*William Robinson, Jr., Plaintiff in error, *v.* William Noble's Administrators.

Damages.

N. stipulated in certain articles of agreement, to transport and deliver, by the steamboat Paragon, to R., a certain quantity of subsistence stores, supposed to amount to $3700 barrels, for the use of the United States; in consideration whereof, R. agreed to pay to N., on the delivery of the stores at St. Louis, at a certain rate per barrel, one-half in specie funds, or their equivalent, and the other half to be paid in Cincinnati, in the paper of banks current there, at the period of the delivery of the stores at St. Louis. Under the agreement was the following memorandum: "It is understood, that the payment to be made in Cincinnati, is to be in the paper of the Miami Exporting Company or its equivalent."

The court erred in refusing to instruct the jury, that the plaintiffs could only recover the stipulated price for the freight actually transported, and that they were entitled to no more than the specie value of the notes of the Miami Exporting Company Bank, at the time the payment should have been made at Cincinnati; the specie value of the notes, at the time they should have been paid, is the rule by which such damages are to be estimated.[1]

The plaintiff, the owner of the steamboat, was not entitled under the contract to recover in damages more than the stipulated price for the freight actually transported; if R. had bound himself to deliver a certain number of barrels, and had failed to do so, N. would have been entitled to damages for such failure; but a fair construction of the contract imposed no such obligation on R.

There is no pretence, that R. did not deliver the whole amount of freight in his possession, at the places designated in the contract; in this respect, as well as in every other, in regard to the contract, he seems to have acted in good faith; and he was unable to deliver the number of barrels supposed, either through the loss stated, or an erroneous estimate of the quantity. But to exonerate R. from damages on this ground, it is enough to know, that he did not bind himself to deliver any specific amount of freight; the probable amount is stated or supposed, in the agreement, but there is no undertaking as to the quantity.

Error to the District Court for the Western District of Pennsylvania. In the district court, the administrators of William Noble, the defendants in error, instituted an action of covenant against the plaintiff in error, upon certain articles of agreement in the following terms:

"Article of agreement entered into this 24th day of February, between
*182] William Noble, of the city of Cincinnati, of the *one part, and William Robinson, Jun., of the city of Pittsburgh, of the other part, witnesseth: That the said Noble hereby agrees, stipulates and binds himself, to and with the said Robinson, to transport and deliver to said Robinson, in the steamboat Paragon, a certain quantity of subsistence stores, for the use of the United States army, supposed to amount to three thousand seven hundred barrels, estimating one-half of the quantity of stores as flour barrels, and the other half as whiskey or pork barrels; the said Robinson delivering the one-half of the same between the 1st and 10th March, to said Noble, at Cincinnati, and the other half by the 30th of March, at the usual place of deposit, near the mouth of the Ohio; the delivery of which stores is to be made and completed in the order in which they are received in the town of St. Louis aforesaid, on or before the 15th day of April next ensuing. In consideration whereof, the said Robinson hereby agrees and binds himself to pay to the said Noble, one dollar and fifty cents per barrel, one-half

[1] A promise made, during the rebellion, to pay in confederate notes, in consideration of the receipt of such notes, and of drafts payable by them, was held not to be an illegal contract. Planters' Bank *v.* Union Bank, 16 Wall. 483. And see Atlanta, Tennessee and Ohio Railroad Co. *v.* Bank of Columbia, 19 Id. 548.

whereof is to be paid on the delivery of said stores in St. Louis, in specie funds or their equivalent, and the other half, in Cincinnati, in the paper of banks current therein, at the period of the delivery of the said stores at St. Louis."

The declaration averred, that in the month of March 1821, he, the said Noble, received on board the steamboat Paragon, all the stores and lading which were offered by Robinson, both at the city of Cincinnati, and the usual place of deposit near the mouth of the Ohio river, and conveyed all the stores delivered on board the said boat, according to the stipulations in the articles of agreement, to the town of St. Louis, and delivered those to Robinson in person; and also averred performance of all the agreements, covenants and stipulations in the articles of agreement. The declaration then proceeded to assign as breaches of the articles of agreement, that Robinson did not deliver one-half of the said amount of 3700 barrels of army subsistence stores, or any other equivalent freight, to Noble, or on board the said steamboat Paragon, at Cincinnati, between the 1st and 10th of March, in the year 1821, although Noble and the boat were, during that time, ready and waiting to receive the same; and Robinson did not, on or before the 30th day of March, in the year last aforesaid, nor afterwards, deliver to Noble, at the usual place of deposit, *near the mouth of the Ohio river, the other half of the said 3700 barrels of army subsistence [*183 stores, or on board of said boat, at said last-mentioned place, although the boat was there, ready and waiting to receive the same, after the said 30th of March, in the year last aforesaid; and although Noble had frequently, before and after that time, requested the said Robinson to furnish the stores and freight stipulated for as aforesaid; and further, that Robinson had not paid to the said Noble, nor to his use, the said sum of one dollar and fifty cents per barrel on the delivery of such amount of said stores as were actually carried in said steamboat and delivered, in all respects, in accordance with the tenor of the articles of agreement, at St. Louis, in specie or otherwise; nor had Robinson paid to Noble, in any money, by the barrel, according to the price stipulated as aforesaid, or otherwise, for such amount of said army subsistence stores as Robinson was, by the tenor of said articles of agreement, bound to furnish for freights to St. Louis, as above recited, but on the contrary, had wholly refused to pay the amount stipulated by him to be paid as aforesaid, in the manner or at the times above mentioned, or at any other times, or in any other manner. And Robinson had further neglected and omitted to perform, in manner by him agreed as above mentioned, the stipulations and covenants made as aforesaid, but the same had broken and not kept, contrary to the tenor and spirit of said articles of agreement; whereby the said Noble not only was deprived of the amount agreed to be paid by Robinson in manner aforesaid, but also of other great gains and profit which might and would otherwise have arisen and accrued to him, during the time of detention of steamboat, caused by the non-performance, by Robinson, of his agreements aforesaid.

On the trial of the cause, the counsel for the defendant prayed the court to charge the jury:

1. That it is an inflexible rule in the construction of contracts, so to interpret them as to effectuate the intention of the parties. That it is within the province of the jury to determine what the intention was, at the time of

the execution of the instrument, according to the rules of construction the court may advise.

*184] 2. That the contract upon which the present action is *instituted, is not a contract of affreightment by charter-party. There is no hiring of the ship; it is a contract for the conveyance of merchandise in a general ship. That the plaintiff cannot recover damages according to the number of tons the ship was capable of containing; but that his damages must be limited, according to the terms of the contract, to the actual freight earned upon the cargo delivered.

3. That the words, the spirit and the meaning of the contract preclude the plaintiff from recovering from the defendant more than the actual value of the Miami Exporting Company paper, at the time it became due, according to the scale of depreciation.

4. That under this contract, there was no legal obligation upon the defendant to tender to plaintiff the amount due him, in the depreciated currency of the Miami Exporting Company, in order to save himself from the payment of the numerical value of the notes, inasmuch as the defendant reserved to himself the right either to pay in the depreciated currency, or in its equivalent.

5. That the plaintiff cannot recover, in the present action at law, the freight for goods actually transported, and damages for the breach of the contract for non-delivery of all the stores defendant contracted to deliver for transportation.

The court charged the jury upon these points:

1. It is certainly true, that the intention of the parties to a contract must govern its construction, provided that no violence is done to the rules of law, in seeking to effectuate such intention, and it is the province of the jury, to judge, from the language of the contract, what that intention is, subject to the opinion of the court as to its legal effect.

2. The contract which is the subject of the present suit, is not a contract of affreightment by charter-party; and, in strictness, the plaintiff cannot recover damages according to the number of tons the boat was capable of containing. The rule of law, in cases where there has been a failure to furnish the stipulated freight, and there exists no charter-party, is, for the jury to take all circumstances into consideration, and to make an allowance for any freight which the master had it in his power to transport, in addition to that which was furnished. If the lading should not be complete, without

*185] the default of the *master, the rule is to estimate the freight by means of an average, so as to take neither the greatest possible freight, nor the least, and such average is the proper measure of damages.

3 and 4. The actual specie value of the paper of the Miami Exporting Company, at the time it became due by the contract, is not the true measure of damages. It was made, and to be executed in the state of Ohio, and the laws of that state must, therefore, govern this case. The defendant having failed to tender to the plaintiff the paper of the Miami Exporting Company, or its equivalent, at the time mentioned in the contract, and the plaintiff having performed all he had covenanted to perform, is, by the laws of Ohio, entitled, to recover the numerical value of the paper of the Miami Exporting Company, in specie, with interest.

5. In answer to the last point, the court said, that the plaintiffs claim,

not only for the freight actually transported and delivered, but damages for failing to furnish as much freight as the article stipulates for; if the testimony supports their claim, they may, in the present action, recover damages for such failure.

Whereupon, the counsel for the defendant excepted to the opinion of the court upon the several points aforesaid, and requested the court to seal a bill of exceptions, which was accordingly done. The jury rendered their verdict, finding in favor of the plaintiff the sum of $3391.14; upon which verdict the court entered judgment; and the defendant prosecuted this writ of error.

The case was submitted to the court, on printed arguments, by *Watts*, for the plaintiff in error; and by *Fetterman* and *Colwell*, for the defendants.

Watts, for the plaintiffs in error.—Noble's administrators were plaintiffs in the inferior court, in an action of covenant, upon a certain agreement, under the seals of the parties. From the face of this paper, as well as from evidence extrinsic, *it appears, that Robinson was a contractor with the United States, for the supply of subsistence stores for their troops [*186 stationed at a north-west post on the Mississippi river; and that Noble was a freighter, who navigated the rivers Ohio and Mississippi in steam and flat boats. As one-half of the stores were to be delivered by Robinson for transportation at Cincinnati, and the other half at the mouth of the Ohio—St. Louis being the destination; there appears to be two subjects of contemplation presented to the mind of said Robinson, at the time he executed the agreement: 1. The usage prevailing between contractors of the United States and the government; the latter reserving the right to restrict the quantity of supplies, by giving to the contractors a reasonable notice of the same. 2. The loss arising from the perils of the river, in navigating it, at that early day, either in steam or keel boats. Hence, the caution observed by said Robinson in the introduction of the terms of his agreement. The stipulation is, on the part of Noble, to carry subsistence stores, *supposed* to amount to *about* 3700 barrels, leaving the covenant, on the part of Robinson, implied, rather than clearly expressed, to deliver any number of barrels for shipment; and that number entirely contingent upon his interests, controlled, as they were liable to be, by the United States, and the dangers of the river.

The testimony of Richard Miller proves, that one-half of the stores was delivered at Cincinnati, and the reason why the other half (two-thirds or three-fourths being delivered) was not ready at the mouth of the Ohio, was the loss of a flat-boat laden with them, and under the direction of said Noble. Notwithstanding the misfortune of Robinson, it is seriously contended by the learned counsel of Noble, that, under the terms of his agreement, Robinson will be obliged to pay for the freight of goods that were sunk on their passage to the place of delivery, and never carried by Noble. But the learned judge, in his charge to the jury, stretched the point further and wider than the conscience of the counsel would allow them to go. For, although he admits there was no "charter-party," still he asserts the irreconcilable doctrine, that *the rule of damages, where there has been [*187 an infraction of the agreement, would be to find an average number between what was actually furnished and what the boat was capable of

containing ; so that, if the capacity of the "Paragon" exceeded 6000 barrels, the average number, according to the charge of the court, and which governed the jury, would be far beyond even the 3700 barrels. By referring to the account of Robinson, the court will see how far a blind chance has carried her votaries beyond the limits of justice.

The second reason assigned for the reversal of the judgment arises out of the misconstruction of the court of that part of the agreement relating to the payment of money. It is proved, by the deposition of Spencer, that the current value of the bills of the Miami Exporting Company paper, on the 1st April 1821, was 66⅔ cents in specie. Cincinnati is about 800 miles from St. Louis, and the mouth of the Ohio not more than one-fourth the distance ; hence the stipulation, on the part of Robinson, to pay one dollar and fifty cents per barrel for transportation from Cincinnati, and the equivalent of one dollar and fifty cents, in the depreciated currency, being one dollar, from the mouth of the Ohio to St. Louis. This intention of the parties is the more apparent, by compairing the different clauses of the agreement. In the first, Robinson contracts to pay in "specie funds ;" and in the second, "in the paper of banks current at Cincinnati, at the period of delivery of said stores at St. Louis ;" and, to put the intention beyond controversy, it is further added, "it is understood, that the payment to be made in Cincinnati is to be in the paper of the Miami Exporting Company, or its equivalent." The term "equivalent" (being compounded of *æquus* and *valeo*), both in its original and ordinary signification, means what this depreciated currency was worth, equal in value ; and cannot be restrained to what it is contended it is, to bank-notes, of numercial value. In the general derangement of currency of 1821, Mr. Robinson clearly reserved
*188] the right to pay either in the paper of the *Miami Exporting Company, in other depreciated paper, or the value of said Miami Exporting Company's paper, in April 1821, in specie.

The case relied upon by the learned judge who ruled this cause will be found in *Morris* v. *Edwards*, 1 Ohio 189. And although dissenting from the opinion of Judge Hitchcock, and yielding to that of Judge Burnet, it is considered, that the opinion of Judge Hitchcock is irreconcilable with that of the district judge in the present cause. It is based upon the principle, that the amount of the indebtedness of the maker of the note was liquidated and fixed at $2000 ; and that, if it had been intended as a promise to pay numerically, or the value of the currency, it ought so to have been expressed ; and the judge infers, from the absence of the expression, that it was not so intended. In the case of *Morris* v. *Edwards*, the evidence of depreciation was excluded from the jury ; in this case, it was admitted without objection.

Differing as that case does essentially from the present, the attention of the court is particularly invited to a review of it. To sustain the position that depreciated bills are not money, not a legal tender, and not negotiable, but a mere commodity, the attention of the court is requested to the cases of *McCormick* v. *Trotter*, 10 S. & R. 94 ; 8 Mass. 260 ; 9 Johns. 120 ; 3 Kent's Com. 76 ; 1 Dall. 124 ; 2 Ibid. 123, 173 ; 1 Bibb 461. It is certainly clear, that when a man agrees to pay an ascertained sum of money, in commodities, as in the case in 1 W. C. C. 376, where there was an agreement to pay 7820 livres, in sugar ; or the bureau case in 2 P. & W. 63, and fails to

tender the commodities, on the day they become due, that the debtor can recover the amount in money, as in the first case, and the price of the bureaus, as in the second. But this does not disturb the inviolable principle. When there is a contract to pay in specific articles, the rule of construction is, to estimate the damages according to the value of the articles, at the time of the infraction of the agreement. See 2 Mason 89 ; 3 Wheat. 200 ; *6 Ibid. 109 ; Pet. C. C. 85 ; 3 Cranch 298 ; 11 S. & R. 445. But by the [*189 positive stipulation of the parties to the present case, the paper of the Miami Exporting Company was rendered a commodity, and Robinson agreed to pay in money, and Noble to receive in money, what it was worth, at a certain date ; and all the circumstances of the transaction, the words and spirit of the covenant, conduce to this construction.

The learned judge, therefore, has erred in his charge to the jury, upon the several points presented ; and injustice has been done to the plaintiff in error.

Fetterman and *Colwell*, for the defendant in error, contended :—By the terms of the contract, Robinson was bound to furnish Noble, the owner and master of the steamboat Paragon, with about 3700 barrels of freight, to be transported to St. Louis ; one-half to be furnished at Cincinnati, and the other half at the mouth of the Ohio, for the transportation of which was to be paid the sum of one dollar and fifty cents per barrel, freight. It appeared in evidence, that he furnished for the long voyage, the full half of 3700 barrels, and prevented Noble from taking other freight ; but that for the short and profitable voyage, he furnished not quite two-thirds of a load. And in the declaration, it is averred, as a breach of the agreement on the part of Robinson, that he did not furnish the stipulated number of barrels, freight. In consequence of which, Noble sought to recover damages.

It is urged, that, by the true effect of the agreement, Robinson is not so discharged, and that he was bound to furnish the 3700 barrels, subject only to such deduction as may be reasonable, under the qualification of the terms connected with the number 3700, keeping in view the circumstances of the case. It is plain, that the owner of a boat, entering into such a contract, would be governed in his arrangements, and in fixing his terms, by the quantity of freight he has to carry. The testimony shows, that the amount agreed for, would make *about two loads for the Paragon. The [*190 voyage was specially undertaken for Robinson ; and doubtless, the rate of the freight was regulated by its length, the time it would occupy and the amount to be furnished. The boat might make money by carrying two full loads at one dollar and fifty cents per barrel, and lose money by carrying a load and a half at the same price. When Robinson agreed to furnish "stores, supposed to amount to about 3700 barrels," how was he understood by Noble? Did either of them suppose, that this stipulation would be fulfilled by a delivery of 3100? Surely, these qualifying terms have some reasonable limitation. When we say, about 3700, we surely mean more than 3000, else why descend to hundreds? Some degree of certainty in hundreds, above three thousand, is clearly intended. Does not the common and plain intent of the language show, that the parties meant some number between 3600, and 3800? As hundreds is the lowest denomination to which the parties have descended, the range of the qualification must be

kept within one hundred of the number named. Here, then, is the case of a plain agreement to furnish at least 3600 barrels of freight, and to pay for the same as further agreed. It matters not, in the view of the defendant in error, whether this is a case of a charter-party, or the case of goods carried in a general ship ; the construction of the agreement must be the same, either way. In relation to this point, our claim arises in the failure of Robinson to furnish the freight agreed upon, and is, therefore, a claim upon dead freight. The agreement, when understood, constitutes the law of this case, and there can be no rule in relation to charter-parties or freight in general ships, affecting its construction, or the rights of the injured party, in reference to the question before the court.

It is objected, that the judged erred in laying down the rule of damages on this point to the jury. It is believed, that no fairer, nor more honest, rule can be found, than the one adopted by him, nor does it militate with any decision. The owner of the Paragon is prevented taking more freight, *by the conduct of Robinson, for the long voyage and the short voy- *191] age ; the owner of the Paragon performed his part of the contract. He transports a full load the long voyage ; he gets but half a load the short one, and that, to him, the voyage intended to be profitable. The judge is correct in saying, that Robinson, when there had been a failure on his part to furnish the amount of freight stipulated, should pay for any freight that might have been transported, and which was not transported, owing to his interference or default. Can there be a fairer rule on this subject, than the average one as laid down by the judge ?

It is believed, that the rule recognised in Story's Abbott, last edition, pages 197–200, and the cases there referred to, fully establish the rule laid down by the learned judge to be the law. See also *Penoyer* v. *Hallett*, 15 Johns. 332. It is also presumed, that the same answer may be given to the fourth assignment of error, which is nothing more than a consequence from the first. Abbot on Shipping 278, where the very rule of the court below is laid down distinctly ; Holt on Shipping 350 ; 3 Chit. Com. Law 399, 407–8 ; Beawes 190 ; Lawes on Chart. Part. 117 ; *Klaine* v. *Catara*, 2 Gallis. 73 ; *Edwin* v. *East India Co.*, 2 Vern. 212.

2. It is assigned for error, that the court were wrong in charging the jury, that Robinson having failed to tender to the plaintiff the paper of the Miami Exporting Company, or its equivalent, at the time it was due, is obliged to pay the numerical value of the paper with interest. It appears from the evidence, that at the time Robinson was to have paid in paper of the Miami Exporting Company, or its equivalent, such paper was considerably under par, and that Noble was an indorser on, and liable for a considerable amount to the Miami Exporting Company. It would then have suited him as well as cash. Robinson, however, does not pay, when the agreed time arrived, and never has paid, even until this day. And now, after this great delay, he comes forward, and asks to be released from a breach of his contract. This is the case of a contract made in the state of Ohio, as the money is to be paid at Cincinnati. *The contract, then, *192] between these parties, must be governed by the law of the state of Ohio on the subject. *Van Reimsdyke* v. *Kane*, 1 Gallis. 271 ; *Camfranque* v. *Burnell*, 1 W. C. C. 340 ; *Golden* v. *Prince*, 3 Ibid. 313 ; *Green* v *Sarmi-*

ento, Pet. C. C. 74; 3 Wheat. 101, 146; *Cox* v. *United States*, 6 Pet. 172; *Boyle* v. *Zacharie*, 6 Ibid. 635; which cases settle the point.

It is apprehended, then, that in Ohio, the question has been decided, both at law and equity. The case of *Edwards* v. *Morris*, 1 Ohio 524, was a bill in chancery, filed by the complainant, alleging, that at the time he contracted to pay for certain land in current bank-notes of the city of Cincinnati, his agreement was, as he supposed, only to pay in paper of the Miami Exporting Company, which was thirty-three per cent. under par, and praying for relief, &c., and that he only may be compelled to pay the real value of that paper. And the case appears, by the report, to have been fully argued, and the opinion delivered by Judge HITCHCOCK, who says: The prayer of the bill, in this case, is, to enjoin a judgment at law, rendered at the last term of this court, and also to procure a rescission of a contract. Two reasons are assigned why the court should interfere. 1st. A mistake in the terms of the note upon which the judgment was rendered. 2d. A doubt as to the title to the land conveyed by the defendant to the complainant, which land was the consideration of the note. The facts set forth in the bill are admitted by the demurrer, and the question to be determined is, whether there is sufficient matter to justify the interference of a court of chancery. It is the peculiar province of chancery, to relieve against fraud, mistake or accident. But how far parol testimony can be admitted, to prove mistake in a written instrument, has been matter of such altercation and doubt. Mistakes in matter of fact, it seems, may be rectified; and the opinion of the court, in the case of *Hunt* v. *Rousmanier's Administrators*, 8 Wheat. 174, goes far to establish the doctrine, that where parties, *through a mistake and ignorance of the law, execute a writing which does not carry into [*193 effect their contract and intention, the true contract and intention may be enforced in chancery. In the case before the court, the alleged mistake consists in this; the purchase-money, which was the consideration for which the note was given, was to have been paid in the notes of the Miami Exporting Company. The note was to have been made thus payable, whereas, in fact, it was made payable in "current bank-notes of the city of Cincinnati." The complainant understood, that he was to pay in the numerical value of the notes. If, in consequence of this mistake, the complainant has sustained an injury, he ought to be relieved. It is an invariable rule in chancery, that he who seeks equity, must do equity. Suppose, the notes referred to had been made payable in the notes of the Miami Exporting Company, and there had been no mistake, what must the complainant have done, to have defended himself at law, and to have secured to himself the privilege of paying in the notes of that bank? He must have tendered the notes on the day; and ought to have them in court. The mistake however happened, which rendered it proper that he should come into a court of chancery: what ought he to do here? The contract was, that he was to pay, on a particular day, the sum named in the obligation, in a particular description of bank-notes. He ought then to show, that he tendered these notes, at the time specified, and he ought to bring them into court, that the opposite party may receive them. The notes, however, are not brought into court, nor is there any pretence that they have been tendered. The complainant, then, does not appear to be ready to do that equity which he requires of the defendant, and on this ground, is not entitled to the relief prayed for. The circum-

stance that the defendant, some time before the promissory note fell due, stated, that he would not receive those bank-notes in payment, cannot excuse the complainant in not making the tender. It is claimed, that an *194] account should be taken of those *notes, and that the complainant should only be made liable for their specie value. This cannot be done. Bank-notes are considered as money—the holder has a right to look to the banks which issue them, for their numerical value in specie, and cannot be compelled to take for them a value fixed by shavers and brokers. The ability or inability of the bank to pay, ought not to be taken into consideration. The demurrer is, therefore, sustained, the injunction dissolved, and the bill dismissed, with costs.

In the same book, page 178, in the case of *Smith* v. *Goddard*, it is ruled at law, that a contract to pay in current bank-notes, is a contract to pay in money, if the bank-notes are not tendered at the day. And also, in the before-cited case of *Morris* v. *Edwards*, 1 Ohio 189 on the law side of the court, the question is fully discussed, both by the bar and the bench; and the question seems conclusively settled. To that case, and to the reasoning of the judges who delivered the opinion of the majority of the court, the attention of this court is respectfully requested.

It is thought, that the principle of the Ohio cases, is sanctioned by a decision of Judge WASHINGTON in the case of *Courtois* v. *Carpentier*, 1 W. C. C. 376. This was an action on a note, given by defendant to plaintiff, at Guadaloupe, both parties being French subjects, for the payment of 7812 livres, in sugars, at money value; it was proved, that notes of this description formed a species of circulating medium at Guadaloupe. That according to the custom of the place, when payment is demanded, or suit brought, three persons are appointed to value the sugar, and determine what quantity should be delivered in payment of the note. That notes of this kind are always in a state of depreciation, from twenty-five to forty per cent. below cash. That when this note was given, it would have been easier to pay $3000 in sugar, than one in cash. That they carried interest only from the time judgment was rendered, or the note registered before a notary. Held, that the law of the place where the contract was made must govern; but *195] since our courts, to which the parties have *appealed, cannot give a judgment for sugar, the value in money must be given, which, in effect, is the precise sum mentioned in the note, but that no interest is to be allowed up to the time of the judgment.

As to the term "about," in the agreement, it is obvious, that it means between 3600 and 3800 barrels—without straining, it cannot be made, in this case, to mean less. It appears, that the half of 3700 was a fair load for the boat, and it is obvious, that the contract was made in special reference thereto. It is believed, that the cases to which the court are referred, will justify the district judge fully in his instruction on all the points to the jury.

MCLEAN, Justice, delivered the opinion of the court.—This case was brought into this court, by a writ of error to the district court (which exercises the powers of a circuit court) for the western district of Pennsylvania. The plaintiffs in the district court commenced an action of covenant on the following instrument.

Robinson v. Noble.

"Article of agreement, entered into this 24th day of February, between William Noble of the city of Cincinnati, of the one part, and William Robinson, Jun., of the city of Pittsburgh, of the other part, witnesseth, that the said Noble hereby agrees, stipulates and binds himself, to and with the said Robinson, to transport and deliver to said Robinson, in the steamboat Paragon, a certain quantity of subsistence stores, for the use of the United States army, supposed to amount to about thirty-seven hundred barrels, estimating one-half of the quantity of stores as flour barrels, and the other half as whiskey or pork barrels, the said Robinson delivering one-half of the same, between the 1st and 10th of March, to said Noble, at Cincinnati, and the other half by the 30th of March, at the usual place of deposit, near the mouth of the Ohio; the delivery of which stores is to be made and completed in the order in which they are received, at the town of St. Louis aforesaid, on or before the 15th day of April next ensuing. In consideration whereof, the said Robinson hereby agrees and binds himself to pay to *the said Noble, one dollar and fifty cents per barrel, one-half whereof is to be paid on the delivery of said stores at St. Louis, [*196 in specie funds or their equivalent, and the other half, in Cincinnati, in the paper of banks current therein, at the period of the delivery of said stores at St. Louis. In testimony whereof, the parties signed and sealed the instrument, the 24th of February 1821." Under the agreement, was the following memorandum. "It is understood, that the payment to be made in Cincinnati, is to be in the paper of the Miami Exporting Company, or its equivalent." (Signed) William Robinson, Jun.

This covenant being before the jury, the defendant's counsel prayed the court to instruct them, that the plaintiffs could only recover the stipulated price for the freight actually transported, and that they were entitled to no more than the specie value of the notes of the Miami Exporting Company Bank, at the time the payment should have been made at Cincinnati. But the court refused so to instruct the jury, and directed them, that they were authorized to take "all the circumstances into consideration, and to make an allowance for any freight which the master had it in his power to transport, in addition to that which was furnished. That if the lading should not be complete, without the default of the master, the rule is to estimate the freight by means of an average, so as to take neither the greatest possible freight, nor the least, and that such average is the proper measure of damages. And the judge further instructed the jury, that "the defendant having failed to tender to the plaintiff the paper of the Miami Exporting Company, or its equivalent, at the time mentioned in the contract, and the plaintiff having performed all he covenanted to perform, is, by the laws of Ohio, entitled to recover the numerical value of the paper of the Miami Exporting Company in specie, with interest." And the jury, under these instructions found for the plaintiff $2377.36 in damages.

On this statement of the case, the question arises, whether the court erred in refusing to give the instructions prayed for by the defendant? And first, whether the plaintiffs were entitled *to recover in damages more [*197 than the stipulated price for the freight actually transported.

By the article, Noble agreed with Robinson to transport "in the steamboat Paragon, a certain quantity of subsistence stores, &c., supposed to amount to about 3700 barrels," &c.; "in consideration whereof, Robinson

binds himself to pay one dollar and fifty cents per barrel." Under this argeement, only 3105 barrels were delivered for transportation. The plaintiff's counsel insist, that Robinson was bound by his agreement to deliver the number of barrels specified, subject only to a reasonable qualification of the words "supposed to amount to 3700 barrels;" and that by this rule, the number could not be reduced below 3600 barrels.

It is clear, from the agreement, that the amount of freight was not ascertained, and that Robinson did not convenant to deliver any specific number of barrels. It was conjectured, there were 3700, and the payment for the transportation was to be at the rate of one dollar and fifty cents per barrel. The master of the steamboat Paragon proved on the trial, that on the second trip which the boat made under this contract, she had not more than two-thirds or three-fourths of a cargo. And it also appeared, that the reason assigned why a greater number of barrels were not delivered to the master of the steamboat was, that one or two flat-boats, laden with flour, designed as a part of the second cargo of the Paragon, were sunk above Cincinnati. If Robinson had bound himself to deliver a certain number of barrels, and had failed to do so, Noble would have been entitled to damages for such failure; but a fair construction of the contract imposed no such obligation on Robinson, and consequently, the breach assigned in the declaration is not within the covenant.

It is unnecessary to determine, whether, under a certain state of facts, and with proper averments in the declaration, damages might not be recovered, beyond the price per barrel for the cargo transported, as such a case is not before the court.

*198] *There is no pretence, that Robinson did not deliver the whole amount of freight in his possession, at the places designated in the contract. In this respect, as well as in every other, in regard to the contract, he seems to have acted in good faith. And he was unable to deliver the number of barrels supposed, either through the loss stated, or an erroneous estimate of the quantity. But to exonerate Robinson from damages on this ground, it is enough to know, that he did not bind himself to deliver any specific amount of freight. The probable amount is stated or supposed, in the agreement; but there is no undertaking as to the quanity. When the circumstances under which this contract was made are considered; the contingencies on which the delivery of the freight, in some degree, depended: the reason is seen, why cautious and indefinite language was used, in regard to the number of barrels, in the contract. And the result proved that this caution was judicious; as, if the contract had stipulated for a specific amount of freight, Robinson would have been bound to pay the full price of transportation, notwithstanding the loss he sustained. The court think that there was no breach of the covenant, in this respect, on the part of Robinson, and that the district court erred in not giving the instruction, as prayed for by the defendant.

The second instruction asked by the defendant's counsel in the court below was, that the plaintiffs were not entitled to recover more than the specie value of the notes, in which the payment was to have been made, at Cincinnati. It was proved, on the trial, that the notes of the Miami Exporting Company, in which, by the contract, the payment was to be made, or other notes of equal value, were not worth more in specie, than 66⅔ per cent. The

express provisions of the contract show, that the payment at Cincinnati was not to have been made in specie, or what was equivalent to specie. The notes of the Miami Exporting Company were substituted by the parties, as the standard of value, which should discharge this part of the contract, and the payment of those notes, or any others of equal value, was all that Noble had a right to demand. But it is contended, *that as the payment [*199 was not made at the day, it must needs be made in specie, and to the full amount of the sum agreed to be paid in depreciated paper. In what does this covenant to pay differ from an agreement to deliver a certain quantity of flour, or any other commodity on a given day. The notes of the Miami Exporting Company purported to be money, and may, to some extent at the time, have circulated as such in business transactions: but it is manifest, they were not considered as money by the parties to this contract; but as a commodity, the value of which was to be ascertained by the amount of specie it would bring in the market. And if it should not be convenient for Robinson to make the payment in these notes, he was permitted to make it, by the contract, in any other depreciated notes of equal value.

Robinson failed to make the payment at the time, and is he now bound to pay the nominal amount of these notes in specie? What damage has Noble sustained by the non-payment? Certainly, not more than the value of the notes, if they had been paid. Had these notes been equal to specie, on the day of payment, Robinson was bound to pay them, or what was of equal value. If they had depreciated to fifty cents in the dollar, Noble was bound to receive them, in discharge of the covenant. Each party incurred a risk in the fluctuations of the value of the notes specified; and nothing could be more unjust, or more opposed to the spirit and letter of the contract, than to require Robinson to pay in specie, the nominal value of these notes. The law affixes no such penalty for default of payment. Robinson can only be held liable to make good the damages sustained through his default; and the specie value of the notes, at the time they should have been paid, is the rule by which such damages are to be estimated.

In this view, it appears that the district court erred in refusing to give the second instruction prayed for by the defendant's counsel; on this ground, therefore, as well as the one first noticed, the judgment of that court must be reversed, and the cause remanded for further proceedings, in conformity with this decision.

*This cause came on to be heard, on the transcript of the record [*200 from the district court of the United States, for the western district of Pennsylvania, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court, with directions that further proceeding be had therein, according to law and justice, and in conformity with the opinion of this court.