*United States, Plaintiffs in error, *v.* William L. Robeson.

Set-off against the government.

An action was instituted on a treasury transcript, for the recovery of the balance stated to be due to the United States, by the defendant, as assistant deputy quartermaster-general; the defendant pleaded, as a set-off, a claim on the United States, which had been assigned to him by the owners of a schooner, for loss and demurrage of the schooner, chartered to the United States on a voyage from New Orleans to Appalachicola, with troops, &c.; this claim was presented to the proper officers of the government, and refused: *Held*, the defendant was not entitled to plead this as a set-off to the claim of the United States.[1]

The rule as to set-off, in questions arising exclusively under the laws of the United States, cannot be influenced by any local law or usage; the rule must be uniform in the different states; for it constitutes the law of the courts of the United States, in a matter which relates to the federal government.

When a defendant has, in his own right, an equitable claim against the government, for services rendered or otherwise, and has presented it to the proper accounting officer of the government, who has refused to allow it, he may set up the claim as a credit, in a suit brought against him, for any balance of money claimed to be due by the government; and when the vouchers are not in the power of the defendant before the trial, or, from the peculiar circumstances of the case, a presentation of the claim to the treasury could not be required, the set-off may be submitted to the action of the jury. But a claim for unliquidated damages cannot be pleaded by way of set-off, in an action between individuals; and the same rule governs in an action brought by the government.

Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, the party that seeks an enforcement of the agreement must show that he has done everything on his part, which could be done, to carry it into effect; he cannot compel the payment of the amount claimed, unless he procure the kind of evidence required by the contract; or show that, by time or accident, he is unable to do so.

Error to the District Court for the Eastern District of Louisiana. The United States, on the 10th of January 1822, instituted a suit, by petition, in the district court of the United States in Louisiana, against the defendant, William L. Robeson, late assistant deputy quartermaster-general in the army of the United States; claiming to recover the sum of $2663.61, for the balance of his account, as such officer, as settled and examined, adjusted, admitted and certified at said department.

*To this petition, and the citation issued thereon, the defendant [*320
answered and pleaded, that the United States were indebted to him in the sum of $3000 for work, labor, attendance, &c., bestowed, by him, in and about the business of the United States, and for the United States, at their request; and for materials and necessary things by him, before the time of action, bought, found and employed, in and about the said work and labor; for goods sold and delivered, and for money laid out and expended for the United States, at their request; for money due and owing to him, and interest thereon; which sums of money exceeded the sum claimed by the United States from him; and out of which sum, so claimed, he was willing, and offered, to set off and allow to the United States the full amount of their claim.

On the same day this answer and plea were filed, the 21st January 1822, William L. Robeson filed an affidavit, sworn to and subscribed in open court, stating that he was equitably entitled to credits which had been sub-

[1] United States *v.* Buchanan, 8 How. 83; s. c. Crabbe 563; United States *v.* Wells, 2 W. C. C. 161.

mitted, previously to the commencement of the suit, to the accounting officers of the treasury and rejected; that the credits were as follows, viz., the sum of $30, for transportation of officers to Baton Rouge and back to New Orleans, and an amount of $39, for transportation of officers from Pass Christianne to New Orleans. That a claim of $364.50, for transportation of contractors' stores, taken from the wreck of the schooner Italian, and delivered at Appalachicola, in April 1818; a claim for demurrage at Mobile Point, of the schooner Experiment, in a voyage from New Orleans to Appalachicola, in 1818, to wit, $330, were presented to the quartermaster-general's department, and returned.

Issue being joined, and the cause having been brought to trial, in December 1829, a verdict was found for the plaintiff for a less amount than the balance of the account stated at the treasury of the United States, the verdict being for $1656.11, instead of $2663.61. This difference resulted from allowances made by the jury, under the ruling and direction of the court, upon various points which arose at the trial; in respect to which, several bills of exception were filed by the counsel of the United States.

*321] The first bill of exceptions stated, that the defendant gave *in evidence certain depositions to prove the amount of loss and damage claimed by Forsyth & Walton, and Breedlove, owners of a certain schooner, called the Experiment, to be due to them by the United States, together with an assignment by the said owners to the defendant, for the consideration of $500, of the whole of the amount so claimed by them under a charter of the Experiment to the defendant, as assistant deputy quartermaster-general, to proceed from New Orleans to Appalachicola with stores; their claim being for the transportation, by the Experiment, of provisions and stores belonging to the United States, taken from the wreck of a schooner, and carried to Appalachicola, amounting to $364.50; for demurrage of the schooner, $330; and for the loss of a cable and anchor, $226.20, together $920.70. The plaintiffs prayed the court to instruct the jury, that the defendant could not set off against the demand of the United States, a greater sum than that expressed as the consideration of the transfer, viz., $500. The demurrage claimed was for detention of the schooner at Mobile Point; and he proved by the charter-party, the right of the charterers to the same, and his right under the assignment thereof; and offered evidence of the detention of the vessel at Mobile Point. The plaintiffs prayed the court to instruct the jury, that evidence of a detention at Mobile Point could not sustain a claim for damage under the charter-party; and that, under the pleading and treasury report, no set-off could be sustained for a detention at Mobile Point; but the court refused so to instruct, and to these refusals the plaintiffs excepted.

The third bill of exceptions related to the assignment from the owners of the schooner Experiment, mentioned in the first bill. The plaintiffs objected to its admission in evidence, because it had been received by the defendant, after he had ceased to be in the employment of the United States, and because not offered as proof of payment of a debt due from the United States, but as evidence of the purchase of a claim against the United States, which could not be set off in this action. The court overruled these objections; and the plaintiffs excepted. The other bills of exception are not inserted, as they were not noticed in the opinion of the court.

United States v. Robeson.

*The case was submitted to the court, by *Butler*, Attorney-General, on a printed argument. No counsel appeared for the defendant in error.

It was contended, that the judgment of the court below was erroneous, and ought to be reversed, for the following reasons. The several decisions of the court, in relation to the off-sets claimed by the defendant under the assignment from the owners of the Experiment, as specified in the first, third and fourth bills of exceptions, were erroneous. There is no act of congress defining, generally, the law of set-off. The third and fourth sections of the act of the 3d of March 1797 (1 U. S. Stat. 515), imply that persons sued as debtors at the treasury, might be entitled, in certain cases, to set off claims for credits rejected by the accounting officers, but they do not attempt to define the nature of those credits. They, however, impose the following restrictions on the right of set-off, that is to say: first, they require the defendant to make oath that he is equitably entitled to credits which had been previously presented to and rejected by the accounting officer. And secondly, they forbid the allowance of any claims for credits except such as shall have been so presented and rejected; unless the defendant shall be in possession of vouchers at the trial, not before in his power, &c. In all other respects, the laws and modes of proceeding on the subject of set-off in the state in which the trial is had, must, under the judicial and process acts, be observed as rules of decision; "except when the constitution, treaties, or statutes of the United States shall otherwise require or provide." Judiciary Act of 1789, § 34. (1 U. S. Stat. 92.)

The claim for detention at Mobile Point not being especially provided for in the charter-party, could not be sustained as a claim for demurrage; it was a mere unliquidated claim for damages. Such a claim could not, under the law of Louisiana, be set off. Civil Code of 1808, p. 298, art. 191; Civil Code of 1825, p. 718, art. 2205; 7 Mart. 516. It is not pretended, that Robeson paid to the owners of the schooner the moneys he desired to set off, in the execution of his duty as disbursing officer. If they had been so paid, in good faith, and for valid claims, they might have been proper credits, because they related to the same general appropriation. Act of March 3d, 1809, § 1. (2 U. S. Stat. 535.) But the credit *claimed [*323
by the party is for an outstanding demand, bought up by this officer, for a gross sum. The second and third sections of the act of the 3d March 1813 (Ibid. 816), by necessary implication, forbid any disbursing officer to apply puplic money remaining in his hands to any such purpose; and require the prompt payment to the treasury of all moneys remaining in his hands, except such as he may be authorized to retain for salary, pay or emolument.

This attempt of the defendant is equally forbidden by the general law of principal and agent, as universally understood. An agent intrusted with moneys to be disbursed for his principal, will not be permitted to pay off his principal's debts, without authority, or to purchase up claims against him, for the purpose of setting off such debts or claims, in an action against him for the moneys remaining in his hands. *Middletown and Harrisburg Turnpike Company* v. *Watson's Administratrix*, 1 Rawle 330. The same principle is recognised in the law of Louisiana. Civil Code of 1808, p. 424,

art. 19, 24, 26, 29; Civil Code of 1825, p. 938, art. 2974–84, p. 942, art. 2990–94. And without reference to the character of the defendant as an agent, the courts of Louisiana will not allow a defendant to set off money paid by him on account of a debt due from the plaintiff to a third person, unless it be shown to have been made at plaintiff's request. *Roger's Heirs* v. *Bynum*, 9 Mart. 82. It is unnecessary to enlarge on the injurious consequences which would probably follow the allowance, in cases of this nature, of the course adopted by the defendant.

At all events, the defendant should only have been allowed to set off the amount actually paid by him; no rule being better established, or more important, in reference to all cases of a fiduciary nature, than that which denies to a trustee the benefit of any profit made in purchasing up claims against the trust estate. *Van Horn* v. *Fonda*, 5 Johns. Ch. 388.

McLean, Justice, delivered the opinion of the court.—The plaintiffs brought their action against the defendant, in the district court of Louisiana, to recover a balance of public money which remained in his hands as late assistant deputy quartermaster-general. The pleadings being made up, the cause was submitted to a jury, who rendered a verdict for a *sum less
*324] by $1007, than the reported balance at the treasury department. This difference was produced by certain decisions of the court, on the trial, and to which exceptions were taken. And these exceptions are now brought before this court by a writ of error.

In the first bill of exceptions, it appears, the defendant gave in evidence certain depositions, to prove the amount of loss and damage sustained by the owners of the schooner Experiment, on a voyage from New Orleans to Appalachicola, with troops and stores for the government of the United States; and also a certain instrument referred to (margin A), by which instrument the owners of the said schooner Experiment transferred to the defendant their claims for compensation upon the United States, &c. And in the third bill of exceptions, the district-attorney prayed the court to instruct the jury, that the above claim could not be pleaded by the defendant as a set-off in this action, which prayer was refused.

The first question which arises on these exceptions is, whether a claim which has been transferred to the defendant, forms a proper subject of set-off, under the acts of congress, to a demand of the government. If this question shall be decided in the negative, it will not be necessary to inquire whether the claim in itself constitutes a proper item of set-off. It seems to have been presented to the proper accounting officer of the government as a credit, and that he refused to allow it. This is a question which arises, exclusively, under the acts of congress, and no local law or usage can have any influence upon it. The rule as to set-off in such cases must be uniform in the different states; for it constitutes the law of the courts of the United States, in a matter which relates to the federal government.

Where a defendant has, in his own right, an equitable claim against the government, for services rendered or otherwise, and has presented it to the proper accounting officer of the government, who has refused to allow it; he may set up the claim as a credit, on a writ brought against him for any balance of money claimed to be due by the government. And *where
*325] the vouchers were not in the power of the defendant, before the trial;

or, from the peculiar circumstances of the case, a presentation of the claim to the treasury could not be required, the set-off may be submitted for the action of the jury. But a claim for unliquidated damages cannot be pleaded by way of a set-off, in an action between individuals; and the same rule governs in an action brought by the government.

There is no law of congress which authorizes the assignment of claims on the United States; and it is presumed, that if such assignment is sanctioned by the treasury department, it is only viewed as an authority to receive the money, and not as vesting in the assignee a legal right. But whatever may be the usage of the treasury department on this subject, it is clear, that such an assignment, as between individuals, on common-law principles, cannot be regarded as transferring to the assignee a right to bring an action at law, on the account, in his own name; or to plead it, by way of set-off, to an action brought against him, either by an individual or the government.

The claim set up by the defendant as a set-off in this case, may have been fairly obtained; and, indeed, such is the presumption, in the absence of all evidence going to impeach the assignment or the consideration on which it was made; but the assignee, not holding the legal right, cannot assert the claim, as a set-off, in this action. If any individual who holds in his hands public money, could defend himself against an action brought by the government, by purchasing claims against it, he might speculate on such claims to almost any extent. This practice would be as impolitic for the government, as it would be injurious to individuals.

The practice of the state courts, which has been adopted under the act of congress of 1824, for the courts of the United States in Louisiana, cannot affect the point under consideration. For if it were made to appear, that under the laws of that state, an open account is assignable, so as to enable the assignee to bring an action in his own name, or to plead the account by way of set-off, it could not be done in the present case. The principles involved in this case are connected with the fiscal action of the government,[1] and they cannot depend either upon the local practice or law of any state.

*The second bill of exceptions states, that, "on the trial of this cause, a certain charter-party or instrument, (marked B, &c.) and by which the steamboat Tennessee was chartered for the conveyance of a detachment of troops under the command of Colonel Arbuckle, was offered in evidence; that by said charter-party, it was agreed, that if a larger quantity of baggage and stores should be carried in said boat than was stipulated in said charter-party, that freight should be paid on the same, on the production of the certificate of the said commanding officer, Colonel Arbuckle. The defendant offered in evidence the deposition of witnesses, to prove the carrying, by the said steamboat Tennessee, of a greater quantity of baggage and stores than that stipulated in the charter-party; to the introduction of which testimony the district-attorney objected; because, under the terms of the said charter-party, no other evidence than the certificate of the said Colonel Arbuckle could be received to establish the claim to surplus freight; but the court overruled the objection, and admitted the evidence." [*326

[1] Watkins *v.* United States, 9 Wall. 765; Hall *v.* Un ited States, 91 U. S. 562.

In the charter-party, it is agreed, that Breedlove, Bradford & Robeson should transport, unavoidable accidents excepted, a part of the seventh regiment of infantry, under the command of Colonel M. Arbuckle, and their baggage, together with a quantity of stores, not to exceed the bulk of eight hundred barrels, to the port of Arkansas, &c. "For the true and faithful performance of the above, certificates of which to be given by Colonel M. Arbuckle, or officer commanding, the party of the second part binds himself, as agent of the United States to pay," &c. And on the charter-party is indorsed, "It is understood, that, for all stores, &c., above the quantity specified, the same rate shall be paid, upon producing duplicate specified certificates of the commanding officer." The following certificate of Colonel Arbuckle was indorsed on the charter-party. "I certify, that Captain A. B. Bradford did, in compliance with the foregoing agreement, transport from New Orleans to this place, a part of the seventh regiment of infantry, amounting to one hundred and ninety-nine, with a suitable number of officers, and their baggage; and that he did also transport thirty men of the seventh regiment, not belonging to the Arkansas command, from New Orleans to
*327] the *mouth of Red river. The boat was detained at Baton Rouge about nine hours, and at the mouth of Red river, about twenty hours. Captain Bradford furnished, for the use of the troops, six cords of wood, for which he is entitled to compensation." As it appears in the record, that payment has been made for the services covered by the above certificate, the evidence which was admitted to be given to the jury, it is presumed, must have been to show the transportation of freight or men, in addition to that which is certified by Colonel Arbuckle. And the question as to the legality of this evidence is raised.

It appears, that the agent of the government expressly stipulated to pay the money under the contract, on the certificate of Colonel Arbuckle, or the officer commanding the party. And for any additional services, to those provided for in the contract, payment was to be made at the same rate, "upon producing duplicate specified certificates of the commanding officer." It does not appear, that any excuse was offered why these certificates were not procured; and the question is, whether the claimant, at his option, can establish his claim by other evidence. The contract is a law between the parties in this respect; as they expressly agree, that the amount of the service shall be established by the certificates of the commanding officer. Can it be established in any other manner, without showing the impracticability of obtaining the certificates? Is not this part of the contract as obligatory as any other part of it; and if so, is not the obtaining of the certificate a condition precedent to the payment of the money?

Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part, which could be done, to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so. And as this was done by the defendant in the district court, no evidence to prove the service, other than the certificates, should
*328] have been admitted by the court. Had the defendant proved that application had been made *to the commanding officer for the proper

certificates, and that he refused to give them; it would have been proper to receive other evidence to establish the claim.

Other exceptions were taken to the rulings of the court in the course of the trial, but as they relate to the assigned claim set up by the defendant, it cannot be necessary to consider them.

On the grounds that the district court permitted the assigned account to be given in evidence by the defendant, as a set-off; and allowed, under the circumstances stated, other evidence than the certificates of the commanding officer to prove the transportation account; the judgment below must be reversed, and the cause remanded for further proceedings.

Judgment reversed.

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*Joseph D. Beers, William L. Booth and Isaac R. St. John, Plaintiffs in error, *v.* Richard Haughton. [*329

Special bail.—Insolvency of principal.

In June 1830, Beers and others brought an action of *assumpsit*, in the circuit court of Ohio, against J. Harris and C. Harris, and obtained judgment against them for $2818 and costs, at December term; Haughton became special bail in this action, by recognising, viz., that the defendants in the action should pay and satisfy the judgment recovered against them, or render themselves to the custody of the marshal of the district of Ohio; in October 1831, a writ of *capias ad satisfaciendum* was issued upon the judgment, and returned to December term 1831; that the Harris's were not found; in February 1831, C. Harris was discharged from imprisonment for all his debts, under the insolvent law of Ohio; J. Harris was in like manner discharged in February 1832. In December 1832, Beers *et al.* commenced an action of debt, on the recognisance of bail, against Haughton; the defendant pleaded the discharge of J. & C. Harris under the insolvent law of Ohio of 1831, and a rule of the circuit court, adopted at December term 1831. The rule of court was as follows: "If the defendant on a *capias* does not give sufficient appearance bail, he shall be committed to prison, to remain until discharged by due course of law; but under neither mesne nor final process shall any individual be kept in prison, who, under the insolvent law of the state, has, for such demand, been released from imprisonment." The plaintiffs demurred to the plea; and upon joinder in demurrer, the circuit court gave judgment for the defendant. The judgment of the circuit court was affirmed.

The recognisance of special bail being a part of proceedings on a suit, and subject to the regulation of the court, the nature, extent and limitations of the responsibility created thereby, are to be decided, not by a mere examination of the terms of the instrument, but by a reference to the known rules of the court, and the principles of law applicable thereto; whatever, in the sense of these rules and principles, will constitute a discharge of the liability of the special bail, must be deemed included within the purview of the instrument, as much as if it were expressly stated.

By the rules of the circuit court of Ohio, adopted as early as January 1808, the liability of special bail was provided for and limited; and it was declared, that special bail may surrender their principal, at any time before or after judgment against the principal, provided such surrender shall be before a return of a *scire facias* executed, or a second *scire facias* returned "*nihil*," against the bail; and this, in fact constituted a part of the law of Ohio, at the time the present recognisance was given; the same having been so enacted by the legislature. This act of the legislature of Ohio was in force at the time of the passage of the act of congress of the 19th of May 1828, regulating the process of the courts of the United States, in the new states, and must, therefore, be deemed a part of the "modes of proceeding in suits," and to have been adopted by it, so that the surrender of the principal *within the time thus prescribed, is not a mere matter of favor of the court, but is strictly a matter of a legal right. [*330

It is not strictly true, that on the return of "*non est inventus*" to a *capias ad satisfaciendum* against the principal, the bail is "fixed," in courts, acting professedly under the common law, and independently of statute; so much are the proceedings against bail deemed a matter sub-