proper for the decision of the court, but states facts proper to be given in evidence upon the general issue joined between the parties. 6. Because the plea tends to draw from the consideration of the jury to that of the court, matters of evidence proper to be shown only to the jury, on the general issue; and is immaterial, insufficient and informal.

*6. The sixth plea was to the said 4th and 9th counts, and denied [*252 that the letter was lost by the negligence, carelessness, or misconduct of the defendant in his office; upon which the plaintiffs joined issue.

7. The seventh plea was to the 1st and 3d counts, and stated, that the bank-notes mentioned in those two counts were notes of the bank of Virginia, "which was a bank duly established under a charter from the government of the state of Virginia, and if the same were in fact fraudulently taken, withheld and secreted by the defendant, or any person employed and entrusted in the said post-office at Washington, then, according to the form of the several statutes in force within the county of Washington aforesaid, every person so acting and doing, became guilty of a felonious embezzle-

ment of the same letter and bank-notes, and liable to suffer the pains and penalties of felony, and ought to have been prosecuted for such crime accordingly ; yet the defendant in fact saith, that no criminal prosecution whatsoever has been commenced, nor any conviction had against any person or persons whatsoever, in the said two counts of the said declaration, supposed to be guilty as aforesaid, and this he is ready to verify," &c. To this plea, there was a general demurrer and joinder.

8. The eighth plea was to the 6th count, and denied that the letter, &c., were received by Henry Whetcroft, at the post-office in Washington, in manner and form, &c., upon which, issue was joined.

9. The ninth plea was to the 7th count, and denied that the letter was received by William Hewitt, at the post-office, &c., in manner and form, &c., upon which, issue was also joined.

10. The tenth plea was to the 9th count, and averred, that the defendant did not unduly, improperly and negligently, delay, detain and keep in the post-office at Washington, nor anywhere else, the said letter, &c., in manner and form, &c.; upon this plea also, the plaintiffs joined issue.

*253] *11. The eleventh plea was to the 5th, 6th, 7th and 8th counts, and averred, that the loss of the letter, &c., was not caused or produced by reason of the same not having been remailed and sent on, at and from the said post-office at Washington, on the same day of the supposed arrival of the said letter and bank-notes at the said post-office, to wit, on the 1st day of August 1806, and by the same mail which, after the said supposed arrival, and on the same day, departed from the said post-office at Washington, with letters for the said town of Petersburg, and by the said letter and bank-notes being delayed by the said Thomas, in the post-office at Washington, until the departure of the next succeeding mail of the 3d of August, in manner and form, &c. Issue was also joined upon this plea.

12. The twelfth plea was to the 9th count, and was precisely like the 11th plea.

13. The thirteenth plea was to the 2d, 4th, 5th, 6th, 7th, 8th and 9th counts, and stated that the defendant, as to his having received the letter, &c., and having wilfully and negligently omitted to forward and send on the same, in the mail, according to the proper destination of the same ; and as to his having unduly kept and detained the same in his office, and as to his having disregarded the duties of his said office, and as to the negligence and misconduct in office imputed to him the defendant, he is not guilty ; and of this he puts himself upon the country, and the plaintiffs likewise.

And as to the residue of the allegations, charges and complaints of negligence and misconduct in the several counts last aforesaid, above supposed to be committed and suffered in the said post-office at Washington, the defendant (protesting that he has in all things demeaned himself, in his said office of postmaster, as a good and faithful officer of the United States, and that he has always exercised all practicable care and diligence to have the business and duties of the said office, regularly, duly and faithfully transacted, performed and executed) says, that at the time when, &c., he took due precaution, &c., by selecting and appointing proper persons, &c. (as in the 5th plea), and if the said letter, &c., were delivered at his office at Washington, *254] and if the *same were, by reason of any casual negligence, misconduct, inadvertence, oversight, error or mistake of any person or per-

sons so employed and entrusted in the said office, not in fact duly remailed, forwarded and sent on, &c., such the delivery of the said letter, &c., at the said office at Washington was entirely unknown to the defendant, and every such misconduct, &c., was likewise entirely unknown to the defendant, and was not caused or produced by any misdemeanor in office of the defendant, nor willingly or knowingly suffered or permitted by him, but was caused and produced by the casual, inadvertent and unintentional mistake, error and oversight of some person or persons so appointed, &c., and altogether without the consent or knowledge of the defendant, and against his will. And so the defendant says, that he took due precaution and used all reasonable care, diligence and circumspection to cause the said supposed letter, &c. (if ever in fact delivered and given in charge of the said post-office), to be duly sent on and forwarded, &c.; and this he is ready to verify, &c.

To the latter part of this plea, as pleaded to the 5th and 9th counts, the plaintiffs, by way of replication (protesting that the defendant did not use due care in selecting proper persons, &c.; and that the loss of the letter, &c., did not happen without the knowledge, consent and authority of the defendant), say, &c., that the letter, &c., regularly arrived at the post-office of the defendant, on the 1st of August 1806, and were received by him, and ought to have been sent on or caused to have been sent on by him, on that day, in the mail, &c., which regularly arrived at Petersburg, and that he did not do so; and did not use due care and diligence in remailing and forwarding the same, and did delay and detain the same unduly, negligently and improperly, whereby the same have been lost, &c.; without this, that the loss of the said letter, &c., was caused or produced by any act without the control, knowledge or authority of the defendant in his office, and which, by using due and reasonable diligence in his said office, he could not have prevented; and this they are ready to verify, &c. To this replication, the defendant demurred. *To the latter part of the 13th plea, as pleaded to the 2d, 4th, 6th, 7th and 8th counts, the plaintiffs demurred. [*255

14. The fourteenth plea was to the same counts, and was the same in substance as the 13th; and the plaintiffs demurred to it as a plea to the 2d, 4th, 6th, 7th and 8th counts, and replied to it as a plea to the 5th and 9th counts; to which replication, the defendant demurred.

15. The fifteenth plea was to the same counts as the 13th plea, and was like it, except that it averred, that if there was any error or omission, &c., it was without the defendant's knowledge and consent, and without any fraud, or wilful or gross negligence of any person by him employed. To this plea, were the same replication and demurrer as to the 13th.

16. The sixteenth plea was to the 2d, 4th, 5th, 6th, 7th, 8th and 9th counts, and, after protesting, as in the 13th plea, and admitting that the letter, &c., were not duly remailed and sent on by the mail of the 1st of August as it ought to have been, averred that it was sent on by the next mail, which left Washington on the 3d of August, and after departing from the post-office at Washington, and being entirely without the care and custody of the defendant, and of every person employed in his post-office, were taken and embezzled by some person or persons as yet undiscovered and unknown, and so lost to the plaintiffs without any participation, connivance, procurement, consent or knowledge of the defendant, or of any person employed or entrusted in his post-office. To this plea, as pleaded to the 2d,

4th, 5th, 6th and 7th counts, the plaintiffs demurred ; and as pleaded to the 8th and 9th counts, they replied, in substance, that by reasonable care and diligence the letter, &c., might have been sent on by the mail of the 1st of August, and was not, and that the loss happened thereby ; and concluded to the country. To this replication, the defendant demurred.

*256] *17. The seventeenth plea was to the 2d, 4th, 5th, 6th, 7th, 8th and 9th counts, and was like the 16th plea, in all respects, except that it concluded with the following traverse, viz : "without this, that the loss of the said letter and bank-notes aforesaid was caused or produced by reason of the same not having been remailed and sent on, as aforesaid, in the mail of the 1st of August, as aforesaid, according to the postmaster-general's instructions as aforesaid, instead of having been delayed for the next succeeding mail of the 3d of the same August as aforesaid, and remailed and sent on in that mail as aforesaid." On this plea, as pleaded to the 9th count, the plaintiff took issue upon the traverse, and demurred to the plea, as pleaded to all the other counts.

18. The eighteenth plea was to the 5th, 6th, 7th, 8th and 9th counts, and after protesting as in the 13th plea, averred, that according to the duly-established regulations of the post-office, and the instructions of the postmaster-general in the declaration mentioned, and then in full force, all letters, &c., put into the post-office at Philadelphia, directed to Petersburg, ought to have been put up in a separate and distinct mail, directed to Petersburg, which mail ought to have been sent on through the several intermediate post-offices, from Philadelphia to Petersburg, and which, according to the regulations and instructions aforesaid, could not have been properly opened either at the post-office in Washington, or at any other intermediate post-office on the route from Philadelphia to Petersburg, for any purpose whatever ; and no such letters, &c., ought, according to the said regulations and instructions, to have been put up and sent on in any mail, which, according to the direction of the same, and the said regulations and instructions, could have been properly opened at the post-office in Washington, to be there distributed and remailed, previous to being sent on and forwarded to Petersburg ; and that the letter, &c., ought not to have been put up and sent on from the post-office at Philadelphia, in any mail to be opened, distributed and remailed at the post-office at Washington, but in a separate and distinct mail, directed to Petersburg, and to be sent on through the post-*257] office at Washington, *without being there opened, distributed or remailed. Whereas, the said letter, &c., was not, &c., but together with all the other letters sent by the same post, and directed and destined for Petersburg, was, contrary to the said regulations, &c., sent on from Philadelphia in a mail which, according to the direction of the same, and the said regulations, &c., was to be opened at the post-office in Washington, for the purpose of being distributed and remailed, &c.; and the defendant said, that if the said letter, &c., had been put up in a distinct and separate mail, directed to Petersburg, it would have been duly sent on in the mail of the first of August, and so the delay was occasioned by the erroneous and irregular manner in which the letter was put up and sent on from Philadelphia, and not by the negligence, carelessness or misconduct of the defendant in his office : "without this, that the said letter was put and forwarded in the mail at and from Philadelphia, and delivered at the said post-office in

Washington, in any other manner than as aforesaid; and this he is ready to verify," &c.

To this plea, as pleaded to the 5th count, the plaintiffs demurred; and as pleaded to the other counts, they replied, and (after protesting that the postmaster at Philadelphia was not bound to send on the letter in a separate mail directed to Petersburg, &c., and protesting that the loss of the letter or the delay, &c., was not occasioned by the supposed erroneous manner in which it was put up and sent on from Philadelphia), for replication said, that the letter, &c., was put up and forwarded by the postmaster at Philadelphia, according to the said instructions of the postmaster-general, in a mail addressed "Southern," containing the letters addressed to places in Virginia, and was thereafter duly and regularly placed in the post-office in Washington, on the 1st of August, to be remailed and sent on in the mail of that day, and that the delay and loss were not occasioned by any error or irregularity in the manner in which it was put up and sent on from Philadelphia, but was occasioned by the want of due and reasonable care and diligence in the performance of the duties of the post-office at Washington, on the first of August; and concluded to the country. *To this replication, the defendant demurred. [*258

All the demurrers were decided by the court below in favor of the plaintiffs.

Upon the trial of the issues of fact, the plaintiffs took seven bills of exception.

1. The first bill of exception stated, that the plaintiffs offered evidence to the jury, that the defendant was deputy-postmaster at the city of Washington, from the 1st of January 1806, until the time of trial, and had under his management and direction, the affairs and business of the post-office at that place; and the plaintiffs produced and read to the jury the printed instructions of the postmaster-general of the United States; and proved by a witness, that those were the instructions delivered to the defendant for his government in the duties of his office as deputy-postmaster in the city of Washington. The plaintiffs further produced to the jury, evidence that they had $2000 in bank-notes, in the hands of Walker & Kennedy, merchants, at Philadelphia, and that that sum of money, in bank-notes, was inclosed in a sealed letter, and directed to the plaintiffs, at Petersburg, in Virginia, the place of their residence, and put into the post-office at Philadelphia, and was by the postmaster at that place forwarded in the mail, addressed to the state of Virginia, on the 31st of July 1806. That it arrived, in due course of post, at the post-office in the city of Washington, under the care and management of the defendant. That it was the duty of the office at Washington, as a distributing office, to open the said mail, so addressed, and to forward to Petersburg, in Virginia, the said letter, according to its address. That the said letter was lost, and never arrived at the post-office in Petersburg, nor came to the hands of the plaintiffs, and that the same was demanded of the defendant, who denied he was liable for it. It was admitted, that the course of conveying the mail from Philadelphia to Petersburg, was as follows: the Virginia mail, tied with a string, and wrapt in papers, was, with many other mails similarly secured, inclosed in a locked portmanteau, and sent by stage to the city of Washington, distant 144 miles. No person or post-office between Philadelphia and Washington was legally authorized

*to open the mail addressed to Virginia ; but the portmanteau was unlocked and opened at the Baltimore post-office, and the various mails were there taken out of the portmanteau, in order to select the Baltimore mail. When the mail arrived at the post-office in Washington, the mail addressed to Virginia was opened in said office, as a distributing office, and the letters addressed to Petersburg assorted, tied and wrapped as aforesaid, and put into a mail addressed to the post-office at Petersburg. The said Petersburg mail, so tied and wrapped, was, with many other mails, put into the portmanteau, which was locked and opened on the route only at Fredericksburg and Richmond. But the said Petersburg mail, wrapped in paper, and tied with a string as aforesaid, though it might properly be taken out of the portmanteau with the other mails at Fredericksburg and Richmond as aforesaid, could not be legally opened at any office between Washington and Petersburg. Whereupon, the plaintiffs' counsel prayed the court to instruct the jury, that if they should find the above facts to be true, the plaintiffs were entitled to recover in this case, on their 2d count, unless the defendant should prove the said letter to have been forwarded from his office, in the time and manner prescribed by law and the said instructions of the postmaster-general ; which opinion the court refused to give.

2. The second bill of exception stated the same facts, and that, thereupon, the plaintiff's counsel prayed the court to instruct the jury, that if they should find those facts to be true, then the plaintiffs were entitled to recover in this case, upon their fourth and fifth counts, unless the defendant should prove the said letter to have been forwarded from his office, in reasonable time, and in the manner prescribed by law and the instructions of the postmaster-general ; which instruction the court refused to give.

3. The third bill of exception stated, that, in addition to the above facts, the plaintiffs offered evidence, under the issues joined on the 6th and 10th pleas, to prove that the letter and bank-notes were lost by the negligence and carelessness of Henry Whetcroft and William Hewitt, sworn clerks and assistants employed by the defendant in his said post-office ; and also certain *260] acts *of omission, undue delay and detention of the said letter and bank-notes by such clerks and assistants of the defendant ; to the competency of which evidence, to support the issues joined on the 6th and 10th pleas on the part of plaintiffs, the defendant objected ; and the court was of opinion, that under those issues, such evidence was incompetent, and refused to suffer the same to be given to the jury under those issues ; and instructed the jury, that the defendant was not liable, under those issues, for any acts or omissions of his said clerks and assistants : to which refusal and opinion, the plaintiffs excepted.

4. The fourth bill of exception stated, that the plaintiffs offered evidence of the facts stated in their 5th and 8th counts, and moved the court to instruct the jury, that if they should believe, from the evidence, that the letter and bank-notes were duly delivered into the defendant's post-office, then it was incumbent on the defendant to prove that the same were duly forwarded. And if the jury should further believe, that the same were not so forwarded, and had become lost, then it was incumbent on the defendant to prove, that the same were not lost by any undue negligence or unreasonable detention of himself, or any person employed by him in his office ; which instruction the court refused to give ; but instructed them, that if the jury should

believe, from the evidence, that the letter and bank-notes were duly delivered into the defendant's office, then it was incumbent on the defendant to prove that the same were duly forwarded ; and if the jury should further believe, that the same were so delivered, and were not so forwarded, and had become lost in consequence thereof ; then it was incumbent on the defendant, to prove that the same were not lost by any undue negligence and unreasonable detention of himself or any other person employed by him in his office. To which refusal, the plaintiffs excepted.

5. The fifth bill of exception stated, in addition to the facts before stated, that the plaintiffs offered in evidence a copy of a post-bill from Philadelphia, of the 31st of July 1806 (showing that a letter whose postage was one dollar and twenty cents, corresponding with the postage upon the letter in question, was charged in the post-bill from Philadelphia to the state of Virginia, *and offered to prove, that the post-bill, of which it was a copy, [*261] was received at the defendant's post-office, with letters in the mail from Philadelphia. And the defendant offered evidence to prove, that it never was the custom, until after the report of the loss of the letter and bank-notes in question, for the actual contents of the mails, sent to the said office for distribution, to be compared with the contents noted in the accompanying post-bills ; except that it was customary to examine the column of paid letters, in order to see whether as many paid letters, and of the same amount of postage, came on in the mail ; that this was done, because the deputy-postmaster had to account to the postmaster-general for all letters sent on from his office and marked "paid ;" whether originally put into his office, or coming there in mails for distribution ; and according to the routine of office, any deficiency, appearing on the arrival of the mail, in the amount of postage marked in his post-bill as "paid," would be chargeable to him ; that in no other respect was any attention paid, or notice taken, whether the actual contents of the mail, as to any letters not marked "paid," corresponded, or not, with the post-bill. That if, by accident, any variance between the post-bill and the actual contents of the mail received for distribution, was discovered, it would never be noted in the office, inasmuch as the printed forms, furnished to the defendant and other deputy-postmasters, from the postmaster-general for the account of mails for distribution, contained no column for noting letters either over-charged, or under-charged, or mis-sent, such as are to be found in the form furnished for account of mails for delivery, and marked No. 1, in the schedule annexed to the instructions of 1804. Whereupon, the plaintiffs prayed the court to instruct the jury, that if they believed, from the evidence, that the copy of the post-bill produced, was a true copy of the post-bill sent on from Philadelphia to the Washington post-office, and that the same was received with letters in the mail from Philadelphia, at the defendant's office, then the jury ought to presume, that the letters accompanying the said post-bill corresponded therewith, unless the defendant should prove the contrary ; which instruction the court refused to give as prayed ; but instructed the jury, that it was competent for them, from *those circumstances, so to presume ; and [*262] to decide upon the force of such presumption, from all the circumstances proved in the case ; to which refusal and instruction, the plaintiffs excepted.

6. The sixth exception was to the refusal of the court to suffer a witness

to be asked, whether the printed general instructions from the postmaster-general, given to the deputy-postmasters in 1804, superseded those before given to the postmaster in Philadelphia, in 1800; both instructions having been produced and read in evidence to the jury.

7. The seventh bill of exception stated that the plaintiffs offered evidence to "prove the several allegations in the said declaration; and further offered in evidence the several printed instructions of the postmaster-general (thereto annexed), and also the depositions (thereto annexed, and which tended to prove the delivery of the letter and bank-notes into the post-office at Philadelphia, and their arrival at the post-office in Washington). And the defendant offered evidence to prove that Petersburg, ever since the 1st of November 1804, was a distributing post-office, as established by the said instructions; that after the said instructions, it was the practice of post-offices (except that of Philadelphia) in which letters were deposited for Petersburg, to put the same up in a separate mail, addressed to Petersburg, and not in the Virginia state mail. That the Philadelphia post office, since the said 1st of August 1806, and not before, had adopted the same practice. That the Virginia state mail, above mentioned, contained the letters directed to the several post-offices in Virginia, except Norfolk and Richmond, and also the letters directed to the states of Ohio and Kentucky; and that before the letters for Petersburg contained in the said mail could be distributed and remailed, it was necessary to assort and distribute the whole contents of the said mail. The plaintiffs then moved the court to instruct the jury, that if they should believe, from the evidence, that the letter and the bank-notes in the declaration mentioned, were put, at the post-office in Philadelphia, in a bundle superscribed 'Virginia state mails,' and that it *263] *had been, since the year 1800, and was the practice, in the said Philadelphia post-office, during the months of July and August 1806, to send letters for delivery at Petersburg, Virginia, in that manner; and that all letters in the Virginia state mail, for Petersburg, Virginia, brought to the defendant's office, had been usually remailed, distributed, and sent on from the post-office kept by the defendant, to Petersburg aforesaid; and should be further of opinion, that the said letter, containing the said bank-notes, was delivered in the said bundle superscribed 'Virginia state mail,' on the first day of August 1806, in the said office of the defendant, and in due time to be remailed, distributed and sent on by the defendant, on the first day of August 1806, from his aforesaid office, in a bundle addressed to Petersburg, Virginia, then it was the duty of the said defendant to have remailed, distributed and sent on the said letter by the mail which left the Washington post-office on the said first day of August 1806; and if they further believed, that this was not so done, or caused to be done, by the said defendant, that it was incumbent on the defendant to make out a just, reasonable and sufficient excuse for the omission:" which instruction the court refused to give as prayed, and the plaintiffs excepted.

The act of congress of March 2d, 1799 (1 U. S. Stat. 733), establishes a general post-office at the seat of government of the United States, under the direction of a postmaster-general; and enacts, that he shall establish post-offices, and appoint postmasters at all such places as shall appear to him expedient, on the post-roads that are or may be established by law. And that he shall give the postmasters instructions relative to their duty;

and shall obtain from them their accounts and vouchers, &c., once in three months, &c. That all persons employed in the care of the mail shall take an oath faithfully to perform the duties required of them, and abstain from everything forbidden by the laws in relation to the establishment of the post-office and post-roads within the United States. That every postmaster shall keep an office in which one or more persons shall attend at such hours as the postmaster-general shall direct, for the purpose of performing the duties thereof, and all letters brought to any post-office half *an [*264 hour before the time of making up the mail of such office, shall be forwarded therein ; except at such post-offices where, in the opinion of the postmaster-general, it requires more time for making up the mail, and which he shall accordingly prescribe ; but this shall in no case exceed one hour. That if any person employed in any of the departments of the general post-office shall secrete, embezzle or destroy any letter with which he shall be entrusted, or which shall have come to his possession, and intended to be conveyed by post, containing any bank-note, &c., he shall, on conviction, be publicly whipped, not exceeding forty stripes, and be imprisoned not exceeding ten years. That the postmaster-general be authorized to allow to the postmasters, respectively, such commission on the moneys arising from the postages, or shall be adequate to their respective services and expenses ; not exceeding, &c.

The instructions of the postmaster-general, issued in pursuance of this act, to the postmasters, in 1804, required that every person employed in a post-office as assistant or clerk should take the oath, and send a certificate thereof to the general post-office. That every postmaster should be responsible "for the care and fidelity of every person so employed." That "the postmasters at distributing offices are to distribute and remail all letters and packages, before the departure of the mail, and on no account delay them a single post."

The verdict and judgment of the court below being for the defendant, the plaintiffs brought their writ of error.

F. S. Key and *C. Lee*, for the plaintiffs in error.— The 3d bill of exception brings into view the question, whether the negligence of the defendant's clerks can be given in evidence, to prove an allegation of negligence of the defendant himself ; which necessarily involves the question whether the defendant is liable for the negligence of his clerks. This bill of exception *arose upon the issues joined on the 6th and 10th pleas. The 6th [*265 plea was, that the letter was not lost by the negligence or misconduct of the defendant in his office ; and the 10th was, that the defendant had not negligently or improperly delayed or detained the letter in the office.

The law in respect to the liability of the postmaster-general is admitted to be the same here as it is stated in *Lord le Despencer's Case* (Cowp. 754), to be in England. But the opinion of Lord Mansfield, in that case, clearly shows that the action lies in the present case. In the case of *Brucker* v. *Fromont*, 6 T. R. 659, it is decided, that a declaration which charges the defendant with negligence, is supported by proof of the negligence of his servant. Where the negligence is in a post-office, it is scarcely possible, in any case, for a plaintiff to know exactly to which of the persons, employed in the office, the negligence is to be attributed. If, as the court below

decided, the defendant is liable for the negligence of his clerks, it seems to be immaterial, whether the declaration state the neglect to be on the part of the defendant or of his clerks ; or state it in the alternative. A collector of the revenue is liable for his deputies, although they are sworn officers ; yet the secretary of the treasury is not liable for the collectors. So, the marshal is liable for his deputies, who are also sworn officers, and who give bond for the faithful discharge of their duty. Why should there be a difference in the case of a postmaster ?

The 4th exception is, that the court refused to instruct the jury, that proof of negligence and loss raised a presumption that the loss was a consequence of the negligence, unless the contrary be shown. Or, in other words, the court below decided, that proof of negligence and loss did not throw the burden of proof on the defendant, to show that the loss was not a consequence of the negligence. To oblige the plaintiffs to prove, that the loss was a consequence of that negligence, was to impose upon them an impossibility, in the nature of things.

The fifth exception is to the refusal of the court to instruct the jury, that *266] they ought to infer that the contents *of the mail from Philadelphia corresponded with the post-bill, when it was received at the Washington office, unless the defendant should prove the contrary. What a jury may infer from facts proved, is a question of law for the court to decide. And what a jury may thus infer, they are bound in law to infer, unless the contrary be proved. The court, therefore, ought not to have left the matter entirely to the jury, but to have given the instruction as prayed. Presumptions are inferences of law. Thus, from long possession, the court will instruct the jury that they ought to presume a deed. So, from evidence of payment of the last ten years' rent, the jury ought to presume all the former rents were paid. So, in trover, from evidence of a demand and refusal, the jury ought to presume a conversion. So, if stolen goods are found in possession of a man, the jury ought to presume that he stole them, unless the contrary be shown.

The 7th exception raises the question whether the defendant was not bound to remail and send on the letter, according to law, and the instructions of the postmaster-general, although the mail arrived at his office in an irregular manner Upon this point, the 5th section of the post-office law (1 U. S. Stat. 734), and the instructions, are decisive. These instructions being given in conformity with the law, become part thereof, and are equally binding.

Jones and *Morsell*, contrà.—All the questions in this case are resolved into one, viz : On which side was the burden of proof, in certain stages of the trial. All the exceptions are grounded upon the idea, that it was only necessary for the plaintiffs to show negligence in the office, and a loss of the letter, without showing that the loss was a consequence of the negligence.

We admit, that the defendant is liable for any loss happening by his own *267] negligence ; but we deny, that he *is liable for that of his clerks. The act of congress requires that the defendant should employ clerks, and that they should be sworn, and imposes specific penalties upon each person employed in the office for his own misconduct. They are all public officers, and liable to be charged *ex delicto officii*. The postmaster is only

bound to use due care and circumspection in selecting proper clerks. He is not like a common carrier, who receives hire in proportion to the risk, and the value of the article. He has only a compensation for his trouble in the office. The liability of a master arises from his supposed assent, arising from the fact that the servant is employed for the benefit of the master. But here, the clerk does not act for the postmaster, but for the public. The servant must be employed in the business of the master and for his benefit, or the latter will not be liable.

Johnson, J.—It has never been attempted to assimilate him to a common carrier. He has nothing to do with the carrying of the mail.

Jones.—It is decided, in England, that the postmaster-general, in England, is not liable for his deputies. *Lane* v. *Cotton*, 1 Ld. Raym. 647; 1 Salk. 17. The instructions from our postmaster-general to the postmasters, that they should be liable for their deputies or clerks, &c., only means that they shall be liable in accounting with him officially for the revenue. He could not make them liable to individuals.

In the case of *Rowning* v. *Goodchild*, 2 W. Bl. 906; 3 Wils. 443, the principal question was, whether the postmaster was bound to send out the letters to the inhabitants; but a question incidentally arose, whether the action, which was brought against the deputy-postmaster, should not have been brought against the postmaster-general. The court, however, was of opinion, that in all cases, deputies are answerable for their own personal misfeasance, such as detaining the letter in question. And in that case, the deputies were made, by act of parliament, *ex necessitate rei*, substantive officers, and their duty pointed out as such.

But if the defendant was liable for the default of his *clerks, yet [*268] the declaration ought to have shown, whether the defendant was called upon to account for his own negligence, or that of his clerks. The case of *Brucker* v. *Fromont*, 6 T. R. 659, was reluctantly decided upon the authority of *Turberville* v. *Stampe*, 1 Ld. Raym. 264; but which does not support the case of *Brucker* v. *Fromont*, which is evidently against principle; and at all events, is confined to the case of master and servant. In the following cases, a discrimination is made in the declaration between the act of the master and that of his servants. *Turner* v. *Hawkins*, 1 Bos. & Pul. 472; *Ogle* v. *Barnes*, 8 T. R. 188; *Savignac* v. *Roome*, 6 Ibid. 125.

Presumptions arising from circumstantial evidence are always to be left to the jury. Such a positive inference as will justify the court in directing the jury, that they ought to make it, can arise only from some solemn act. In the present case, there was other evidence, showing that no such inference could be drawn as the plaintiffs had supposed; and therefore, the court did right to leave the whole to the jury.

The 7th exception required the court to say, that the defendant was bound to send on the letter, on the 1st of August, or to show a reasonable excuse for not sending it on, although the mail was made up in an irregular manner in Philadelphia. The idea of reasonable diligence is excluded; and it supposes the defendant bound, at all events, to send the letter on by that mail, or to give a sufficient excuse for not doing so, although he sent it by the next mail, and although the loss was not the consequence of not sending it on the 1st of August.

The defendant was not bound to show that he sent it on ; it would be impossible, in the course of the business of the office, to prove the sending on of every particular letter. Sworn officers are presumed to have done their duty, until the contrary is proved. *Williams* v. *East India Company*, 3 East 192.

March 14th, 1812. All the judges being present, JOHNSON, J., delivered *269] the opinion of the court, as follows :—*It is necessary to dissipate the cloud of pleading in which this case is enveloped, in order to form a distinct idea of the questions intended to be brought to the view of the court below. The object is to charge the postmaster with the loss of money sent by mail; and the points, which the exceptions are intended to make, are, how far he is liable for his own act or neglect? how far for the acts or neglect of his assistants? and what evidence shall be sufficient to support the plaintiff's action ? But unfortunately, as not unfrequently happens, in this complex and injudicious mode of conducting a suit, with all the clerical skill displayed by counsel in multiplying their counts, and pointing their bills of exception, the principal questions are really, at last, not brought to the view of this court.

On the first and second exception, it is unnecessary to make any remark, as they are admitted to apply to counts which the evidence did not support, and have been, in fact, abandoned.

The third exception is intended to raise the question, how far a postmaster is liable for the neglect of his assistants ; but connected with the pleadings, it presents another and a very different question, to wit, whether, when the issue is taken upon the neglect of the postmaster himself, it is competent to give in evidence, neglect in the assistant, acting under him? Now, the distinction between the relation of a postmaster to his sworn assistant, acting under him, and between master and servant, generally, has long been settled ; and although the latter relation might sanction the admission of such evidence, we are unanimously of opinion, that, if it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case ; and his liability then will only result from his own neglect, in not properly superintending the discharge of their duties in his office.

In the fourth exception, the only difference between the opinion prayed for and that given, is, that the court require the loss to be a consequence of *270] not forwarding *the letter described in the declaration. Now, in justice to the correctness of the plaintiff's counsel, this court hope that they meant nothing more than what the court conceded ; for, certainly, if the loss was not a consequence of the state of things made out in the evidence, they were not entitled to recover.

On the fifth exception, it is only necessary to remark, that if the court below erred at all, it was in conceding too much to the prayer of the plaintiff. An entry on the post-bill is by no means conclusive evidence of the transmission of a letter, for, it may still never have been put into the mail, or may have been stolen in its passage.

The sixth exception is equally untenable. The instructions of the postmaster-general spoke for themselves. If the one superseded or rescinded the other, the evidence was to be sought for by comparing them together.

And the seventh exception affords the court an opportunity to remark, how much more conducive to the purposes of justice it would be, to substitute special verdicts, and demurrers to evidence, for the tedious and embarrassing practice of the court from which this case comes up. It is a fact, that this bill of exceptions claims a right of recovery, without stating any loss or damage whatever. The opinion prayed for was, that if the jury believed the various facts therein detailed, then it is incumbent on the defendant to make out a just, reasonable and sufficient excuse for omitting to forward the letter described. But, unless an individual has sustained some loss or damage by an omission of that kind, why should the postmaster be held to make out a defence? Each bill of exceptions must be considered as presenting a distinct, substantive case; and it is on the evidence stated in itself alone, that the court is to decide. We cannot go beyond it, and collect other facts which must have been in the mind of the party, and the insertion of which in this bill of exceptions could alone have sanctioned the opinion as prayed for. Upon the whole, the judgment below must be affirmed.

Judgment affirmed.

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*HEZEKIAH WOOD *v.* JOHN DAVIS and others. (*a*) [*271

Conclusiveness of judgment.

A verdict and judgment that a mother was born free, is not conclusive evidence of the freedom of her children; unless between the same parties or privies.[1]

ERROR to the Circuit Court for the district of Columbia, sitting at Washington.

The defendants in error, John Davis and others, were children of Susan Davis, a mulatto woman, who had obtained a judgment for her freedom, in a suit which she had brought against Caleb Swann, to whom she had been sold by Wood, the plaintiff in error. The petition of the children stated that their mother, Susan Davis, had obtained a judgment for her freedom, upon the ground, that she was born free. The issue was joined upon the question, whether the petitioners were entitled to their freedom.

Upon the trial of this issue, in the court below, the plaintiff in error, Wood, tendered a bill of exceptions, which stated, that it was admitted, that the petitioners were the children of Susan Davis; and they produced the record of the judgment in favor of their mother, Susan Davis, against Caleb Swann (in which case her petition stated that she was born free, being descended from a white woman; and the issue joined was upon the question whether she was free or a slave); and it was admitted, that Susan Davis had been sold by Wood to Swann, before the judgment; whereupon, the petitioners, by their counsel, prayed the court to direct the jury, that the record aforesaid and the matters so admitted were conclusive evidence for the petitioners in this cause; and the court directed the jury as prayed: to which direction, the defendant, Wood, excepted.

(*a*) March 9th, 1812. Present, all the judges.

[1] This overrules Davis *v.* Forrest, 2 Cr. C. C. 23. But a judgment in favor of the freedom of the mother, is conclusive in favor of her subsequent issue, as against the same claimant. Alexander *v.* Stokely, 7 S. & R. 299.